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TABLE OF CONTENTS

ADDRESS BY MR JUSTICE TOOHEY TO AGM

Mr Justice Toohey addressed the Annual General Meeting of the Australian Institute of Administrative Law in Canberra on 23 September 1997.

A week or so ago, I spoke at the annual dinner of the Blackstone Society, the society of law students at the University of Western Australia. As it is 50 years since I entered Law School, I felt justified in engaging in some reminiscences.

Don't be alarmed, I shall not do the same this evening. Time limits are the order of the day and I can hardly complain that I have been allotted something less than is an applicant for special leave to appeal. Perhaps I am entitled to look back a little. One of the matters I mentioned at the dinner was the dearth of Australian texts when I was a student, except in the field of constitutional law. It is therefore of some interest that 1950 saw the publication of Friedmann's *Principles of Australian Administrative Law*. While it later ran into several editions, the first edition was a slim volume of just over 100 pages. The work was reviewed, in the first volume of the *University of Western Australia Review*, by "B" who, I take it, was Professor Beasley, the Dean of the Law School. In the review he wrote:

> In general, the High Court and State Supreme Courts have been largely content to base their attitude to local administrative tribunals on the model provided by the English superior courts; this is mainly due to the exaggerated respect, almost veneration, which our Courts still pay to House of Lords and even Court of Appeal decisions, and does not necessarily mean that the problem presents itself in Australia in the same way, and with the same complexities, as in the United Kingdom.

As might be expected, Friedmann approached the supervision of administrative authorities and tribunals by the courts through the mechanism of the prerogative writs. He did refer to the declaratory judgment, observing[1]:

> It may well develop into one of the most important means of ascertaining the legal powers of public authorities in the intricate mixture of public and private enterprise which is becoming a distinctive feature of ... Australian life.

Associated Provincial Picture Homes Ltd v Wednesbury Corporation[2] had been decided some three years earlier and was seen by Friedmann as confirming Lord Greene's opposition to judicial interference with administrative discretion for all but the most compelling reasons. In the light of later developments, it is perhaps curious that Friedmann did not appear to attach much significance to the requirement that the discretion conferred on a statutory body must be exercised "reasonably", since Lord Greene gave a meaning to what is "unreasonable" which included directing oneself properly in law, considering what is relevant, excluding what is irrelevant as well as not acting in a way that no reasonable person would act.

Although the *Administrative Decisions (Judicial Review) Act* 1977 (Cth) ("ADJR Act") identifies[3] expressly as an improper exercise of power

> an exercise of power that is so unreasonable that no reasonable person could have so exercised the power

Australian courts still speak of the *Wednesbury* principle. Indeed in England it has taken on a life of its own. In a recent decision[4], concerned with the inferences to be drawn from the failure to give

evidence by a 15 year old with a mental age of 9, the Court of Appeal considered whether the judge's directions were "*Wednesbury* unreasonable".

Between 1950 and the enactment of the *Administrative Appeals Tribunal Act* 1975 (Cth) and the ADJR Act there were, I think, only two other Australian texts on administrative law, Benjafield and Brett. Since that time there has been a plethora of works, more than 80 if text books and reports are taken into account. And AGIS records more than 1000 articles since 1977, over 900 of which have been written since 1990. A growth industry indeed.

The 1960s was a decade of debate as to the future of administrative law, whether there should be administrative tribunals or a continuance of the traditional review by the courts. In the 70s Australia struck out on its own with the establishment of the Administrative Appeals Tribunal, empowered to review decisions under certain enactments and, it was held, to make the "correct or preferable" decision if it had not been made by the decision-maker. The ADJR Act conferred on the Federal Court jurisdiction to quash administrative decisions on a variety of grounds which, broadly speaking, answered the description of errors of law.

The *Federal Court of Australia Act* 1976 (Cth) was in existence for a time before the ADJR Act came into operation and conferred on the Federal Court this new and extensive power of judicial review. The judges were called upon to exercise jurisdiction in fields that were relatively new such as trade practices or had assumed a particular shape as in the case of administrative review. There was inevitably a time lag before the legal profession saw the potential of the new legislation. But applications under the new legislation soon began to grow and the index to any set of reports, particularly the Federal Court Reports and Australian Law Reports, reveals the dominant role administrative law now plays. Still, we are talking about less than 20 years.

There are two ideas underlying these remarks, one obvious enough, the other perhaps not so. The first is what is often described as the tension between judicial review and decision-making. The second is the way in which judicial review has taken the courts into different areas of the law.

In its early judgments the Federal Court made it clear that it was not empowered to review a decision on the merits or to substitute its decision for that of the decision-maker. But the Court was faced with a number of basic questions. Was there a decision or conduct susceptible of review? Was there an error of law involved in the decision impugned or was the Court being asked to review matters of policy? Did the application in reality invite the Court to look at the merits of the decision? There were and continue to be hard decisions to make. Government departments and statutory bodies have at times not welcomed what they saw as interference by the courts in day to day decision-making.

Much has been written about the distinction between administrative and judicial review. In *Minister for Aboriginal Affairs v Peko-Wallsend Ltd*[5] Mason J emphasised the distinction when he said:

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

Mason J completed this passage with a reference to *Wednesbury Corporation* and his language is very much that of *Wednesbury*.

Undoubtedly, the question which hangs over judicial review of administrative decisions is whether the courts have trespassed too far into the areas of decision-making. This has perhaps been most controversial where the courts' intervention has been to ensure natural justice or procedural fairness. Of course the controversy is not peculiar to Australia; it exists wherever there is an independent judiciary. It has taken particularly dramatic turns in England, in relation to sentencing of child offenders, criminal compensation, deportation, foreign aid and other matters, thereby attracting some media hostility and the Civil Service publication, "The Judge Over Your Shoulder".

Much has been said and written about the so-called tension between judicial review and administrative decision-making. Tension can be a pejorative term and it is often used pejoratively in this context. But in its ordinary meaning, it does fairly point up that there is necessarily a difficult relationship between the judicial and administrative roles. The limits cannot be defined in a way that forecloses debate. They have to be worked out in the traditional way, through decided cases.

The High Court has spoken from time to time on these matters and in cases such as *Australian Broadcasting Tribunal v Bond*[6], *Minister for Immigration and Ethnic Affairs v Wu Shan Liang*[7] and *Minister for Immigration and Ethnic Affairs v Guo*[8] the Court has identified some of the parameters of the review permitted by the ADJR Act.

Most of the emphasis in academic writings has been on the scope and limits of judicial review in the sense I have mentioned. What has not been sufficiently recognised perhaps is the development of other areas of the law which have taken place within the framework of judicial review. In this regard I would acknowledge as an exception Mr McMillan's article "Recent Themes in Judicial Review of Federal Executive Action"[9].

The law is something of a seamless web and administrative law does not fall in a discrete compartment. Thus, the protection of individual rights through procedural fairness has gained emphasis in decisions under the ADJR Act, as where the construction of a statute has been at issue. But the cases go further than that, stressing the need to recognise individual rights where decision-making is involved.

Something similar can be seen in the judgments of the European Court of Human Rights. In its implementation of the Convention on Human Rights, the Court has used Art 6, the right to a fair and public hearing within a reasonable time, to set aside administrative decisions which have failed to accord natural justice or due process and to make decisions where there has been an inordinate delay. This has happened particularly with the granting or refusal of licences, planning permission and the like. Likewise the European Court of Justice has included human rights breaches in its consideration of European Community Law.

Statutory construction has drawn in considerations such as international conventions which have not become part of domestic law. Legitimate expectations have been held to arise in relation to decision-making. It is possible to give other examples.

The language of European laws, the margin of appreciation for instance, has been referred to in the context of constitutional decisions in the High Court. So too has proportionality but it is also a term that has surfaced in the language of judicial review. Does proportionality bear on the question of unreasonableness is one question that has been asked. To know the vocabulary of the courts and tribunals of other countries is one thing. The meaning the words have in those

countries does not always translate so readily.

Not only does time prevent me from exploring these issues, it would not be appropriate to do so. But even a brief consideration shows how interwoven are areas of the law and how difficult it is to maintain administrative law as some discrete set of legal principles.

No doubt this is part of the fascination of the subject. The Institute has a valuable role to play, particularly because it brings together those who make the decisions and those who review them. From this cross fertilisation of ideas much, I think, has been gained and will continue to be gained in a field of such great importance to the whole community.

Endnotes

1 Friedmann at 72.
2 [1948] 1 KB 223.
3 s 5(2)(g), 6(2)(g).
4 *R v Friend* [1997] 2 All ER 1011 at 1018.
5 (1986) 162 CLR 24 at 40-41.
6 (1990) 170 CLR 321.
7 (1996) 185 CLR 259.
8 (1997) 144 ALR 567.
9 (1996) 24 *Federal Law Review* 347 at 349-365.

THE PUBLIC SERVICE BILL 1997

*Phillipa Weeks**

Paper presented to an Australian Institute of Law Seminar, held on 20 August 1997.

Before taking on my role of critic at this seminar (having been paired as a speaker with Peter Kennedy, Deputy Commissioner in the Public Service and Merit Protection Commission and proponent of the legislation), I should like to begin with praise for the Bill.

Not the least of its virtues is the admirably direct and succinct statement of the essential characteristics of public service. The so-called "APS Values" in clause 10 spell out what have been largely *implicit* assumptions about the constitutional principles and employment standards appropriate to the public service. Praise is due not only to the drafters, who have produced a Bill which is almost breathtaking in its lucidity and simplicity, and an Explanatory Memorandum which is uncommonly intelligible and informative, but also to the policy-makers who, in conceptualising this streamlined public service regulation, have perceived the importance, both in practical and symbolic terms, of crystallising fundamental principles, conventions, and standards.

As a labour lawyer, I am most interested in the framework for employment - the work relationship between the Crown and the public servant- and I shall address my commentary to the three issues nominated for discussion at the seminar:

- will the Public Service Bill mark the end of the apolitical bureaucracy?
- will it inject needed private sector values into the APS?
- what does it mean for accountability and the principles of responsible government?

An apolitical bureaucracy and security of tenure

At the head of the APS Values set out in clause 10 is the statement -"the APS is apolitical, performing its functions in an impartial and professional manner".

The natural tendency is to regard this value as concerned with insulating public servants from political pressure from the government of the day, although in a recent speech the Secretary of the Department of the Prime Minister and Cabinet drew attention to another dimension - that it should restrain public servants from leaking confidential information to hinder or embarrass that government.[1] In the more familiar arena, one which has been explored in the media and before the Joint Committee of Public Accounts in recent weeks, we have conventionally relied on security of tenure as the primary means of protecting impartiality and independence.

It must be acknowledged that tenure was never fully secure, and over time has been progressively diluted.[2] But now this Bill may well have removed *all* security.

First, Agency Heads are given power to determine the basis of engagement as employees - that is, whether on a continuing or temporary basis, for a fixed term or as casual, or subject to

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termination by notice. The novelty here is that fixed term contracts and contracts terminable by notice are to percolate down the ranks from Secretary to SES and even lower.

Secondly, clause 29 says: "An Agency Head may at any time, by notice in writing, terminate the employment of an APS employee in the Agency". That is, the Head may terminate in apparent breach of contract. Even where the employee is engaged on a continuing basis or for a fixed term, the Head has an unfettered power to terminate. The consolation is that employees other than Agency Heads,[3] SES employees,[4] and employees terminated for machinery of government reasons,[5] will all have recourse to remedies for unfair or unlawful termination under the *Workplace Relations Act 1996*, and so will have the same protection as private sector employees.

This proposal appears to reflect the status quo: public servants had recourse to review under the then *Industrial Relations Act 1988* from March 1994, as an alternative to review under the *Public Service Act* and *Merit Protection (Australian Government Employees) Act 1984*,[6] and in 1995 the unions and government agreed that the *Industrial Relations Act* (now the *Workplace Relations Act 1996*) should be the exclusive avenue of appeal.[7]

There are, however, at least 2 concerns to raise here. (At this early stage, before the development of Commissioner's Directions and Regulations, I put these comments no higher than concerns.)[8]

First, certain categories of employee are excluded from the *Workplace Relations Act* scheme, notably all fixed term employees. So, for example, a fixed term employee, who is dismissed before expiry of the agreed term on grounds, for example, of misconduct or redundancy, or incompatibility with a colleague, or for no explicit reason, cannot seek redress.[9]

The Public Service Bill envisages that public servants may be engaged for a fixed term. Will those employees be deprived of access to review of terminations under the *Workplace Relations Act*?

There is authority that a contract for a fixed term which provides for earlier termination by notice is not in truth a fixed term contract.[10] Thus, if an Agency Head contracted for a fixed term subject to the right of early termination by notice, a termination by notice before the expiry of the fixed term would be reviewable under the *Workplace Relations* Act.[11] What would be the position, however, where the fixed term contract did not expressly provide for termination by notice? Possibly, the provision in clause 29 of the Public Service Bill, allowing the Agency Head to terminate with notice at any time, would have the same effect as an express contractual term, and an employee prematurely dismissed would be entitled to seek remedies under the Act. But it is arguable that, according to the High Court's reasoning in *Byrne v Australian Airlines*,[12] the provisions of a statute (in this case clause 29) are not automatically imported into a contract, with the result that the Australian Industrial Relations Commission and the Federal Court, exercising jurisdiction under the *Workplace Relations Act 1996*, would be obliged to take the fixed term contract at face value, and deny a hearing to an aggrieved former employee.

In such cases, as well as for Agency Heads, SES employees and employees displaced by machinery of government changes, something akin to the dismissal at pleasure rule appears to apply. Whether there would be a common law remedy for wrongful termination - that is, for breach of a continuing or fixed term contract by the employer - would depend on the interplay of contract, statute and, possibly, prerogative.

I take an SES employee as an example. If the employee is engaged for a fixed term and there is an express contract term allowing the Agency Head to terminate the employment with notice, then early termination by notice will not constitute breach, and the employee will not be entitled to any remedy.[13] If the SES employee is engaged for a fixed term and the contract makes no reference to the power of termination by notice, and the Agency Head does terminate the contract early by notice, the availability of a remedy may well depend on the legal character of the power used by the Agency Head in terminating the contract. If clause 29 of the Bill is interpreted as conferring a statutory power, then the exercise of the power could not constitute breach of contract.[14] If, however, clause 29 is construed as describing the prerogative power to dismiss at pleasure which revives after repeal of the extensive statutory regulation in the *Public Service Act 1922*, it could be argued that the New South Wales Court of Appeal decision in *Suttling v Director-General of Education*[15] applies - that is, that the Commonwealth is bound by the contract and, while the contract will not be specifically enforced, damages for breach by early termination would be payable.[16]

The second concern I have about reliance on the *Workplace Relations Act* to promote or protect an apolitical bureaucracy, is that, in contrast to the provisions in place until the end of 1996, that Act offers little by way of enforceable legal rights to dismissed employees.

Under the *Industrial Relations Act*, terminations were rendered unlawful on several grounds, including unfairness in a substantive or procedural sense. If a termination *were* unlawful, the employee was entitled to a remedy of reinstatement or compensation *as of right* from a court exercising judicial power. Under the *Workplace Relations Act*, unfairness is now a matter for review through the processes of conciliation and arbitration. Not only is the issue of unfairness a matter for the balancing of various factors, including management's right to manage,[17] but the availability of a remedy is discretionary, even where unfairness is established.[18] There is still scope for challenging a termination as unlawful in the Federal Court, but the grounds have been narrowed - to the giving of an inadequate period of notice, or termination for a prohibited reason such as age, or union membership.

What is clear is that the current general law of termination provides materially less protection for public service employees than it did in 1995 when unions and government agreed to abandon the specialised scheme for review of terminations in the *Public Service Act* and *Merit Protection (Australian Government Employees) Act 1984*.

Now, does all this matter? The Secretary of the Department of the Prime Minister and Cabinet thinks not: "I do not believe that loss of tenure per se really should or needs to impact upon professional advice in the public sector. I think that tenure ... has very little to do with intelligence or honesty".[19]

Others - including insiders past and present - believe it does matter.[20] They believe that loss of tenure and the consequent insecurity will tempt public servants to tell Ministers what they want to hear, and induce younger staff to move into the private sector rather than seek advancement to senior ranks. They believe that perception and fear are potent forces in the workplace.

This is one of those debates where assertion is matched by pronouncement. Suffice for me to make a modest suggestion that it is imperative that there be clear guidance from the government on:

- parameters for the adoption of fixed term contracts and notice provisions in employment contracts, and

- parameters for the exercise of the power of termination, especially in relation to those employees who will not have access to the procedures and remedies under the *Workplace Relations Act.*

Accountability

This is one of the more intriguing themes of the Bill, and the surrounding documentation. It is certainly central, as signalled by the discussion paper circulated in May just ahead of the Bill, entitled *Accountability in a Devolved Management Framework.* Of course it is not a new component of public service regulation. Rather, what is proposed is a new model of accountability - new mechanisms, new paths, and a different mix.

Again I put forward two concerns: one is about accountability lost; the other about accountability gained.

First, the loss. The government's policy is to abolish the remaining avenues for merits review of employment decisions,[21] and to curb if not eliminate judicial review. Little of this scheme has been detailed in the Bill[22] and will materialise in regulations.[23] But an outline appeared in the paper *Accountability in a Devolved Management Framework.*

All existing appeal rights for merits review in the current *Public Service Act* are to disappear, and accordingly the *Merit Protection (Australian Government Employees) Act 1984* is to be repealed. So-called "external review" of decisions other than on termination is to be the responsibility of the Public Service Commissioner, who may conduct the reviews or approve independent reviewers. It will also be possible to streamline the process if the external reviewers are used by agencies to carry out initial consideration of grievances; then, one tier in the process will be eliminated in the interests of more timely resolution. The external review will be limited to making recommendations rather than re-making the decision,[24] but the Commissioner will have power to report on unsatisfactory cases to the Minister or Parliament.

The model, then, is an Ombudsman-type review scheme, *without* the Ombudsman's independence. With every respect for the integrity of the Public Service Commissioner, this arrangement is not "external review". It is not independent review.

So the accountability of merits review by the Merit Protection Review Agency has been jettisoned. With the one narrow exception for unlawful termination, there is to be no mechanism for guaranteed legal redress of substantive or procedural wrongs committed against APS employees, that is, for breach of the APS Values set out in clause 10 such as the merit principle, equity, consultation, fairness, flexibility and diversity in the workplace.

The position of judicial review of employment decisions is not so clear.

The government has expressed the view that the streamlining of the statutory employment framework will reduce if not eliminate judicial review under the *Administrative Decisions (Judicial Review) Act 1977.* The assumption is that a decision made by an Agency Head in relation to employment - a decision about appointment, promotion, transfer, assignment of duties and so on - will not be a "decision made under an enactment", which is the jurisdictional trigger for judicial review under the ADJR Act. Rather the decision can be characterised as made pursuant to contract.[25]

The Full Federal Court decision in *Australian National University v Lewins*[26] might give comfort to the government, but there are other, less encouraging decisions: such as *Chittick v Ackland* and *Mair v Bartholomew*.[27] Overall, I think it would not be difficult to convince the Federal Court or the High Court that decisions made by an Agency Head by reference to "Values" set out in a Public Service Act , or decisions made in accordance with Public Service Commissioner's "Directions", which are to be disallowable instruments, or decisions made by reference to Commissioner's "guidelines" *are* decisions made under an enactment and therefore subject to judicial review. Nonetheless, the fate of judicial review as an accountability measure for public service employment is unclear.

Secondly, accountability gained.

The Public Service Bill introduces a Code of Conduct which prescribes obligations of APS employees. For example an employee must in the course of employment

- behave honestly and with integrity,
- act with care and diligence,
- treat everyone with respect and courtesy and without coercion or harassment,
- comply with any lawful and reasonable direction given by someone in the employee's agency who has authority to give the direction,
- disclose and take reasonable steps to avoid any real or apparent conflict of interest,
- use Commonwealth resources in a proper manner, and so on.

The Code is legally enforceable on employees by way of personal liability to a range of sanctions for breach.[28]

Strictly speaking, this is not a new form of accountability. But there is a new focus or weighting of accountability, which becomes apparent when the enforceability of the APS Values on employees is juxtaposed with the repeal of mechanisms by which employees would enforce on management the distinctive employment standards of the public service which are included in the APS Values - that is, the merit principle, non-discrimination, consultation, fairness and flexibility.

The result is that Agency Heads are to be liberated from statutory constraints - from the enforceable procedures for selection and recruitment, promotion, discipline, termination and so on in the *Public Service Act 1922* - and from external appeal processes. They will be required to "uphold and promote"[29] the values, but there will be no direct sanction for default. Rather they will be subject only to the guidance, monitoring and reporting of the Public Service Commissioner, and to the toothless "external review" triggered by employee complaint.

The policy, then, is to render unenforceable and non-justiciable the employment principles which protect employees, while confirming the enforceability of those principles which impose duties on employees. So accountability is at once being personalised, and de-institutionalised.

Accountability and scrutiny are flexible concepts. Their value and effectiveness depend very much on the angle of the light shone and the focus of the lens.

Private sector values

One of the premises of the Bill is that "the industrial and staffing arrangements for the public service should be essentially the same as those of the private sector"[30]

and that the peculiar features of public service employment law (like service-wide terms and conditions and centralised control, detailed legislation and regulations. and the overarching role of administrative law) should all be stripped away.

The rationale seems to be largely one of efficiency: best practice people management, measured in economic terms, is found in the private sector, and so, to quote Commissioner Shergold, "we need to walk the same green fields and gaze the same blue skies that inspire innovation in the private sector".[31]

I have less enthusiasm for the transplantation of private sector values, and am sceptical about the capacity of the private sector employment paradigm to accommodate and satisfy the APS Values of merit, equity, participation, fairness, diversity and so on.[32]

The ordinary employment relationship is contractual. "Best practice" employers may well negotiate contracts with their employees which by express terms provide for merit-based, fair, equitable and consultative decisions about work issues. But they are not obliged to make such contracts. And terms which are implied by law in all contracts of employment tend to sanction managerial prerogative and employee subordination. These terms impose on employees onerous duties of obedience and of fidelity, and even perhaps a positive duty of cooperation, and the obligations often extend to controlling the employee's activities and self-expression beyond the workplace and working hours.

Of course, employers are not unregulated. They are bound by awards and agreements made under industrial legislation to pay certain wages and provide certain conditions. They are also bound by other statutes dealing with working conditions like superannuation, long service leave and occupational health and safety. But, subject to minor qualifications, these awards and statutes do *not* impose on employers a general obligation of fairness and do not institute merit as the basis for employment decisions.

The qualifications include anti-discrimination statutes, and unfair dismissal laws, which have been noted above. Another possible qualification is a recent common law development. English courts are prepared to contemplate a duty of reasonableness or respect on the employer's part as an implied term of all contracts of employment. The duty has most force in the situation of termination of employment, and has been narrowly confined in other contexts of the employment relationship.[33] Australian courts have only recently, and tentatively, recognised the duty.[34] There is no suggestion in the caselaw that a duty is owed to applicants for employment, nor that there is a duty to consult or negotiate with employees over terms and conditions, nor an obligation to provide natural justice in decisions to promote, or transfer, or allocate duties. The common law duty of reasonableness on the part of employers is at this stage not a solid shield, let alone a sword, for employees.

In summary, private sector employment law, barely recognises, still less protects, the standards and values which are regarded as essential to public sector employment. Those public sector standards and values are currently enforceable only because of the detailed legislative prescription and administrative law package of merits review and judicial review.

That's what makes public sector employment different.

I am not predicting an outbreak of arbitrary, tyrannical, unfair employment decisions by public service managers. Rather, my argument is that a shift to an employment regime of unenforceable

"values" inevitably jeopardises the values. Merit, equity, and fairness involve costs, and in an era when economic considerations dominate public policy and the public sector budget is shrinking, those values must be vulnerable to compromise, if not generally and uniformly, then in particular instances.

At the base of the comments I have made on an apolitical bureaucracy, on accountability, and on private sector values is the issue of whether, why, and how far public employment should be different from private employment. I close by citing the insights of an American scholar, YS Lee, who in 1992 in a book called *Public Personnel Administration and Constitutional Values*, said:

> To many, especially those who are familiar with private sector personnel administration, it is difficult to understand why public employees should be treated any differently from private sector employees .... The answer is simple. It is because their employers are governmental entities ....
>
> Some may contend that under the existing civil service regulations, it is difficult, if not impossible, to dismiss unproductive employees ... [and that] due process protection ... completely ties the hands of public personnel managers. There is an element of truth in this argument; the due process of law can slow down personnel administration, forcing public managers to compromise the principle of efficiency. This is not a trivial issue. Yet one should note that an equally - if not more - important value in public administration is that public employers "do it right", even if it is a little slow and costly. When government is allowed to deviate from what is right and fair, it creates a possibility of tyranny .... In this sense, one should not dwell upon a view that the due process protection ties the hands of public managers. but rather find ways to improve efficiency within the [legal] framework.[35]

Lee's argument is potent. There is inefficiency, complexity and duplication in APS employment, which should be addressed. But it is possible to modernise, consolidate and simplify the legislative and administrative framework for management in the APS[36] without dismantling the distinctive legal framework for public sector employment, in particular the "statutory underpinning" and the safety-net of administrative law.[37]

Indeed, the reforms already made to the general employment law framework through the *Workplace Relations* legislation provide the governmental employer with about as much flexibility and scope for deregulation as it could wish for.

Endnotes

1 PSMPC Lunchtime Seminar Series, 6 August 1997.

2 G McCarry, "The Demise of Tenure in Public Sector Employment" in R McCallum, G McCarry and P Ronfeldt (eds), *Employment Security* (1994) pp 138-162.

3 Public Service Bill clauses 52(4), 60(3).

4 Public Service Bill clause 38.

5 Public Service Bill clause 65(3).

6 *Maggs v Comptroller General of Customs* (1995) 128 ALR 586.

7 Continuous Improvement in the Australian Public Service Enterprise Agreement 1995-96, clause 11(f)-(h) and Schedule 1 of Attachment F. The Agreement was a certified agreement made under the *Industrial Relations Act 1988*, and as provided in section 121, overrides inconsistent federal statutes. Note that the Merit Protection Review Agency could not order compensation in lieu of reinstatement.

8 Draft regulations and directions were presented in several versions to the Joint Committee of Public Accounts, to which the Public Service Bill and the accompanying Public Employment (Consequential and Transitional) Amendment Bill 1997 were referred for consideration and an advisory report. The Committee's *Report 353* was presented on 29 September 1997.

9 Reg 30B(1)(a), (b); the regulation previously exempted only short-term fixed term employees.

10 *Andersen v Umbakumba Community Council* (1994) 126 ALR 121, [1995] 1 IRCR 457 (Von Doussa J); *Cooper v Darwin Rugby League Inc* [1995] 1 IRCR 130 (Northrop J).

11 Of course such a clause may well command a premium on remuneration.

12 (1995) 185 CLR 410.

13 As noted in the Explanatory Memorandum for the Public Service Bill at 4.26, an agreement between the Agency Head and the employee

"could deal with compensation for early termination of a fixed-term engagement."

14 *Director-General of Education v Suttling* (1987) 69 ALR 193 at 200 (Brennan J).

15 (1985) 3 NSWLR 427.

16 The measure of damages is however limited at common law by the principles in *Addis v Gramophone Co Ltd* [1909] AC 488. If there were a term implied at common law in all contracts that termination shall not be unfair, then a higher measure of damages may be available: *Gregory v Philip Morris Ltd* (1988) 80 ALR 455.

17 *Workplace Relations Act 1996* s 170CG(3) lists a number of factors to be taken into account, including "any other matter the Commission considers relevant". Section 170CA(2) refers to the test of "a fair go all round" formulated by Sheldon J in *in re Loty and Holloway v Australian Workers Union* [1971] AR (NSW) 95 at 99 and which Sheldon J said included consideration of the right to manage.

18 *Workplace Relations Act 1996* s 170CH(2).

19 PSMPC Lunchtime Seminar Series, 6 August 1997.

20 Sir Lenox Hewitt, Denis Ives, and Derek Volker, who made submissions to the Joint Committee of Public Accounts; Tony Ayres, quoted by Michelle Grattan, *Financial Review* 11 Aug 1997.

21 Note that review of selection was removed during the Fraser government, promotion appeals were removed for positions at or above the classification of Senior Officer Grade C in 1986, and as already noted the special provisions for review of termination were withdrawn by a Certified Agreement in 1995.

22 Clause 33(1) simply states that "An APS employee is entitled to review, in accordance with the regulations, of any APS action that relates to his or her APS employment".

23 Public Service Bill clause 33 makes provision for the regulations to prescribe exceptions to the entitlement to review, and to provide for "the powers available to the Commissioner, or any other person or body, when conducting a review of the regulations".

24 While not made clear, this restriction would presumably apply whether the review was one-tier or two-tier.

25 Public Service and Merit Protection Commission and Department of Industrial Relations, *The Public Service Act 1997: Accountability in a Devolved Management Framework* (1997) p 21.

26 (1996) 138 ALR 1.

27 (1984) 1 FCR 254 and (1991) 104 ALR 537.

28 Public Service Bill clause 15.

29 Public Service Bill clause 12.

30 *Towards a Best Practice Australian Public Service - Discussion Paper issued by the Minister for Industrial Relations and Minister Assisting the Prime Minister for the Public Service, the Hon Peter Reith MP, November 1996* (1996) p 5; see also the Explanatory Memorandum for the Public Service Bill p 3.

31 Speech, 8 July 1997, "A New Public Service Act: The End of the Westminster Tradition?"

32 The following section repeats views expressed by the author in a presentation to the National Administrative Law Forum (presented by the Australian Institute of Administrative Law and the Institute of Public Administration) on 2 May 1997 in Canberra. The proceedings are in press.

33 *Bliss v South East Thames Regional Health Authority* [1987] ICR 700; *Imperial Group Pension Trust Ltd v Imperial Tobacco Ltd* [1991] IRLR 66; *Scally v Southern Health and Social Services Board* [1991] ICR 771; *Reid v Rush & Tompkins Group plc* [1989] 3 All ER 228. See discussion in W Creighton, W Ford and R Mitchell, *Labour Law Text and Materials* (2nd ed, Law Book Co, 1993) paras 9.17-9.25; B Creighton and A Stewart, *Labour Law - An Introduction* (2nd ed, Federation Press, 1994) paras 868-870. A recent decision of the House of Lords, *Malik v Bank of Credit and Commerce International SA* [1997] 3 WLR 95, does however suggest a broader operation of the duty. It was held that the conduct of a business in a corrupt or dishonest manner is a breach of the general obligation not to engage in conduct likely to destroy or seriously damage the degree of trust and confidence the employees were reasonably entitled to have in their employer.

34 *Byrne v Australian Airlines Ltd* (1994) 120 ALR 274 at 334-335 (Gray J); *Durazin v Blacktown City Guardian Pty Ltd* (1996) 142 ALR 144 (Full Court, Industrial Relations Court of Australia).

35 Quorum Books, pp 25-26.

36 As recommended by the Joint Committee of Public Accounts, *Report 323, Managing People in the Australian Public Service - Dilemmas of Devolution and Diversity* (1993) p 21. See also MAB/MIAC, *Achieving Cost Effective Personnel Services*, Report No 18 (1995).

37 The term "safety net" is deliberately chosen, but not for the sense in which it is currently being used in industrial relations and industrial law to refer to a floor of minimum pay and conditions above which bargaining will operate.

NARROWING OF JUDICIAL REVIEW IN THE MIGRATION CONTEXT

*The Hon Philip Ruddock MP**

Address given to an AIAL Seminar entitled "Narrowing Judicial Review", held on 30 October 1997

Introduction

I thank the Australian Institute of Administrative Law for the invitation to speak on the topic of "Narrowing Judicial Review in the Migration Context", an issue which has the potential to be very significant in the area of administrative law.

My paper details the history of attempts by governments to limit judicial review of migration decisions, why narrowing has been considered necessary and reasonable, and why the government now seeks a further narrowing of judicial review by means of the enactment of a privative clause.

Today movement of people between the countries of the world is occurring on a scale never before seen. There are massive numbers of people who seek to resettle in Australia and they seek to do so for a wide variety of reasons.

The issue of human population movement is an issue that governments and communities cannot ignore.

Under our humanitarian program Australia has an outstanding record in fulfilling its international humanitarian obligations by resettling refugee and humanitarian entrants within our borders.

But our ability is finite. It is essential in the context of specific funding in the budget for humanitarian entrants for a limited number of places, that these places go to persons genuinely in need of Australia's protection. It is my intention that bona fide applicants will be accepted. I do not intend to see refugees refouled and I expect my Department and the Refugee Review Tribunal to discharge this responsibility.

But I am concerned about abuse of the onshore refugee/asylum application process. I have particular concerns in relation to those who travel to Australia on a visitor visa, with the necessary documents issued by their own government to travel here, and who seek to claim refugee status in Australia merely to enable them to gain work rights or access to Medicare.

To give you an idea of the increasing problem, this year, we expect in the order of 10,000 onshore claims for refugee status and yet ten years ago, under the former government, we saw in the order of 500 claims a year.

Immigration is probably the only area of administrative law where delaying a final determination is beneficial to the applicant, as they remain in Australia while the case is being processed. Delay is therefore an end in itself.

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Decisions made in relation to applicants are frequently being reviewed by both the tribunal and the courts, resulting in what amounts to five tier decision making in a large number of cases:

- primary decision made by the Department
- Refugee Review Tribunal
- Federal Court
- Full Federal Court
- High Court

And at the end of the process the applicant is still able to access my ministerial discretion.

Given that around 49% of all migration cases withdraw before hearing, there are clearly a substantial number using the legal process as a means to extend their stay in Australia.

Much of the growth in applications for judicial review has come from the refugee area. I see this high level of litigation, particularly by onshore asylum seekers, as highly undesirable given the associated costs and delays, and for those in detention, significantly longer periods of detention.

Since 1993-94 there have been 10,008 decisions taken by my Department to refuse refugee status that have been affirmed by the Refugee Review Tribunal.

979 of these applicants have appealed to the Federal Court. 143 were sent back to the Tribunal for reconsideration and this resulted in 21 favourable decisions - only 21 decisions over a four period.

To give you an idea of the cost involved, over this four year period litigation would have cost my Department approximately $20 million. That does not include the cost of running the courts or of legal aid.

This means that each successful application cost around $1- million.

Suffice to say my non-compellable ministerial discretion costs far less than $1-million a case! I am also able to address the full merits of the particular case - a far wider power than the role of the courts in judicial review.

The assumption from these figures is that, while there are genuine applications, most applications are simply not bona fide. The abuse cost taxpayers millions of dollars, undermines public trust and disadvantages genuine applicants.

In part to address problems of abuse, a series of changes is proposed to both the merits and judicial review systems in the migration area. These changes are contained in the Migration Legislation Amendment Bills (nos. 4 and 5), which have passed through the House of Representatives and are currently awaiting debate in the Senate. Bill no 4 includes measures relating to merits review, and Bill no.5 contains a privative clause in relation to visa decisions.

History

The pre-1989 situation

I would like to now look at moves that have occurred in the past in an attempt to limit judicial review of migration decisions, beginning with an outline of the decision-making powers under the *Migration Act 1958* and the changes which have been made to the Act since 1989. The pre-December 1989 Act provided for very broad general discretions to grant and refuse visas and entry permits to applicants. These broad provisions were supplemented by departmental manuals which set out government policy and provided decision-makers with instructions on how to make decisions.

After substantial criticism by such bodies as the Administrative Review Council, Human Rights Commission (as it was then), the Committee to Advise on

Australia's Immigration Policies (CAAIP)[1] as well as the courts, that these provisions were too vague and did not set out the basis on which a person would be granted a visa, the legislation was significantly changed. In 1989 the government at that time amended the *Migration Act* to provide for a system of entitlements to visas and entry permits where an applicant met the criteria spelt out in regulations made under the Act. The policy manuals were replaced by the Migration Regulations, which for the first time set out the criteria for a visa or entry permit in legislative form, thus providing a fairer and more certain system for both applicants and decision-makers.

The 1989 amendments to the Act also provided, for the first time, a statutory merits review procedure for most migration decisions, by the Migration Internal Review Office (MIRO) and the Immigration Review Tribunal (IRT).

It was envisaged that, by removing the broad discretion of decision-makers, and replacing it with codified criteria for grant of visas, in conjunction with statutory merits review of certain decisions, recourse to judicial review would be less attractive. This did not prove to be the case. In the early 1980s the Federal Court received only about 30 applications for review of migration decisions each year. By the end of that decade this had increased to about 100 applications each year, and by 1992 it was almost 200 per year.

The *Migration Reform Act (1992)*

Since 1989 the process of reform has continued. The most significant recent reforms came into operation on 1 September 1994 with the commencement of the *Migration Reform Act 1992* or MRA. The most important features of this Act were:

- The introduction of a detailed statutory code of procedures for most primary decisions, setting minimum standards for dealing with visa applications;

- Replacement of the judicial review scheme under the *Administrative Decisions (Judicial Review) Act 1977* as well as s.39B of the *Judiciary Act* with a *Migration Act* specific judicial review scheme, which removed certain grounds of review such as the grounds of natural justice and unreasonableness;

- The extension of merits review to many decisions previously not covered by merits review - most significantly, the creation of the Refugee Review Tribunal (RRT) to provide merits review of refugee determinations.

The aim of these amendments was to provide a system which was, for both decision makers and applicants, fairer and more certain. It was also intended to increase the accountability of decision-makers as well as providing clarity for all on how applications would be dealt with.

It is useful to re-emphasise the previous government's expressed intentions in making these amendments. In his second reading speech the then Minister for Immigration and Ethnic Affairs, Mr Gerry Hand, said this:

> Under the reforms, decision making procedures will be codified. This will provide a fair and certain process in which both applicant and decision maker can be confident. Decision makers will be able to focus on the merits of each case knowing precisely what procedural requirements are to be followed. These procedures will replace the somewhat open ended doctrines of natural justice and unreasonableness.

The most important feature of the reform insofar as it related to judicial review was

the removal of the common law grounds for challenging decisions, of breach of the rules of natural justice and unreasonableness. Part 8 of the *Migration Act*, after the MRA and currently, now sets out the means and the grounds for the challenge to visa eligibility and cancellation decisions, and is the sole source of Federal Court jurisdiction in migration matters. However, the High Court retains its original jurisdiction to review decisions under the Constitution.

Section 475 provides that only certain decisions are judicially reviewable under the scheme. These are decisions of the IRT and the RRT, as well as any decisions relating to visas which are non-merits reviewable. This was designed to ensure that applicants with merits review rights exercised those rights prior to seeking judicial review.

Section 476 sets out the grounds for challenge. These are the *only* grounds on which a decision under the Act can be challenged in the Federal Court, and codify existing common law grounds of review. It is this section that removes the common law grounds of review of failure to comply with the rules of natural justice and unreasonableness from review by the Federal Court.

Common law natural justice has been replaced with the ground that procedures required by the Act were not followed. Critical to this ground is the prescription in the Act and regulations of a code of procedures to replace the common law principles of procedural fairness. The prescribed procedures contained in sections 44 to 140 of the *Migration Act* now set out the procedural standards for the grant and refusal of visas, consideration of an application for a visa and cancellation of a visa.

The MRA extended merits review to virtually all decision categories - in fact non-refugee cases currently get two tiers of merits review, a situation which will be altered by Migration Legislation Amendment Bill (no.4), which, as already noted, is currently before Parliament. As mentioned before, the judicial review scheme requires that applicants have exhausted all merits review options prior to challenging legality. Currently applicants have the opportunity of at least three considerations of their case for ordinary visa eligibility decisions and two for protection visa decisions. In most situations the person will have received an oral hearing at least once.

Provisions setting out the code of procedure, in conjunction with the disclosure provisions and merits review, would provide, the former Government believed, effective and comprehensive protection of the applicant's interests as well as providing decision makers with a standardised framework within which to operate. Again it was envisaged that with increased merits review, a more certain procedural framework, and reduced grounds of judicial review, there would be less need for applicants to seek judicial review, and hence fewer actual applications.

Problems with Part 8

The hope that increased merits review, in conjunction with more certain procedures and reduced grounds for judicial review, would decrease the number of applications for judicial review has not been fulfilled - applications for judicial review have in fact *increased* in number since the MRA was passed, and *continue* to trend upwards - 378 cases in 1994-5, 630 in 1995-6 and approximately 640 in 1996-7. Migration matters now make up 65% of the Federal Court's administrative law caseload.

The most recent figures indicate that litigation costs my Department in the vicinity of $7 million each year, and this does not include the cost of legal aid, nor

the courts' running costs. There is also evidence that delays associated with litigation are also growing - the average number of days between the date of application and judicial decision is now 337 for refugee cases as compared with 107 days in 1993-4, and 288 for non-refugee cases as compared with 259 days in 1993-4.

Much of the growth in applications for judicial review has come from the refugee area; that is, appeals from the RRT to the Federal Court. I see this high level of litigation, particularly by onshore asylum seekers, as highly undesirable given the associated costs and delays, and for those in detention, significantly longer periods of detention. I am also concerned that, given around 49% of applicants in all migration cases withdraw before hearing, there are a substantial number using the legal process as a means to extend their stay in Australia.

Further, all has not turned out as expected with respect to the operation of Part 8, as the Federal Court appears to be finding the means to incorporate common law grounds of review back into decisions of the Tribunals. This is despite the clear intentions of the Act. The means for doing this is via certain provisions, which were inserted into the Act with the 1989 and 1992 reforms (creating the merits review tribunals).

The most significant of these are sections 353 and 420 of the Act. These provisions require that the IRT and RRT respectively are to act according to "substantial justice and the merits of the case" when conducting their functions.

Since the introduction of Part 8, a large number of refugee-related cases have examined whether the requirement to provide "substantial justice" is a "procedure" which must be observed for the purposes of the Act. The argument has been that the "substantial justice" provision effectively requires that the RRT observe procedural fairness in making its decisions. This is despite the fact that the Act specifically excludes "natural justice" as a ground of review.

The Explanatory Memorandum for the *Migration Reform Act* states the following in relation to s.420 (then s.166C):

> Substantial justice" is used to emphasise that it is the issues raised by the case, rather than the processes of deciding it, which should guide the RRT in making its decisions. It is intended that the RRT will operate in an informal non-adversarial way that will facilitate applicants putting their own case in their own words.

In other words, s.420 was intended *to remove* RRT and judicial attention from "processes", and ensure that the RRT focuses on the merits of the case, allowing the applicant to tell *his or her* story. It was certainly not intended that s.420 be used as a "back door" method of requiring that procedural fairness be observed by the RRT.

Until the recent decision of the Full Federal Court in *Eshetu v MIMA*[2], judicial authority on the matter was nearly evenly split, perhaps with a slight majority of Federal Court authority favouring the position that provision of substantial justice was *not* a "procedure" for the purposes of the Act. The Full Federal Court in *Eshetu* appears to have found that this *is* such a "procedure", and found that the RRT had denied substantial justice to the applicant. While later cases have accepted *Eshetu* as being authoritative on this issue, special leave to appeal to the High Court has been sought.

The case of *Amarjit Singh v MIMA*[3] also extended the operation of s.420 to instances of apprehended bias, and found that in the case of an applicant with a second application before the RRT, "substantial justice" required that the RRT for the second hearing be constituted by a

different Member. This decision was made despite the fact that the Act removes the ground of apprehended bias from judicial review, replacing it with actual bias, which was not alleged against the Member who heard both cases.

Thambythurai v MIMA[4] may have expanded the scope of these provisions even further. Finkelstein J confirmed the position that provision of substantial justice is a "procedure" for the purposes of the Act. Regarding the content of "substantial justice", His Honour preferred the view that it imposes only one obligation, and that is "an obligation to act in a manner Deane J in *Australian Broadcasting Tribunal v Bond*[5] referred to as 'acting judicially'." The exact extent of this duty would vary from case to case, but it would normally include:

- the absence of actual or apprehended bias
- according an appropriate opportunity to be heard
- regard be paid to material considerations and immaterial or irrelevant considerations be ignored, despite the fact that this ground is also excluded by the Act
- decisions be made on the basis of logically probative evidence, despite the fact that this ground is limited by the Act.

In summary, the current position is that the reforms made by the MRA and the restrictions upon judicial review contained in Part 8 of the Act have not been effective in reducing judicial review. In addition, the common law grounds of review Part 8 sought to exclude as grounds of review of migration decisions are being given new life, but in the guise of the allowable grounds of review under Part 8.

What the Coalition Government is doing

The Government is determined to review and improve Australia's administrative law system. To do this requires a critical appraisal of the current situation, what Australia needs and what Australia can afford.

Any appraisal must broadly view administrative law in the wider context of Government policy making and implementation. This is particularly so in the area of immigration, where the most direct beneficiaries of the administrative law system are not members of the Australian community.

It should also be remembered that the privative clause is only one measure in a number of initiatives put forward by this government, to ensure the integrity of, and restore the Australian public's confidence in, the migration programme.

These reforms include:

- Measures contained in Bill no.4 which involve:
  - The merger of the Migration Internal Review Office (MIRO) with the IRT. This means that all visa applicants will now have one tier of merits review.
  - Greater power will be given to the Principal Members of the IRT and RRT to ensure efficient processing of cases brought to these Tribunals.
- The imposition of a $1000 post-decision fee on unsuccessful applicants before the RRT. This will reduce the number of unmeritorious cases brought to this Tribunal. (I should stress, this is not an upfront fee.)

- Restrictions on work rights for people lodging Protection Visa applications.

  - People making Protection Visa applications will not have work rights unless they have applied within 45 days of arriving in Australia.

  - Many people overstay their visa and only make a protection claim when they are located by my Department.

- Increased testing of the bona fides of many classes of visa applicants, particularly those wishing to enter Australia on marriage grounds.

All of these reforms seek to ensure that only genuine applicants for visas are granted permission to enter and remain in Australia, and that unmeritorious applicants are dissuaded from making applications, or that such applications are quickly finalised, removing the benefit of a delayed decision.

The Privative Clause

I will deal now with the privative clause. The Migration Legislation Amendment Bill (No 5) 1997 was introduced into the House of Representatives on 3 September 1997. This Bill, if enacted, will insert a "privative clause" into the *Migration Act*, replacing the current Part 8.

The privative clause is merely another step towards achieving the overall aim of reforms to the decision making process.

Unlike Part 8, the privative clause will apply to both the High Court and the Federal Court. The new s.474 provides that decisions made under the Act are final and not subject to any judicial review or remedies. The word "decision" is widely defined, and includes all decisions relating to the entry and stay of non-citizens. The Government decided to legislate for a privative clause on the basis of advice received from several eminent legal practitioners that the privative clause is the best way of implementing our policy on the judicial review of migration decisions.

The clause, which closely reflects other such clauses in Commonwealth legislation, is expressed to broadly oust the jurisdiction of the courts. As you are no doubt aware, the High Court's jurisdiction given under the constitution cannot be ousted without amendment to the Constitution. Paragraphs 75(iii) and 75(v) of the Constitution provide that the High Court shall have original jurisdiction in all matters in which the Commonwealth is a party, or when writs of mandamus, injunction or prohibition are sought against the Commonwealth. Other such clauses have in practice been interpreted by the High Court as providing that a *decision is valid* and not subject to being set aside by the courts as long as:

- It is a bona fide exercise of power by the decision-maker;

- The decision relates to the subject matter of the enabling legislation;

- It is within constitutional power.

The decision will be valid as long as it is within the decision-maker's power to make it; that is, as long as the error was not a jurisdictional error. So ruled Dixon J in *R v Hickman, ex parte Fox and Clinton*[6], which has been broadly upheld in several subsequent cases, the most recent being *Darling Casino Ltd v NSW Casino Control Authority*[7].

The privative clause, regardless of the manner in which it is expressed, is therefore *not* an ouster of the jurisdiction of the courts. Applicants will still be able to apply to the courts to challenge a decision, and a remedy will be available if the error identified fits within those

described by Dixon J in *Hickman*. The operation of a privative clause is easy to comprehend if you think of it in terms of it not restricting the jurisdiction of the courts, but expanding what is considered as the lawful actions of a decision-maker.

Objections to the privative clause

It is useful to note and address some of the objections to the privative clause raised by legal practitioners and academics during the Senate Legal and Constitutional Committee hearings, dealing with Bill No 5.

It was suggested that the privative clause is unconstitutional and possibly in breach of the separation of powers required by the Constitution.

My Department obtained extensive and detailed advice on this matter, and all the advice received from eminent legal practitioners was that the privative clause was not unconstitutional, and did not offend the important principle of the separation of powers.

It was suggested to the Senate Committee that a leave requirement would achieve the government's aims of restricting judicial review to "exceptional circumstances" and remove unmeritorious cases at an early stage.

However, while the government does have the power to place a leave requirement on the Federal Court, it does not have this power with respect to the High Court. Further, such a requirement could effectively double the number of hearings before the Federal Court. On this basis, a leave provision was not viewed as a viable option.

The risk that a genuine refugee could be refouled without access to judicial review was also raised. However, the Government considers that any increased risk is minimal, the RRT will act knowing that it is the last level of review and decide the applicant's case accordingly. The Minister also retains a special power to intervene and grant a visa where the public interest warrants this step.

Conclusion

In conclusion, migration decision-making is integral to the whole migration program. As Minister, I am determined to ensure that the decision-making process is effective, and efficient in terms of cost, time and quality of outcomes. The planned changes to judicial review to narrow its operation are an important part of achieving this goal. They are part of a wide range of measures in place, or to be put in place, to ensure that the government has effective management and control over migration to Australia.

In my view, the challenge to the system of administrative law, and its practitioners, is to not simply focus on particular aspects of the system - such as whether there is "full" judicial review of decisions available, whether the ADJR Act applies to decisions, and minor technical matters of this nature - but on the wider system of which they are a part.

There must be an ongoing process of properly balancing the interests of individuals with the interests of the wider community, and it is the government's opinion that the planned changes to judicial review of migration decision-making achieve that goal.

Endnotes

1 Administrative Review Council, *Review of Migration Decisions*, ARC report No. 25, AGPS, 1986; Human Rights Committee *Human Rights and the Migration Act* 1958, HRC report No. 13, AGPS, 1985; Committee to advise on Australia's Immigration Policies, *Immigration A Commitment to Australia*, AGPS, 1988.

2 (1997) 145 ALR 621

3 Unreported, Federal Court, Mansfield J, 19 August 1997
4 Unreported, Federal Court, Finkelstein J, 16 September 1997
5 (1990) 170 CLR 321 at 366-367; (1990) 94 ALR 11 at 46
6 (1945) 70 CLR 598
7 (1997) 143 ALR 55

RESTRICTING JUDICIAL REVIEW

*Robin Creyke**

Paper presented to an AIAL Seminar, entitled "Narrowing Judicial Review", held on 30 October 1997.

Introduction

I find myself in an odd position this evening posing as the champion of the courts. I have for some time now had a particular interest in and involvement with administrative tribunals. Hence, to be arguing that the migration tribunals should not be permitted to "go it alone" may seem inconsistent.

Let me say, however, that my respect for the operation of tribunals in this country is in the context of an administrative law system which is balanced by a range of avenues of review, thus ensuring there are inbuilt checks and balances. The courts are an integral part of that system as I see it and I do not welcome the prospect that their role may be significantly circumscribed or removed.

The mechanism by which that restriction or removal may be effected is the removal from the *Migration Act 1958* (Cth) of the existing Part 8 which contains limited grounds of judicial review, and the shoring up of this move by a comprehensively worded privative clause. The relevant provisions are contained in the Migration Legislation Amendment Bill (No 5) 1997.

The privative/ouster clause has been introduced in the wake of a period of judicial activism by, in particular, the Federal Court, coupled with increased pressure on the migration determination system from refugees and other would-be entrants.

The effect of that clause, according to the Explanatory Memorandum for the Bill is:

- To limit the review jurisdiction of the High Court and the Federal Court to errors in three areas - constitutional invalidity, decisions made in bad faith, and narrow jurisdictional error;[1]
- To apply these restrictions to virtually all substantive decisions in the migration jurisdiction;[2]
- To permit by regulation the removal of the prohibition on review, without, however, indicating the circumstances in which this ameliorating provision might be exercised;
- To establish a strict time limit of 28 days for review of applications and to take away any discretion to extend time;[3]
- To prohibit the Federal Court exercising any review jurisdiction until an applicant has fully exercised any merit review rights;[4]
- To prohibit absolutely review by the Federal Court of the personal discretionary powers of the Minister;[5] and
- To provide that there be no attempt to defeat these restrictions on the Federal Court's powers by commencing the matter in the High

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Court with a view to having it remitted to the Federal Court under section 44 of the *Judiciary Act 1903* (Cth).[6]

The outcome, as the Minister promised in his Second Reading Speech, is intended to "restrict access to judicial review in migration matters in all but exceptional circumstances".[7]

Assuming that the legislation is passed,[8] the next step will undoubtedly be a challenge to the provisions before the High Court. The High Court has three options:

- To invalidate the clauses because they have exceeded the constitutional protection provided by s 75(v), a feat not yet essayed;[9]
- To uphold the provisions as they stand; or
- To uphold the provisions but interpret them in a way which retains some effective review jurisdiction.

A subsidiary question is whether the more comprehensive restrictions on the Federal Court's jurisdiction will be upheld by the High Court. The argument in favour of validity is that the Federal Court is a creature of statute and its jurisdiction is *prima facie* not constitutionally protected. However, there are countervailing views.

Privative clauses in Commonwealth administrative law

If anyone had said to me a few years ago that administrative lawyers would be debating the merits of a federal privative clause of this kind I would have scoffed at the idea. Federal privative clauses have been notable by their absence. The Australian experience has been that these clauses have their principal place in the States', not the Commonwealth's, domain. There have been two reasons for this inhibition:

- The prohibition on ousting the judicial review jurisdiction of the High Court provided by section 75(v), the constitutional protection of the judicial review jurisdiction in this country; and
- The abrogation by the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (*ADJR Act*) s 4 of privative clauses then in force - at least for *ADJR Act* applications - a move which undoubtedly contributed to the disfavour in which such clauses have been held in the Commonwealth sphere.

With the signal exception of the industrial relations jurisdiction, there has been little need to explore the few privative clauses in Commonwealth legislation. The exception - industrial relations - was the area in which the principles in *R v Hickman; Ex parte Fox and Clinton*[10] (*Hickman*) were developed. These principles have been long accepted as the solution to the constitutional conundrum posed by a clash between s 75(v) and any ouster of jurisdiction by legislation of the federal Parliament, of which more anon. Again, however, few cases have examined the meaning of these principles. In summary, there has been a paucity of jurisprudence on the meaning and effect of federal ouster clauses generally or of the *Hickman* compromise.

Whether High Court will uphold validity of proposed privative clause

Against this background it is, therefore, surprising that the advice received by the Minister was, as he put it, "that the only workable option was a privative clause".[11] That surprise is due not only to the limited use hitherto made of privative clauses, but also because privative clauses has always been unpopular with courts, and there are alternatives.

There are several reasons why the privative clause is both risky and not the preferable option:

- litigation about these privative clauses will plunge administrative law at the Commonwealth level into a degree of uncertainty and complexity not yet experienced in this jurisdiction;

- exclusion of judicial review is wrong in principle. To make tribunals which are part of the executive the final arbiter of decisions by the executive is inappropriate. For the health of public administration, decision-makers need the safeguard of judicial review;

- it is doubtful that the High Court would fully uphold the privative clause as it applies to the Federal Court; and

- there are other options.

What is being attempted is to exclude - almost completely - judicial review of migration decisions. That leaves the jurisdiction solely in the hands of the merit review bodies - the Immigration Review Tribunal and the Refugee Review Tribunal. I think we need to ask ourselves:

- are we as a nation prepared to leave the development of migration law and policy to the Department of Immigration and Multicultural Affairs and to the two migration review tribunals?

- is it wise to oust the courts' jurisdiction in this or any other area of public administration?

- and, in particular, is it wise to do so by such an uncertain route as an ouster clause?

1 Complexity and uncertainty

The first point is that there may well be constitutional problems in designating the migration tribunals as, in effect, the final decision-maker. Finality has long been held to be an attribute of courts in their exercise of judicial power. Given the vigorous manner in which the separation of powers doctrine and its protection of Commonwealth judicial power has been applied in this country - especially in recent times[12] - I venture to suggest that there may well be constitutional uncertainty inherent in that choice.[13]

Secondly, the unwisdom of adopting this mode of excluding review is its uncertainty - uncertainty in interpretive terms. The privative clause is argued to be effective to exclude all but narrow jurisdictional error. However, the difference between a jurisdictional and a non-jurisdictional error has been elusive.[14] It was, after all, for that very reason that Lord Diplock in *Anisminic Ltd v Foreign Compensation Commission*[15] attempted to do away with these subtleties. Do we want decisions in the migration jurisdiction to be dependent on such a "tenuous"[16] distinction? Despite the exhortation in clause 474(6) of the Migration Legislation Amendment Bill (No 5) 1997 that:

> ... it is the intention of the Parliament that this section
>
> (a) be construed in a way that gives full effect to its natural and ordinary meaning; and
>
> (b) not be construed in a way that would limit its operation ... ,

can we be sure that the court will not take a stringent, rather than a literal, approach to its interpretation? The courts have consistently interpreted ouster clauses in a manner which does not read their terms literally and once that has occurred it is difficult to ascertain or predict their meaning.

Further, do we want to sanction constant calls on the High Court's time to determine, on a case by case basis, whether the error is jurisdictional or within jurisdiction? I say the High Court because, if the ouster clause is effective, it is the Federal Court's jurisdiction which is primarily affected. In effect, that would make the High Court the court of first

instance - an outcome which would surely be unwelcome to that body.

The Minister's advice is that this privative clause will only permit the High Court to review decisions which are unconstitutional, made in bad faith and in breach of the narrow jurisdictional error doctrine. These limited avenues for judicial review clearly refer to the constitutional compromise fashioned by Justice Dixon in the *Hickman* case decided in 1945 and referred to earlier. In *Hickman* Dixon J, faced with a broadly worded privative clause, enunciated a principle that decisions, within constitutional bounds, will be protected if they meet three conditions:

- the purported exercise of the power is *bona fide;*
- the exercise of the power relates to the subject matter of the legislation; and
- the decision is reasonably capable of reference to the power.[17]

Taking a literal view of the three provisos one could say that it would be highly unlikely that migration officials, the Minister, or members of the migration tribunals would act in bad faith; or make decisions on matters outside the migration field. That same conviction may not be available in relation to the ambit of the third criterion since its interpretation, even at first sight, is not so apparent. One thing, however, is certain. Courts have consistently refused to take a *prima facie* view of the meaning of privative clauses. It is the very reason interpreting them becomes so problematic.

It must also be remembered that such interpretation as there has been of the *Hickman* tests has occurred almost wholly in the industrial relations jurisdiction - a jurisdiction which has always been treated as *sui juris* not least because decisions are made by a long established and well respected specialist body, and it is an industrial tribunal, with highly developed expertise in the subject matter. There are additional distinctions which differentiate the two jurisdictions: the industrial relations jurisdiction is not a mass jurisdiction like migration; nor does it have the same strong human rights overtones.

Moreover, the most recent cases on *Hickman* do not appear to interpret its impact on broadly couched ouster clauses in the minimalist manner which the Minister's advisers have predicted. This is not the place or the time for minute analysis of these decisions. Some examples, however, give a flavour of the lack of clear principle in the area. By way of introduction the following points can be made.

It is clear that there is little useful jurisprudence on the three provisos. A statement in 1991 by *Mason CJ in the O'Toole v Charles David Pty Ltd*[18] that "[t]he scope and content of the three provisos in the *Hickman* principle have not been examined in any detail in subsequent decisions of this Court",[19] remains true today.

Aronson and Dyer, in their leading text on Australian judicial review, have pointed out that the various provisos "clearly present several leeways to which a court can resort if it is unwilling to concede an ouster clause much practical effect".[20]

The most recent case on the issue - *Darling Casino Ltd v New South Wales Casino Control Authority,*[21] bears out that comment. In *Darling Casino* Gaudron and Gummow JJ, in a judgment which was agreed with by Brennan CJ, Dawson and Toohey JJ, noted that, on the present state of the law, even a broadly couched ouster clause would not protect what are described as "inviolable limitations or restraints" upon the jurisdiction or power of the decision-maker.[22]

It is difficult to know what that description encompasses - indeed it has been suggested that "answering the question may come close to a process of selection from one of Professor Stone's categories of meaningless reference".[23] Read literally, it could be assumed, at the very least, that it would cover errors of any magnitude going to jurisdiction or to the power being exercised. There is clearly no suggestion that the principle would be confined to narrow jurisdictional error, that is, refusal to accept jurisdiction, or to mistakes about a tribunal's powers. Indeed, Dawson J in *O'Toole v Charles David Pty Ltd* indicated that *Hickman* only excluded minor or unimportant errors - or as he put it "a mere defect or irregularity".[24] That is a different opinion from the ones on which the Minister is relying.

In *Darling Casino Ltd,* Gaudron and Gummow JJ also indicated that breaches of statutory obligations or "imperative duties"[25] are not protected by a broadly worded ouster clause.[26] Again there is no suggestion that this expression is restricted to duties which can be described as within the narrow jurisdictional error band. In addition, Brennan CJ, Dawson and Toohey JJ noted that decisions made in breach of procedural fairness - a controversial area at present in the migration jurisdiction - would not be protected by a broad privative clause,[27] although such a clause could protect against other minor or procedural defects.[28]

Obiter dicta in other cases have suggested that the first proviso - exclusion from review of decisions made in good faith - would not protect decisions made for an improper or unauthorised purpose, or in abuse of power.[29] That suggestion would add considerable scope to this limb of the *Hickman* tests.

Finally, the words "not reasonably referable to the power" in the third proviso are clearly ripe for expansion. Previous cases have restricted this expression to decisions made "wholly without power"[30] or acts done "altogether outside the scope of the authority"[31]. Faced with a privative clause akin to the one proposed in the migration jurisdiction, the High Court is likely to reduce the reach of this proviso. That task is facilitated by the inclusion in the expression of that flexible lawyer's tool - reasonableness. The expression would permit the Court to exclude from the third proviso decisions which are "the very essence or subject matter of the inquiry",[32] quarantining only decisions which are collateral, preliminary or procedural in nature, other than decisions in breach of fair process. If it takes that path, the Court would follow recent English jurisprudence[33] which has interpreted similarly extensive clauses as not ousting review of the central matter for decisions or, as it was described, "an error of law on which the decision of the case depends".[34]

The upshot is, that despite the breadth of the ouster clause in the Migration Legislation Amendment Bill (No 5) 1997, the High Court is unlikely to restrict its review powers in the way predicted. Indeed, to rely on a narrow interpretation of the *Hickman* provisos is to ignore history and the industrial relations context in which *Hickman* has been used. It is significant that Aronson and Dyer have estimated that *Hickman* has validated decisions tainted with jurisdictional error in at most eight cases in the more than fifty years since the test was first developed.[35]

2 Exclusion of judicial review is wrong in principle

The principal beneficiary of the privative clause, if it were to be interpreted as intended, are the migration tribunals. These bodies are part of the executive. There is something inherently pernicious about hiving off from judicial supervision areas of executive decision-making. That is, it is hard to accept that Parliament would provide that certain administrative

decisions can be unlawful, unfair, unreasonable and procedurally tainted. Section 75(v) was inserted into the Constitution "to make it constitutionally certain that there would be a jurisdiction capable of restraining officers of the Commonwealth from exceeding federal power".[36] In a democratic society privative clauses threaten the fundamental balance between two arms of government by removing a key role of the courts as the watchdog against executive impropriety.[37]

In effect, what is being attempted is to 'judge-proof' migration decisions. The mechanism for achieving this is to rely on the possibility that the privative clause will trump s 75(v) of the Constitution. In principle, positive rights granted in the Constitution should not be abrogated lightly. There are surprisingly few of them. Moreover, this right - the right to seek review by the High Court of executive decision-making - represents the foundation stone for the administrative law system in this country. The High Court as the upholder of the rights in the Constitution is likely to think carefully before it concedes unbridled power to the executive particularly when it affects a high volume area of administrative decision-making. Indeed, as Barnes has noted there should be "a real conflict *from parliament's point of view* in the notion of an unenforceable right" (italics supplied).[38]

There are other reasons why the attempt to give virtually exclusive jurisdiction to migration tribunals is abhorrent. In the first place, it deprives someone of a remedy for wrongful government action and that means, in effect, "to grant dictatorial power".[39]

Whatever is said about unmeritorious claims by would-be migrants, it has been a proud tenet of our legal system that it is open to all, even to non-citizens. Our stature as a nation would be diminished by any erosion of that principle. Further, to say that all applicants have access to administrative review by the migration tribunals is no answer since that right is a partial and incomplete one.

For the High Court to embrace this privative clause would be to ignore precedent. The reason for the traditional reluctance of the courts to give full effect to privative clauses is that by doing so they permit inferior courts or tribunals to exceed the statutory limits of their jurisdiction without check. If the ouster clause in the proposed migration legislation is upheld it would sanction the logical contradiction that a body with powers limited by statute may expand those powers at will.

That notion has always been anathema to common law courts of superior jurisdiction. Witness the now well-known exchange between the current Chief Justice of the High Court, Sir Gerard Brennan, and counsel appearing for Lorenzo Ervin in the special leave application against the cancellation of Ervin's entry visa. His Honour commented of Part 8 of the *Migration Act 1958* (Cth), which excludes judicial review of certain grounds of review, that it was

> a matter of the gravest constitutional importance ... that this Court does not have the jurisdiction to control unlawful acts committed by a Minister

and the argument put by Ervin's counsel that the High Court lacked jurisdiction in the matter was

> completely inconsistent with the notion of judicial review for it would isolate the Executive from judicial control in respect of acts done which are unlawful, and that cannot be, surely, the intention that one would either attribute to the Constitution or to the Parliament.[40]

Behind that comment is the belief in the value of judicial review, a belief which is shored up by the common law presumption of statutory interpretation that the jurisdiction of the courts should not lightly be taken away.[41] That presumption is given even stronger force in relation to

the administrative law jurisdiction by s.75(v) of the Constitution.

Finally, it would be misguided to believe that the Court would uphold the full import of the ouster clause because of the stature of the court or tribunal, or the expertise of the decision-maker in the subject matter of the decision - an argument often presented in the case of bodies in the industrial relations arena.[42] Neither of those pre-requisites - stature or specialist membership - applies in the case of the migration tribunals, and given the High Court's recent statement in *Craig v South Australia*[43] affirming the secondary status of tribunals, I see no reason for optimism about the degree of deference which the Court would be prepared to give to the relatively new migration tribunals.

3 Validity of the privative clause in relation to the Federal Court.

The privative clause is aimed principally at the Federal Court. How effective is it likely to be? Clause 476 of the Bill is designed to preserve so much of the Federal Court's jurisdiction under s 75(v) which the High Court also retains (see earlier discussion on the effectiveness of the privative clause in relation to the High Court's jurisdiction). In addition, however, the Federal Court's review powers over personal discretionary decisions by the Minister, and over decisions which have not been fully considered by the merit review tribunals are ousted. The questions to be answered are whether the ouster of the Federal Court's jurisdiction under s.75(v) will be coterminous with that of the High Court, and, if not, what is the ambit of each? Second, are the additional exclusions likely to be upheld?

In *David Jones Finance & Investments Pty Ltd v Federal Commissioner of Taxation*[44] it was held by majority (Morling and French JJ, Pincus J dissenting) that "it is apparent from the language of s 39B, its identity with that of s 75(v) and the second reading speech, that the intention of the legislature was to confer on the Federal Court the full amplitude of the original jurisdiction of the High Court under s 75(v)", subject only to the specific statutory restrictions in s 39B itself.[45] Their Honours went on, in relation to statutes post-dating the *Administrative Decisions (Judicial Review) Act 1977* (Cth) s 4 - the provision which nullified the effect of privative clauses in federal legislation in force at its commencement - "there will be a powerful presumption, in the absence of clear words to the contrary, that no such displacement, qualification or limitation is intended".[46] For as Morling and French JJ noted, the consequence for the High Court of any erosion of the Federal Court's jurisdiction would be that it would "effectively return it, contrary to the legislative intention, to the exclusive province of the High Court".[47]

The practical implications which their Honours discerned are a powerful disincentive to treating the Federal Court differently from the High Court. That disincentive has received an added impetus in recent times by the concatenation of High Court decisions (*Wilson v Minister for Aboriginal and Torres Strait Islander Affairs*,[48] *Grollo v Palmer*,[49] and *Kable v Director of Public Prosecutions (NSW)*[50]) which have developed the concept of an integrated federal court system for the purpose of the exercise of federal judicial power.

A key element of these cases has been the requirement that courts, both federal and state, should continue in existence and by implication continue to be available for the exercise of their jurisdiction. Since the supervisory jurisdiction of the High Court and Federal Court is but one element of the exercise of federal judicial power, it can be postulated that the High Court might be prepared to find an implied constitutional right arising from these principles that the Federal Court, like the High Court, retain its jurisdiction in this area largely unfettered. Otherwise if the

Federal Court were muzzled by a judge-proof privative clause, that might effectively disable the High Court itself.

As to the specific Federal Court exclusory provisions, the comment under 4 on the success of limited privative clauses suggests that the time-limited element of the clause may well be upheld, and to require that the review jurisdiction should not be exercised until merits review rights are exhausted is not unreasonable.

4 Other options

There are other options for reducing the number of judicial review applications. However, the preliminary point should be made that any action may be premature. The government should take heart from three migration decisions[51] - the decisions in *Ozmanian*, *Wu Shan Liang* and *Guo Wei Rong* - which are likely to have a major impact on the claimed activism of the Federal Court in this jurisdiction. It will take eighteen months to two years before the effect of these decisions is fully manifested but they will undoubtedly result in a downturn in the number of decisions which the Federal Court will be willing or able to review and there is already anecdotal evidence that this is happening.

Assuming that positive steps are required, it is clear from the treatment of privative clauses in common law countries that limited privative clauses are more likely to be upheld by the courts.[52] If that history is heeded, one option would be for the limits of migration review to be spelt out by Parliament in legislation. There are clearly democratic reasons why this is a more satisfactory solution.[53] There are two proposals which suggest themselves (and I claim no originality in suggesting either):

- Parliament should list those decisions which it does not wish to be reviewed. It attempted a partial list in the Migration Legislation Amendment Bill (No 5) - but only of those decisions which would not be subject to the operation of the privative clause.[54] It should also be possible for it to schedule those areas of decision-making over which it would prohibit review. The list could be included in the *Migration Act 1958* (Cth) itself; or by adding to Schedule I of the *Administrative Decisions (Judicial Review) Act 1977 (Cth).* Limited deference, rather than denial, might better promote the purpose of restraint.

- Preferably, however, there could be instituted a review by leave procedure for migration decisions heard by the Federal Court. That would require an amendment to the *Judiciary Act 1903* (Cth) s 39B. The High Court successfully operates such a system, and a similar scheme could be introduced at the Federal Court. The criteria for its exercise could be spelt out in legislation. For example, the matters excluded might be questions of general importance to the migration jurisdiction; cases of manifest error by the tribunals; or those in which new evidence was available which could not have been produced in the earlier hearing.[55] Such a restriction should be more than adequate to produce the downturn in the number of Federal Court cases which the Minister is understandably anxious to achieve.

- A further option is to lay down statutory criteria for the exercise of the Federal Court's discretion to review decisions brought under either the *Administrative Decisions (Judicial Review) Act 1977* (Cth) s 10 or the common law jurisdiction imported under the *Judiciary Act 1903* (Cth) s 39B. At present, the only criterion for exercise of that discretion is found in s 10(2)(b), namely, that there is a concurrent application before the Federal Court or another court in the same matter; or an alternative avenue for review. It would be possible,

> perhaps solely for the migration jurisdiction, to identify further criteria which the Court should take into account when assessing the reviewability of such applications.

In this context, it is noted that the time limit of twenty eight days for review of applications which is contained in the Migration Legislation Amendment Bill (No 5) 1997 clause 477 would probably be effective. Time-limited provisions are generally upheld, particularly, as here, where there are alternative avenues for merits review.[56]

Conclusion

Privative clauses in common law countries represent a battleground between two of the three arms of government - the legislature and the courts - and between fundamental principles - the sovereignty of parliament and the rule of law, with its concomitant principle that all action by government and its officials must be lawful.

There are undoubtedly tensions between these principles but if the balance between them becomes skewed too far in favour of one or the other, history has shown that a democratic society is the loser.

If the legislation is passed, the High Court will have to pronounce on the validity of this privative clause. In doing so the High Court will need to comment on the ambit of the *Hickman* tests, read in the light of the constitutional rights in s 75(v). Justice French, quoting from the *Convention Debates*, had this to say of s 75(v):

> in moving the inclusion of what became s 75(v) in the draft Constitution in March 1898, Edmund Barton observed that the words of the provision "could do no more harm and might protect us from a great evil".[57]

Let us hope that that will be the epitaph of the High Court's deliberations.

Endnotes

1 Migration Legislation Amendment Bill (No 5) clause 474 (1).
2 Id clause 474(2)-(6).
3 Id clause 477
4 Id clause 476(1).
5 Id clause 476(2).
6 Id clause 476(4).
7 The Hon Philip Ruddock MP, Minister for Immigration and Multicultural Affairs, Second Reading Speech, *Hansard Debates, House of Representatives*, 3 September 1997, 7338.
8 That assumption has been fortified by the recommendation of the Senate Legal and Constitutional Legislation Committee in its report of October 1997 that the Migration Legislation Amendment Bill (No 5) 1997 be passed without amendment (Senate Legal and Constitutional Legislation Committee *Consideration of Legislation Referred to the Committee: Migration Legislation Amendment Bill (No 4) 1997; Migration Legislation Amendment Bill (No 5) 1997* at 41).
9 The extent to which a privative clause can render less effective the supervisory jurisdiction over an "officer of the Commonwealth" under s 75(v) has not been definitely determined (*David Jones Finance and Investments Pty Ltd v Federal Commissioner of Taxation* (1991) 99 ALR 447 at 470-471, 472, 473 per Pincus J). See also M Aronson & B Dyer *Judicial Review in Australia* Sydney, Law Book, 1996, 960.
10 *R v Hickman; Ex parte Fox and Clinton* (1945) 70 CLR 598.
11 The Hon Philip Ruddock MP, Minister for Immigration and Multicultural Affairs, Second Reading Speech, *Hansard Debates, House of Representatives*, 3 September 1997, 7338.
12 *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518; *Harris v Caladine* (1991) 172 CLR 84; *Polyukhovich v Commonwealth* (1991) 176 CLR 501; *Leeth v Commonwealth* (1992) 174 CLR 455; *Lim v Minister for Immigration* (1992) 176 CLR 1; *Grollo v Palmer* (1995) 184 CLR 348; *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 138 ALR 220; *Kable v Director of Public Prosecutions (NSW)* (1996) 138 ALR 577.
13 *David Jones Finance and Investments Pty Ltd v Federal Commissioner of Taxation* (1991) 99 ALR 447 at 470 per Pincus J.
14 eg *Pearlman v Keepers and Governors of Harrow School* [1979] QB 56.
15 [1969] 2 AC 147.
16 GL Peiris "Statutory Exclusion of Judicial Review in Australian, Canadian and New Zealand Law" (1982) *Public Law* 451, 455. See also M Aronson and B Dyer *Judicial Review of Administrative Action* Sydney, Law Book Co, 1996, 967.
17 *R v Hickman; Ex parte Fox and Clinton* (1945) 70 CLR 598 at 615.

18 (1990) 171 CLR 232.
19 Id 249.
20 M Aronson and B Dyer *Judicial Review of Administrative Action* Sydney, Law Book Co, 1996, 974.
21 *Darling Casino Ltd v New South Wales Casino Control Authority* (1997) 143 ALR 55.
22 *Id* 74. See also *R v Metal Trades Employers Association; Ex parte Amalgamated Engineering Union, Australian Section* (1951) 82 CLR 208, 248.
23 J Stone *Precedent and Law: Dynamics of Common Law Growth* Sydney, Butterworths, 1985, 68-70 quoted in R French "The Rise and Rise of Judicial Review" (1993) *UWALR* 120 at 124.
24 *O'Toole v Charles David* (1991) 96 ALR 1, 50 per Dawson J.
25 *Darling Casino Pty Ltd v New South Wales Casino Control Authority* (1997) 143 ALR 55, 75.
26 Id 74. See also *R v Metal Trades Employers' Association; Ex parte Amalgamated Engineering Union, Australian Section* 1951) 82 CLR 208 at 248.
27 Id 56.
28 Id 74.
29 *David Jones Finance and Investments Pty Ltd v Federal Commissioner of Taxation* (1991) 99 ALR 447 at 466-67 per Morling and French JJ, 466 per Pincus J.
30 *Magrath v Goldsbrough Mort & Co Ltd* (1932) 47 CLR 121, 126 (HCA)
31 *The Coal Miners' Industrial Union of Workers of Western Australia v Amalgamated Collieries of Western Australia Ltd* (1960) 104 CLR 437, 443 (HCA).
32 G L Peiris "Statutory Exclusion of Judicial Review in Australian, Canadian and New Zealand Law" [1982] *Public Law* 440, 455.
33 *Pearlman v Harrow School Governors* [1979] QB 56.
34 Id 69-70 per Denning LJ, Eveleigh LJ agreeing at 77.
35 M Aronson & B Dyer *Judicial Review in Australia* Sydney, Law Book, 1996, 970.
36 Sir A Mason "The Importance of Judicial Review of Administrative Action as a Safeguard of Individual Rights" (1994) 1 *Australian Journal of Human Rights* 3.
37 Senate Standing Committee for the Scrutiny of Bills *Alert Digest No 10 of 1997*, 27 August 1997, 29-30. Peiris also commented that "the instinctive security engendered by judicial surveillance is an inarticulate premise of current judicial approaches to preclusive provisions" (G L Peiris "Statutory Exclusion of Judicial Review in Australian, Canadian and New Zealand Law" [1982] *Public Law* 451 at 464).
38 Jeffrey Barnes "Administrative Law: Privative Clauses - the Compromise We Had to Have" (1992) *Australian Business Law Review* 172. The effect of the privative clause, if upheld, is to give a right without a remedy, contrary to the classic adage, 'no right without a remedy". Administrative law does not deserve this treatment.
39 HWR Wade *Constitutional Fundamentals* (rev'd edn) London, Stevens, 1989, 83.
40 Transcript of special leave application, http://www.austlii.edu.au/au/other/hca/transcripts/1997/B29/2.html at 7.
41 D C Pearce and R S Geddes *Statutory Interpretation in Australia* (4th ed) Sydney, Butterworths, 1996, para 5.24.
42 *Attorney-General (Qld) v Riordan; Ex parte Lamsoon (Aust) Pty Ltd* (1997) 146 ALR 445 at 450 451 per Brennan CJ & McHugh J, at 469-470 per Kirby J.
43 *Craig v SA* (1995) 184 CLR 163.
44 (1991) 99 ALR 776.
45 *David Jones Finance & Investments Pty Ltd v Federal Commissioner of Taxation* (1991) 99 ALR 447 at 459-460 per Morling and French JJ, at 472-473 per Pincus J dissenting.
46 Id 460.
47 Ibid.
48 (1996) 138 ALR 220.
49 (1995) 184 CLR 348.
50 (1996) 138 ALR 577.
51 *Minister for Immigration and Multicultural Affairs v Ozmanian* (1996) 141 ALR 322; *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259; and *Minister for Immigration and Ethnic Affairs v Guo Wei Rong* (1997) 144 ALR 567.
52 "The odd result ... is that a privative clause qualified by the insertion of a limitation is more successful in achieving the end of ousting judicial review than a privative clause which is expressed without reservation to be intended to oust judicial review." (M A Allars *Introduction to Australian Administrative Law* Sydney, Butterworths, para 5.144).
53 Jeffrey W Barnes "Administrative Law: Privative Clauses - The Compromise We had to Have" (1992) *Australian Business Law Review* 169, 174.
54 Migration Legislation Amendment Bill (No 5) cl 474(4) This provision specifies the decisions which are not subject to the operation of the privative clause in cl 474(1).
55 A similar list was developed by the Administrative Review Council in its *Better Decisions* report (*Better Decisions: Review of Commonwealth Merits Review Tribunals* Report No 39, 1995, para 8.63, recommendation 97).
56 *Baulkham Hills Shire Council v Minister for Planning and Environment* (1982) 49 LGRA 236; *Re Canadian Pittsburgh Industries and International Association of Bridge, Structural & Ornamental Ironworkers, Local Union* (1977) 77 DLR (3rd) 581; *Smith v East Elloe Rural District Council* [1956] AC 736; *R v Secretary of State for the Environment; Ex parte Ostler* [1977] QB 122.

57 *Official Records of the Australasian Federal Convention Debates*, Vol 2, Melbourne Government Printers 1898, 1876 quoted in R French "The Rise and Rise of Judicial Review" (1993) 23 *UWALR* 121 at 122.

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