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TABLE OF CONTENTS

DEVELOPMENTS IN ADMINISTRATIVE LAW

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Government initiatives, inquiries, legislative and parliamentary developments

New Council of Australasian Tribunals

On 7 June 2002 the Commonwealth Attorney–General announced the establishment of the Council of Australasian Tribunals "to bring together a diverse range of Commonwealth, State, Territory and New Zealand tribunals in a forum that allows them to share ideas, experiences and working methods". Following recommendations from the Administrative Review Council (ARC) and the Australian Law Reform Commission, the ARC was requested by the Attorney–General to play a lead role in establishing the Council. Its activities have been described in its recent Report on the Council of Australasian Tribunals (October 2002).

Some 30 tribunals are members of the Council. The inaugural meeting of the Council was held on 6 June 2002. It was agreed that the Council would operate through a federal structure, comprising a National Council, State and Territory Chapters, and New Zealand Chapters. Presiding members of participating tribunals are eligible to take part in the National Council. Members of tribunals are entitled to be members of State, Territory and New Zealand Chapters of the Council, and membership is also open to practitioners, academics, and other interested persons.

The Chair of the Council is to be a presiding member of a tribunal, and secretariat support is expected to come from the Chair's registry. There is also a Deputy Chair and an Executive Committee comprising the heads of the Chapters. The inaugural chair is the Hon Justice Murray Kellam, President of the Victorian Civil and Administrative Tribunal. For further information see the Council's website at: www.coat.gov.au (***Commonwealth Attorney-General's News Release***, 7 June 2002).

Western Australian proposal for a State Administrative Tribunal

The final report of a Taskforce, appointed by the Attorney–General of Western Australia to develop a model of a civil and administrative review tribunal, has recommended that a State Administrative Tribunal (SAT) be established to assume relevant functions of a wide range of tribunals, courts, boards, Ministers and officials with administrative review and appeals functions and some other adjudicative functions. The Taskforce was chaired by Mr Michael Barker QC, then chair of the WA Chapter of the AIAL, who has since been elevated to the WA Supreme Court bench. The report was the culmination of a series of reports by various bodies dating back to 1982, the most recent of which, the 1999 WA Law Reform Commission report on civil and criminal justice, had recommended a tribunal with a wide range of functions. The WA Attorney–General has announced that Cabinet has endorsed in principle most of the recommendations of the report, but that the Government is still

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receiving public feedback on the report (*Hansard*, Legislative Assembly, 10 September 2002).

The recommended tribunal is modelled closely on the Victorian Civil and Administrative Tribunal and the New South Wales Administrative Decisions Tribunal, and adheres to the general model for administrative review provided by the Commonwealth Administrative Appeals Tribunal. The Taskforce stressed the importance of an independent, judicially led tribunal, with full-time, part-time and sessional members appointed for between seven years (the President) and five years (all other members). It considered the SAT would replace the existing *ad hoc* system with a one-stop tribunal in place of a variety of tribunals and other bodies. Among the other benefits of establishing the SAT mentioned in the report were the development of an independent and impartial system, better and more consistent decision making, greater accessibility and service to the public, a wide range of expert and experienced members, economies of scale, and more effective and systematic recruitment and training of members.

Excluded from the SAT's proposed jurisdiction are liquor licensing, industrial relations and workers' compensation appeals. A significant feature of the SAT's jurisdiction is the inclusion of the disciplinary functions of various professional and occupational boards and other bodies, and of the functions of a number of tribunals and boards that make primary administrative decisions of a personal, commercial or equal opportunity nature. Nearly all existing administrative review functions will be assumed by the SAT except for some ministerial appeals requiring political or policy judgment by the government of the day. The Taskforce rejected the recommendation of the 1996 Commission on Government that all administrative decisions should be subject to review: the government and Parliament should decide on a case by case basis what other existing administrative decisions should be subject to review, and should consider at the outset whether new decision-making powers should be subject to review. The Taskforce recommended that, at least initially, some existing original and other decision-making bodies not be included in the SAT, including the Assessor of Criminal Injuries Compensation, the Information Commissioner and the Small Claims Tribunal. However, by majority the Taskforce recommended that the SAT, rather than the Supreme Court, should hear FOI appeals from the Information Commissioner, subject to appeal on questions of law from the SAT to the court by leave of the court. The Taskforce also recommended that, while the Guardianship and Administration Board and the Mental Health Review Board should remain as separate tribunals, they should be aligned with the SAT by co-location and shared membership. (***Western Australian Civil and Administrative Review Tribunal: Taskforce Report on the Establishment of the State Administrative Tribunal*****,** May 2002)

Commonwealth Act limiting procedural fairness in migration matters

The Commonwealth Parliament has passed the *Migration Legislation Amendment (Procedural Fairness) Act 2002* (Cth) (assented to on 3 July 2002) which seeks to limit the operation of procedural fairness in relation to what the Minister for Immigration and Multicultural and Indigenous Affairs called "codes of procedure" contained in the *Migration Act 1958* (Cth) dealing with visa applications, visa cancellations, revocations of visa cancellations, and the conduct of reviews by the merits review tribunals. The Act was designed to make clear that those codes "exhaustively state the requirements of the natural justice or procedural fairness hearing rule". The intention of the Bill was to reverse the effect of the decision of the High Court in *Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 601 that there could still be a breach of the common law requirements

of the natural justice hearing rule "even where a decision maker has followed the code in every single respect". In the Minister's view, the *Miah* decision also led to legal uncertainty as to the procedures necessary for a lawful decision. The Act contains a clause providing that the amendments made by the Act are not to be taken to limit the scope or operation of the privative clause in s 474 of the Migration Act. Many submissions to the Senate Legal and Constitutional Committee's inquiry had opposed the Bill. The Labor Party sought to defer the Bill as premature pending the decision in *NAAV* (see below under heading "Judicial review"), while the Greens and Democrats opposed the Bill. (For the Minister's Second Reading Speech see *Hansard*, House of Representatives, 13 March 2002, pp 1106–7, and debates in the House of Representatives and the Senate on 26 and 27 June respectively. See also *Report of the Senate Legal and Constitutional Legislation Committee on Inquiry into the Migration Legislation Amendment (Procedural Fairness) Bill 2002*, tabled on 5 June 2002.)

Judicial review

High Court finds asylum seekers denied procedural fairness

In decisions in associated appeals, the High Court found that the Refugee Review Tribunal (RRT) denied procedural fairness to two Chinese-Indonesian asylum seekers seeking review of refusals to grant them protection visas. The denial of procedural fairness constituted jurisdictional error, and the Court granted prohibition, certiorari and mandamus. The litigation was conducted on the basis of the law in force in 1998 (compare above for the *Migration Legislation Amendment (Procedural Fairness) Act 2002*.). It was the practice of the Department of Immigration and Multicultural and Indigenous Affairs (the Department) to electronically send copies of documents (Part B documents) from the Departmental CISNET database to a computer server in the RRT, rather than sending them in the form of paper documents. In these matters the documents, which related to the relevant country of origin of asylum seekers, had been referred to in the decisions of primary decision makers. The electronic material was subject to updating and amendment on a regular basis. Other documents were available from libraries to which members of the RRT had access.

While the court as a whole did not consider it appropriate or necessary to decide whether this practice complied with the then ss 418(3) and 424(1) of the *Migration Act 1958* (Cth) (the latter has since been repealed), Gleeson CJ, Gaudron and McHugh JJ considered the practice satisfied the statutory requirement to "give" the documents to the RRT. However, Kirby J held there was a legally significant failure to comply with the statutory requirements that might affect future cases; the legislative scheme required the movement of identified relevant documents, not mere provision of access to an intangible database. The evidentiary foundation for review should not involve materials more limited than those available to the primary decision maker.

A majority of judges (five in *Muin* and four in *Lie*) decided that the plaintiffs had been disadvantaged through being misled as to the materials before the RRT by statements that it would receive and look at all material used in the primary decision; they would otherwise have presented their cases differently by drawing attention to the documents. Chief Justice Gleeson and McHugh J dissented on this issue in both cases, while Callinan J did not consider the adverse decision in *Lie* was affected by the denial of procedural fairness. Four judges (Gleeson CJ, Gaudron, McHugh and Kirby JJ) also found that Muin had been denied procedural fairness by the failure of the RRT to inform him of specific information it had received concerning a change in 1998 in Indonesian government and Army attitudes towards

protection of nationals of Chinese descent. This was significant adverse evidence to which he had a right of reply (Kirby J). Justices Hayne and Gummow JJ considered there was no requirement to inform Muin of this specific piece of information. Justice Callinan was not convinced the material in question was "decisive" or that it was of such a kind that its use would not reasonably have been expected by the plaintiff.

The court was careful to note that while the two matters were part of representative actions, its decisions related only to the circumstances of these two matters. Lawyers in the first case claimed in the media that over 7,000 other refugee appeals to the RRT could be affected by the same defect as in this case. Government ministers have denied that there is any necessary implication that a large number of other cases are affected. (***Muin v Refugee Tribunal & ors, Lie v Refugee Tribunal & ors* (2002) 190 ALR 601**)

Full Federal Court rules on Migration Act privative clause (s 474)

A five member bench of the Full Court of the Federal Court has given judgment in five different appeals raising questions concerning the interpretation and effects of the privative clause contained in s474 of the *Migration Act 1958* (the Act). Divergent views had been expressed on the issues by single judges of the court in a large number of cases. Section 474 was introduced in the legislative package enacted in the aftermath to the *Tampa* incident (see *Migration Legislation Amendment (Judicial Review) Act 2001*). Section 474(1) applies to all decisions under the Act or regulations that are not specifically excluded. It declares that a relevant decision is final and conclusive, must not be challenged, appealed against, reviewed, quashed or called in question in any court, and is not subject to prohibition, mandamus, injunction, declaration or certiorari in any court on any account. It was common ground on the part of all judges that such a clause does not mean what it says, and that its application is to be interpreted in the light of the "*Hickman* principle" enunciated by Dixon J in *R v Hickman; Ex parte Fox and Clinton* (1945) 70 CLR 598 and referred to in a number of subsequent High Court cases. Justice Beaumont noted that only the High Court could reconsider the *Hickman* principle.

A majority of the court (Black CJ, Beaumont and von Doussa JJ) endorsed an approach that left little room for judicial review of decisions to which s 474 applies. On that view the effect of the privative clause is to implicitly change the substantive meaning of the Act so that the jurisdiction and power of decision makers are expanded, except where provisoes to the principle apply (see below). This view resulted in rejection of one appeal by an asylum seeker where the applicant (NAAV) claimed a denial of procedural fairness, although Wilcox and French JJ held that the obligation of natural justice had not been specifically excluded by the legislation and that, unlike many of the other traditional grounds of judicial review, it was not excluded by s 474. However, the Chief Justice joined the minority (Wilcox and French JJ) to find against the Minister in two other matters (*Turcan* and *Wang*). The court rejected the remaining two appeals on other grounds.

The majority also held that in the face of s 474(1), it was not open to an applicant to obtain review on the ground of absence of procedural fairness where what was complained of did not come within the three principal provisoes of the *Hickman* principle. Wilcox and French JJ held that the obligation of natural justice had not been specifically excluded by the legislation and that, unlike many of the other traditional grounds of judicial review, it was not excluded by s 474.

None of the three provisoes to the *Hickman* principle acknowledged by the Minister in the Parliamentary debate on the relevant Bill was held by any judge to apply in any of the matters (i.e. decision not made in good faith, decision not reasonably capable of reference to the relevant power, and decision not related to subject matter of legislation). All judges also agreed that, read according to the *Hickman* principle, s 474 was not constitutionally invalid as it did not operate to oust the jurisdiction conferred on the High Court by s 75(v) of the Constitution. Where they differed was over the scope of a fourth proviso expressed in some of the authorities as arising where "inviolable limitations or constraints" were exceeded. Justice von Doussa (Beaumont J and Black CJ essentially agreeing) considered s 474 as the leading provision where it was inconsistent with another provision of the Act, and that consequently very few limitations on power were jurisdictional in kind justifying review unless one or more of the above three provisoes applied.

Justices French and Wilcox held that a privative clause such as that in s 474 operates only on "valid decisions", and not where a limit or condition is necessary for the effective exercise of a power. It could not immunise otherwise invalid decisions from judicial review, and there were no cases under Commonwealth law where it had had that effect. Section 474 had to be read with the whole of the Act and "not as a later addition which transforms otherwise invalid decisions into valid decisions". Despite his narrower view on the *Hickman* principle, the Chief Justice agreed with Wilcox and French JJ in two appeals that an "inviolable limitation" had been exceeded in relation to a cancellation of a visa and the revocation of a cancellation. Justices Wilcox and French doubted that the new privative clause in s 474 would have the intended result of reducing litigation and delay, the former noting the effects of the clause in diminishing the rule of law and suggesting that leave of the court to bring an appeal, and better legal advice to applicants concerning the limited scope of judicial review, would have more success.

Any appeals in these matters may be overtaken by the proceedings mentioned in the next item. (***NAAV v Minister for Immigration & Multicultural & Indigenous Affairs, and related matters*, [2002] FCAFC 228**, Full Federal Court, 15 August 2002; see also David Bennett, "Privative Clauses – Latest Developments" (2002) 34 *AIAL Forum* 11.

High Court reserves judgment on challenges to s 474 of Migration Act

In two matters heard together by the High Court on 3–4 September 2002, the court was presented with three different approaches to the "*Hickman* principle" (see preceding item). The Commonwealth Solicitor–General, Mr Bennett QC, argued that the Minister had been correct in stating in his Second Reading Speech that s 474 should be read according to *Hickman* and its settled provisoes, exclusive of any "inviolable limitations" proviso, giving decision makers wider lawful operation for their decisions and narrowing the grounds of challenge in the courts. There was a settled construction of words in the High Court which the legislature had adopted and Parliament should be taken to have used the words in the sense applied by the court. In any case, the Minister's second reading speech stated clearly what was intended by s 474.

Mr Basten QC, counsel for the prosecutors in the first case (identified by the media as Mrs Bakhtiari and family) contended on the basis of "*Hickman* and its progeny" that the effect of a general provision such as s 474 "cannot override express specific constraints contained in the legislation". It was not necessary to abandon *Hickman* properly understood, which at one level was only "authority for the proposition that if the Parliament appears to speak with two

voices, the Court must seek to reconcile its statements". Counsel in the second case, Mr Colquhoun-Kerr, argued that s474, whether read literally or purposively, was completely invalid because it was directly inconsistent with the conferral of original jurisdiction on the High Court under s 75(v) of the Constitution where mandamus, prohibition or an injunction is sought against an officer of the Commonwealth. Nothing in *Hickman* prevented this conclusion, and no decision of the court had upheld such a privative clause. Counsel also challenged the absolute time limit of 35 days for applying to the High Court contained in s 486A of the Migration Act, on the ground that, by purporting to exclude the discretion of the court to allow an application outside time, it was inconsistent with the grant of jurisdiction in s 75(v) of the Constitution.

The court reserved its decision on both matters. (***Ex parte Applicants S134/2002 v Minister for Immigration & Multicultural & Indigenous Affairs & Refugee Review Tribunal*, S134/2002; and *Plaintiff S157/2002 v Minister for Immigration & Multicultural & Indigenous Affairs*, S157/2002)**

Habeas corpus – Federal Court orders release of detainee awaiting removal to country of origin

On 15 August 2002, a single judge of the Federal Court (Merkel J) ordered release from detention of a Palestinian who had not succeeded in his claim for refugee status. The initial decision to detain him was made because there seemed no realistic prospect of being able to return him to his place of origin in Gaza. The applicant had requested on 5 December 2001, under s 198 of the *Migration Act 1958* (the Act), that he be returned to the Gaza Strip. The Department of Immigration and Multicultural and Indigenous Affairs (DIMIA) had been unable to obtain permission for the applicant to enter any country in the region from which he could have returned to Gaza. DIMIA continued to detain him in the Woomera Detention Centre, where he suffered anxiety and depression and attempted self-harm.

His Honour held, consistently with decisions of the Privy Council, the English High Court and the US Supreme Court, that ss 196 and 198 of the Act – concerning detention of non-citizens without visas and removal "as soon as reasonably practicable" of unlawful non-citizens who requested removal – did not authorise indefinite detention. The power of detention was limited to the period during which the Minister is taking reasonable steps to secure removal and removal is reasonably practicable in the sense of there being a real likelihood or prospect of removal in the reasonably foreseeable future. There was insufficient evidence before the court to show such a real prospect or likelihood of removal in that timeframe. The provisions of the Act only prevented release of a person lawfully detained. Similarly, the privative clause in s 474 could not operate to prevent habeas corpus if the statutory authority for detention had ceased.

The court held it had no discretion to refuse an order for release, but even if it did it would not have been appropriate in this case. "Unlawful non-citizens" had a lawful entitlement under the Convention on the Status of Refugees 1951 and 1967, enacted into Australian law, to claim refugee status as persons who are "unlawfully" in the country in which the asylum application is made. In a related action, his Honour rejected the Minister's request for a stay of proceedings pending an appeal. There was no evidence of a real or likely risk of abscondment, and the interests of the Minister were protected by agreed reporting conditions.

A little over two weeks later the applicant was again taken into detention. The Minister presented evidence that circumstances had changed so that there was now a reasonable likelihood of removing the applicant from Australia in the immediate future. Justice Merkel ruled on 6 September that in those circumstances the Minister could again exercise the power to detain the applicant in order to arrange for his removal, although the court's previous orders had provided a way of achieving this without detention. The Minister's office advises that Mr Al Masri has been returned to Gaza. (***Al Masri v Minister for Immigration & Multicultural & Indigenous Affairs*** **[2002] FCA 1009, [2002] FCA 1037,** both 15 August 2002 and **[2002] FCA 1099,** 6 September 2002, Merkel J. A Full Court of the Federal Court has reserved its decision on an appeal in this matter.)

Habeas corpus – Federal court interlocutory order to release asylum seeker claiming his detention was unlawful

In a decision raising some of the same considerations as those in *Al Masri* (see preceding item), Merkel J made an interlocutory order for the release of an Afghani applicant for refugee status who claimed that he was being detained unlawfully. The claim was based on the existence of a signed but not dated document which took the form of a decision to grant a temporary protection visa. The applicant argued that it either constituted an immediate decision to grant a visa or, alternatively, that it was subject to a condition which had been met shortly afterwards. The Minister for Immigration and Multicultural and Indigenous Affairs argued that the document was only a draft decision. He also contended that the court was precluded by provisions in the *Migration Act 1958* (the Act) from granting an interlocutory order for release.

The court found that the privative clause in s 474(1) of the Act had no application, and that the provisions of ss 196(1) and (3) did not preclude review of unlawful detention. The court had power under s 23 of the Federal Court of Australia Act 1976 to grant an interlocutory injunction in appropriate circumstance. There was a consistent and well established line of authority that had not construed the discretionary or the mandatory detention provisions in the Act as expressly or impliedly denying the s23 power in a case where the applicant is challenging the legality of his detention. The court concluded there was a serious question to be tried and that the balance of convenience supported an interlocutory order for release on specified reporting and other conditions. It took account of the deprivation of the applicant's liberty and the resulting detrimental effects on him, and the absence of any evidence supporting a real risk of abscondment. (***VAFD v Minister for Immigration & Multicultural & Indigenous Affairs*** **[2002] FCA 1062**, Federal Court, 27 August 2002).

Administrative review and tribunals

Report of UK Review of Tribunals by Sir Andrew Leggatt

Australians may be interested in the report of the UK Review of Tribunals appointed by the Lord Chancellor in May 2000. Conducted by Sir Andrew Leggatt, a former Lord Justice in Appeal, the Review reported in March of 2001. The Review was required to report on the delivery of justice through tribunals concerned with disputes both between citizens and the state and between other parties. A central aim was to ensure a coherent structure, together with the courts, for the delivery of administrative justice. The review concerned 70 different tribunals responsible for dealing with nearly one million cases a year; professional disciplinary bodies were not part of the Review.

The Review presented a package of connected recommendations for implementation in several stages. The chief features of the recommendations were:

- the establishment of a Tribunals Service within the Lord Chancellor's Department to provide administrative support to tribunals.

- Bringing existing tribunals together within a coherent and independent Tribunals System grouped by subject-matter into Divisions, together with an appellate Division to hear appeals on points of law, with a further such appeal to the Court of Appeal. The System would be headed by a High Court judge acting as Senior President, and each Division would be headed by a President who is normally a judge.

- Strong emphasis on the independence of tribunals from relevant departments or agencies, and funding of tribunals by sponsoring departments in proportion to the number and type of cases their decisions generate.

- Members of tribunals to be appointed by the Lord Chancellor after relevant consultations for terms of from 5 to 7 years, with renewal for such periods being automatic except for an age qualification of 70 years and provision for specified grounds for non-renewal. There was a strong emphasis on the need for improved training at all levels for tribunal members, and for measuring performance.

- Creating a Tribunals Board to provide advice, recommendations and monitoring concerning matters relating to members and rules of procedure.
- Designating the Council on Tribunals to act as "the hub of the wheel that is the Tribunals System". It would play an oversight and monitoring role, as well as a consultative role on relevant new legislation, and would make reports to the Senior President of the System, to a Select Committee of Parliament and to the public. So far as possible, the Model Rules of Procedure prepared by the Council should form the basis for the procedures of all tribunals.

- An emphasis on the promotion of user-friendly procedures and practices to enable unrepresented users to participate effectively and without apprehension. The Review looked to the Tribunals System to achieve a new culture of informality, simplicity, efficiency and proportionality.

- Emphasising the importance of the interface between agencies, users and tribunals, with an expectation that tribunals would provide consistent decisions and promote remedies for systemic problems in agency decision-making.

The Lord Chancellor's Department has set up a Tribunals for Users Programme (TUP) to respond to the Leggatt Report. It has developed and analysed a number of reform options which are currently before the British Government. The TUP informs *AIAL Forum* that other existing tribunal modernisation projects are continuing alongside or in conjunction with those generated by the Review. (***Tribunals for Users – One System, One Service: Report of the Review of Tribunals by Sir Andrew Leggatt***, delivered March 2001, published August 2001, available from the Review website at: www.tribunals-review.org.uk/leggatt.htm)

(See also above, '"Western Australian proposal for a State Administrative Tribunal".)

Ombudsman

Scope of the Ombudsman's power to investigate administrative action

Section 12(1) of the *Ombudsman Act 1978* (Tas) (the Act) provides that, subject to the Act, the Ombudsman may investigate "any administrative action" taken by or on behalf of a public authority and may investigate all circumstances surrounding that action. Ombudsman legislation in other Australian jurisdictions is substantially similar. In an action brought by the Tasmanian Anti-Discrimination Commissioner (the Commissioner) against the Acting Tasmanian Ombudsman, Justice Crawford of the Tasmanian Supreme Court ruled that it is "*any* administrative action taken by or on behalf of a defined public authority that may be investigated", not merely action that could be described as "maladministration". That term is not used in the Act although it was referred to in the Minister's Second Reading Speech. In his Honour's view the applicant's argument, that the Ombudsman's jurisdiction was confined to cases of maladministration, confused jurisdiction to investigate with the possible outcome of an investigation the Ombudsman has jurisdiction to carry out. His Honour applied the view expressed in a line of Victorian cases that identified administrative action with the performance of the executive function of government, and the view of the New South Wales Court of Appeal in *Botany Council v The Ombudsman* (1995) 37 NSWLR 357 that the Ombudsman's powers, conferred by beneficial legislation, were extremely wide and should not be read down by the court.

The case arose out of disputes between the Commissioner, Dr JA Scutt, and the Tasmanian Director of Public Prosecutions, Mr TJ Ellis, concerning the Commissioner's investigation of two complaints of discrimination. The Director complained to the Ombudsman concerning a number of matters, including the Commissioner's interpretation of s 61 of the *Anti-Discrimination Act 1998* (Tas) concerning representation of respondents, and her failure to communicate with the Director as legal representative of the relevant authorities. The Ombudsman found against the Commissioner on a number of the complaints. The Commissioner challenged the Ombudsman's jurisdiction during the investigation, as provided for by the Act, and as a result the court had jurisdiction to consider her application. However, the court had no jurisdiction to determine whether the opinions reached by the Ombudsman after investigation fell within the statutory provisions relating to maladministration. (***Anti-Discrimination Commissioner v Acting Ombudsman*** **[2002] TASSC 24**, 9 May 2002, Crawford J)

Freedom of Information

Report of Canadian Task force on Access to Information

A Task Force appointed by the Canadian Government in August 2000 reported in June 2002 on its review of the working of the federal *Access to Information Act 1983* (ATI Act). It is only the second review of the ATI Act, the previous one occurring in 1987. The last ten years or so have produced considerable controversy about the effectiveness of the administration of the ATI Act, including allegations of a continuing culture of secrecy, major differences between the Information Commissioner and the Privacy Commissioner and a growing number of

Federal Court proceedings relating to the scope of the Information Commissioner's powers and questions of procedural fairness.

The Task Force was chaired by a senior member of the Treasury Board Secretariat, which has a major coordinating role in the implementation of the ATI Act. Its other members were drawn from leading federal government agencies, together with one member of a provincial government agency. It worked with an Advisory Committee of Assistant Deputy Ministers, and had an External Advisory Committee drawn from academia, the media and the law. The Task Force undertook wide-ranging consultations within and outside government. In addition, twenty-nine research papers were prepared by consultants for the Task Force's consideration on a wide range of relevant issues, ranging through the governance context, scope of the Act, access processes, redress and investigations, and performance reporting.

The Task Force concluded that the ATI Act was basically sound but needed modernisation in some areas. It stressed the need for changes to broaden administrative practices and attitudes within government, including record creation and management, making information available outside the Act, and embedding a culture of access within government. The Task Force considered that the original goals and principles of the Act remained as relevant and attainable today as when they were formulated 20 years before, but thought that all those involved in access to information needed to recommit themselves to those goals and principles. Some of the most interesting of the 139 recommendations include practical measures for achieving cultural change in the attitudes to access of government agencies and officers.

The Task Force did not recommend major changes to the structure of exemptions and exclusions, but its recommendations included the following: the need for guidelines on the exercise of the discretion not to claim certain exemptions; including Cabinet confidences within the scope of the Act but making them subject to a mandatory class exemption (lasting 15 rather than the existing 20 years), subject to easy severance of background information and analysis and its disclosure when the relevant decision is released or after five years; and listing certain categories of information not subject to the internal working processes exemption, as well as reducing the period of protection for such information to 10 years.

Other significant recommendations include a division between commercial and non-commercial access requests for purposes of calculating fees, and the expansion of the role of the Information Commissioner to include public education, an advisory role to government institutions on administering the Act, and power (together with the Treasury Board Secretariat) to conduct assessments of practices of agencies having an impact on compliance.

At the time of writing, the government of Canada had not responded to the Report. (***Access to Information: Making it Work for Canadians, Report of the Access to Information Task Force***, Government of Canada, June 2002, available from: www.atirtf-geai.gc.ca)

DON'T THINK TWICE? CAN ADMINISTRATIVE DECISION MAKERS[1] CHANGE THEIR MIND?

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Expanded version of a paper given at an AIAL seminar in Canberra on 10 October 2002.

Introduction

Can administrative decision makers vary or revoke a decision they have made? This is a question of some significance to many administrators. It is a question that has traditionally received little judicial or academic attention, but has recently been the subject of a High Court decision, in *Minister for Immigration and Multicultural Affairs v Bhardwaj,*[2] a number of Federal Court decisions,[3] and a range of broader discussion.[4] As many of these cases and articles recognise, it is a question which appears to have a practical focus, but in fact leads to some of the most basic questions in public law.

Decision makers may wish to revoke or vary their decision in a range of circumstances. These can include:

- where the document recording or communicating the decision contains clerical errors, or other accidental errors or omissions;
- where the decision has been procured by fraud or misrepresentation;
- where the decision maker realises they have made a significant legal error;
- where it is based on mistaken facts, new facts have come to light or the circumstances of the person affected by the decision have changed;
- where there has been a change in law or policy or the decision maker's interpretation of that law or policy;
- where the decision has been criticised because it is seen to be inconsistent with other decisions in similar cases or for other reasons; or
- where the decision maker thinks that it was simply not the right decision, and wants to make it again.

The issue as to whether the decision should be reconsidered may arise on the motion of the decision maker, or be prompted by a complaint of the person affected by the initial

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determination.[5] The reconsideration may be with the agreement of the person affected, or in the face of their objection. The reconsideration might improve the position of the person affected, by reconsidering a benefit denied or detriment imposed, or worsen their position, by reconsidering a benefit granted or detriment not imposed. The decision and reconsideration may affect no-one, or only one person or a range of persons.
The issue of reconsideration can arise therefore for a range of reasons, and in a range of circumstances. This paper looks at the various questions which a Commonwealth decision maker needs to ask in order to decide whether they can vary or revoke their decision.

1 Has a decision been made? The first part of this paper considers the question of when a decision becomes operative.

2 Can the decision be treated as invalid, and made again? The paper then looks at the effect of invalid decisions, and whether and on what terms a decision maker can ignore a decision and make it again. This is the issue which was recently considered by the High Court in *Bhardwaj*.

3 Is there an express statutory power to vary or revoke in the statute, and if so how can that power be exercised ? Is there an implied power to vary or revoke in the statute, or do subsections 33(1) and 33(3) of the *Acts Interpretation Act 1901*(Cth) provide the power to do so. The next part of the paper discusses how general principles of statutory interpretation affect the existence and extent of a power to vary or revoke. We ask what are the factors which suggest an implied power, or rebut the presumptions in subsections 33(1) and (3) of the *Acts Interpretation Act*?

4 Is the decision maker estopped from exercising a power to vary or revoke? Finally, the paper briefly notes the relevance of whether the remedy of estoppel is available, in public law, to prevent the exercise of a power to revoke or vary.

Underlying issues
A number of underlying tensions run through this area of law, and give rise to difficult issues. It is useful to introduce these in a general non-technical way.

Flexibility v finality
The principles of administrative law should promote "good" decisions. There will be a range of views as to what this means, but it clearly involves considered, rational, fair decisions. The easy ability to reconsider a decision can promote such good decisions. Decision makers, at least on occasions, make decisions which could have been more considered, or more rational, or fairer. To allow them to return to the decision and improve it can mean a better decision. It can also avoid the expense and effort of review mechanisms.[6] But "good decisions" are also those which are certain and timely. The easy ability to reconsider a decision can result in significant uncertainty as to the legal position; decisions may be seen as simply provisional, since they may be subject to change; and the final decision may be delayed. A significant tension arises from the fact that whilst flexibility may promote better decisions, finality promotes certainty and timeliness.

Judicial v administrative
A second issue is whether administrative decisions should be treated in the same way as judicial decisions, or differently. The Australian Constitution enshrines a strict separation between judicial decision making and administrative decision making. This suggests that judicial decisions and administrative decisions are fundamentally different. But in many cases the principles which the courts apply in reviewing administrative decisions are derived from judicial decision making; a prime example of this is the rules of procedural fairness which are

derived from the conduct of judicial proceedings, but then applied, at times quite stringently, to administrative proceedings. An underlying issue in this area is in what respects should the legal principles for administrative decisions follow those for judicial decisions, and in what respects should they be different.

Invalidity v other remedies

A third issue concerns the appropriate result of legal error in administrative decision making. Is invalidity generally the most appropriate result and remedy? And when we talk of invalidity, what do we mean? Given that administrative decisions are generally made under power derived from the Constitution, or legislation made under the Constitution, it is easy to assume perhaps too quickly that error means invalidity. The increasing emphasis by Australian courts on the concept of jurisdictional error has further entrenched this thinking, as we shall see. But the *Administrative Decisions (Judicial Review) Act 1977* (Cth) provided for a broader range of remedies for good public policy reasons. There is a significant question of legal policy in relation to administrative decisions as to whether invalidity should be the primary remedy for illegality.[7]

We return to these broader issues throughout the paper.

Functus officio

An important comment needs to be made about the term *functus officio*. The question of whether a decision maker can vary or revoke their decision is sometimes described as determining whether or not the decision maker is *functus officio*.

The concept of *functus officio* has its origin in the judicial system, where once the formal judgment of a court has been passed and entered, it cannot be reopened. This is subject to a court's inherent power to prevent injustice and to correct clerical errors, as well as the existence of any statutory powers to re-open.[8] The concept of *functus officio* in this judicial context can refer to the principle that courts generally cannot reopen their decisions and to the conclusion reached by the application of the principle.

The concept of *functus officio* has been used in relation to administrative decision-making. It is sometimes suggested that this means that there is a principle, or presumption, that once an administrative decision is made it cannot be reopened, varied or revoked. There may once have been relevant common law presumptions[9] but in our view, there is generally no such overarching principle. Rather in each case it is necessary to consider what the powers of the decision maker are in this regard. This generally requires the application of administrative law and statutory interpretation principles.

As we discuss below, the High Court in *Bhardwaj* has rejected any blanket principle that once a power to make an administrative decision is purportedly exercised it is necessarily spent. That is the Court rejected a principle of *functus officio*, analogous to that for courts, in relation to administrative decisions. Further, Chief Justice Gleeson in *Bhardwaj* formulated the basic legal issue in relation to whether a decision maker has a power to vary or revoke in a broad manner, which focussed on statutory power[10]:

> The question is whether the statute pursuant to which the decision maker was acting manifests an intention to permit or prohibit reconsideration in the circumstances that have arisen.

This statement is in line with the weight of Federal Court thinking, in a range of contexts. Justice Gummow in *Minister for Immigration, Local Government and Ethnic Affairs v. Kurtovic*[11] stated:

> The matter is one of interpretation of the statute conferring the particular power in issue.

Justice French similarly stated in *Sloane v Minister for Immigration, Local Government and Ethnic Affairs*[12]:

> … reconsideration of a statutory decision may itself be a course contemplated or authorised by the statute. The question is one of statutory construction.

Justice Goldberg J stated in *Jayasinghe v Minister for Immigration and Multicultural Affairs,*[13] that the doctrine of *functus officio:*

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

Whilst Justice Goldberg uses the term doctrine, it is clear that he is referring to the result of a finding that a decision maker does not have a power to revoke based on a consideration of the statutory power.

In our view these comments suggest that the central task in each case is to interpret the extent of the statutory power conferred on the administrator to determine whether this includes a power to vary or revoke. Such an analysis will reveal that in some cases a decision maker cannot vary or revoke, and is in that sense *functus officio*. The concept is useful in this context. But in our view in relation to administrative decisions the concept of *functus officio* is a conclusion; not a principle or presumption to be applied in order to reach a conclusion.

1 Has a decision been made?

When a decision is provisional, or better characterised as conduct leading to a decision, it has not yet been perfected. In such a case, it is still open to the decision maker to reconsider the issue, whether or not a power to revoke or vary an actual decision exists.[14] This is because in such circumstances the decision is unperfected and not yet operational.

What is required to perfect a decision will depend on the terms of the relevant statute.[15] This was discussed by Finn J in *Semunigus v The Minister for Immigration and Multicultural Affairs*.[16]

> The making of a decision involves both reaching a conclusion on a matter as a result of a mental process having been engaged in and translating that conclusion into a decision by an overt act of such character as, in the circumstances, gives finality to the conclusion - as precludes the conclusion being revisited by the decision maker at his or her option before the decision is to be regarded as final.
>
> What constitutes such an act can obviously vary with the setting in which the decision is made: it may be no more than a written notation of a conclusion on a departmental file; it may be publication of the conclusion in a particular forum, or communication of it to another; it may be performing a consequential or collateral act that presupposes the decision having been made, etc.

The proceedings in issue involved a decision by a Member of the Refugee Review Tribunal to deny a protection visa. It was contested on the basis that the Member had failed to consider additional submissions after he had forwarded reasons for his decision to the registry for

recording and dissemination. Spender J in the Full Court of the Federal Court was of the opinion that:

> had the Member wanted to recall his signed decision, because for example, he had changed his mind or had realised that he had made a mistake, he would have been able to retrieve the decision at any time prior to a copy of it having been sent to either the Minister or the applicant as then required by s430(2) of the *Migration Act 1958* (Cth).[17]

Madgwick J on the other hand held that only communication to the applicant was relevant to perfection because, in the context of an appeal to the Refugee Review Tribunal, the applicant was the only party.[18]

In this case, the disagreement did not need to be resolved, because the Full Court held that, under the *Migration Act 1958* (Cth), the Federal Court did not have jurisdiction to consider applications alleging a breach of natural justice. However, the case indicates that where express provision is not made in the relevant legislation, the question of when a decision is perfected can be contentious.

Nonetheless a decision will generally be perfected where it is communicated to the affected person, either orally or in writing, and in a manner that indicates that the decision is not merely provisional.[19] Until then the decision maker will be able to change their mind.

2. Can the decision be treated as invalid?

What if the decision is invalid? Can the decision maker just ignore it and make it again? Of course where the decision is subject to judicial review, or some form of administrative review, the decision maker is subject to the jurisdiction of the review court or other body; if the court or other body sets aside the decision and orders the decision maker to make it again, the decision maker must do so. The difficult legal issue is whether a decision maker can simply treat a decision as invalid and make it again without direction from a review court or other body. The recent decision of the High Court in *Bhardwaj* is directly relevant to this issue.

Before *Bhardwaj*, this question had been one of considerable controversy. In *Bhardwaj* Justice Kirby noted that the debate about invalidity of administrative decisions "presents one of the most vexing puzzles in administrative law. Principle seems to pull one way. Practicalities seem to pull in the opposite direction".[20] There were in fact a number of different approaches to the question of whether a decision maker could simply treat a decision as invalid and make it again without direction from a court or other body. We outline these in a very general manner.

Absolute invalidity

The first approach follows from the concept of absolute or objective invalidity, which is the view that if a decision maker acts outside their jurisdiction, the decision is invalid from that time and for all purposes. Importantly, in this context, there is no need to have a court determine this issue. This approach pays significant deference to the principle of legality by allowing the decision maker, and others affected by a decision infected by jurisdictional error, to ignore it.[21]

An important statement of the approach of absolute invalidity was made by Dixon J in *Posner v Collector for Interstate Destitute Persons*:[22]

> It must be borne in mind that, when a party is entitled as of right upon a proper proceeding to have an order set aside or quashed, he may safely ignore it, at all events, for most purposes. It is, accordingly, natural to speak of it as a nullity, whether it is void or voidable, and, indeed, it appears almost customary to do so. …

> When there has been a failure of the due process of law at the making of an order, to describe it as void is not unnatural. But what has been said will show that, except when upon its face an order is bad or unlawful, it is only as a result of the construction placed upon a statute that the order can be considered so entirely and absolutely devoid of legal effect for every purpose as to be described naturally as a nullity. Modern legislation does not favour the invalidation of orders of magistrates or other inferior judicial tribunals and the tendency is rather to sustain the authority of the orders until they are set aside and not to construe statutory provisions as meaning that orders can be attacked collaterally or ignored as ineffectual, if the directions of the statute have not been pursued with exactness.

This case concerned the status of an order made by a court of summary jurisdiction in Perth against Mr Posner, in proceedings based on that order in Victoria. Mr Posner apparently had no notice of the proceedings in Perth, and raised this in the Victorian proceedings. Dixon J approached the matter on the basis that the Perth order appeared upon its face to be regularly made.[23] He considered that the question whether the Perth order was "completely void" depended on the legislation under which it was made.

A few points can be noted. First, Dixon J linked treatment of a decision as invalid to the availability of proceedings; the order can be treated as "void" if the party is entitled to have it set aside. We return below to the relationship between the availability of judicial review and the ability to treat a decision as invalid. But we note that some formulations of the absolute invalidity theory suggest that the ability to treat a decision as invalid is unrelated to the availability of judicial review.[24]

Second, Dixon J drew a distinction between an order bad or unlawful upon its face, and one bad on further investigation, in particular "as a result of construction placed upon a statute". This appears to be a distinction between obvious or patent error, and latent error, and a suggestion that some latent legal errors may allow a decision to be ignored, but others may not. This is an issue to which we return below.

Third, Dixon J appears to suggest that the ability to treat an order as invalid and ignore it, and its susceptibility to collateral challenge, go hand in hand. Collateral challenge generally means a challenge that occurs in proceedings where the validity of the administrative act is merely an incident in determining other issues.[25] Interestingly, Dixon J notes the modern tendency to sustain the authority of orders, that is to presume them to be valid, rather than to jump too quickly to a position of absolute invalidity, with its related liability to both collateral attack and to being ignored as ineffectual. This may simply be a recognition of the ability of legislation to be directory, and not mandatory, in its requirements; but in its terms it is also a recognition of a move away from the absolute theory of invalidity.

Fourth, we also need to note the decision of the Court in *Posner*. Dixon J held that the structure and arrangement of the relevant legislation did not support the conclusion that non-service rendered an order "absolutely void".[26] Rather, in effect, the Perth court had jurisdiction to decide the matter. A majority of the High Court agreed that the non-service had not rendered the Perth order void. Thus although the comments we have noted by Dixon J are often used to support the absolute invalidity position, the reasoning and result in *Posner* reflects many of the complexities involved in the issue.

The absolute invalidity approach has received recent judicial support from McHugh J in *Ousley v R*[27] and Finkelstein J in *Leung.*[28] In the latter case, Finkelstein J, with whom Beaumont J concurred, held that a decision, tainted by jurisdictional error, fraud or misrepresentation, does not in fact have the character of a decision and can simply be ignored.[29] It does not have to be revoked because it is a nullity, and it does not require a judicial determination that it is a nullity.

The absolute invalidity approach also has support from some commentators.[30]

Relative invalidity

The alternative approach is that there is no such thing as absolute invalidity; decisions are only invalid if a court determines that they are invalid. This position is often articulated as a presumption of validity for administrative decisions. It may have its source in separation of powers principles, under which, in Australia, courts have the exclusive role of conclusively determining the rights and liabilities of individuals in their disputes with the state.[31]

A leading statement of the relative or subjective view of invalidity is by Aickin J in *Forbes v New South Wales Trotting Club Ltd*:[32]

> That which is done without compliance with applicable principles of natural justice, in circumstances where the relevant authority is obliged to comply with such principles, is not to be regarded as void ab initio so that what purports to be an act done is totally ineffective for all purposes. Such an act is valid and operative unless and until duly challenged but upon such challenge being upheld it is void, not merely from the time of a decision to that effect by a court, but from its inception. Thus, though it is merely voidable, when it is declared to be contrary to natural justice the consequence is that it is deemed to have been void ab initio.

This view has received much modern judicial support,[33] and was accepted by Gummow J in the recent decision of *Ousley v The Queen*[34]. Justice Wilcox stated most forcefully in *R v Balfour; ex parte Parkes Rural Distributions Pty Ltd:*[35]

> Although this was not so clear in earlier times, it is now accepted that, however apparent the defect may be, an administrative decision remains good in law unless and until it is declared to be invalid by a court of competent jurisdiction.

It also has much support amongst commentators.[36]

The relative view of invalidity appears more suited to a system of administrative law where judicial remedies are discretionary.[37] Professor Wade has argued that the concept of a void decision has always been relative:

> Unless the validity of the action is challenged within the time allowed by law and by someone entitled by law [and unless the court in its discretion grants a remedy], it will have to be accepted as valid not only by those affected but by the rest of the world also.[38]

Alan Robertson has recently noted[39] that there are a range of discretionary considerations in relation to judicial review: bad faith or other blameworthy conduct, delay, waiver, relying on one's own error, lack of standing, futility, mootness, fragmentation of civil or criminal processes, immateriality of the error of law, adverse effect on third parties, and the public interest in good administration. That any of these factors may lead a court to decline relief notwithstanding error undermines any absolute view of invalidity, unrelated to a judicial determination.

The reforms of the *Administrative Decisions (Judicial Review) Act* seemed to be moving in the direction of relative invalidity. Section 16 sets out the orders which a court may make. This includes:

> (a) an order quashing or setting aside the decision, or a part of the decision, with effect from the date of the order or from such earlier or later date as the court specifies; … .

When a court sets aside a decision, the default position is that it is from the time of the order of the court, not from the time the decision was made. This suggests relative invalidity, not absolute invalidity. Further, the section provides for a range of non-invalidating remedies. In addition, s10 of the ADJR Act provides the court with a discretion to refuse an application if adequate provision is made for review by another court, tribunal, authority or person.

A middle position

But whilst most judges and commentators begin at one end of the spectrum, they are often forced by practical realities to move towards the middle. There is a need to balance the insights of one position, with those of the other; to balance the presumption of validity with underlying legality; to accommodate the fact that all decisions have effect for some purposes, but that some decisions are blatantly beyond power.

Even those who would start from the relative view of invalidity differentiate within the sphere of jurisdictional error between those decisions that are patently invalid and those that are latently invalid.[40] The presumption of validity then applies to decisions that are latently invalid, while decisions that are patently invalid are treated as nullities from their inception. Even Professor Wade, a staunch relativist, seemed to acknowledge such a category when he stated[41]:

> If the Eastbourne Watch Committee purported to dismiss the Brighton Chief Constable, or if the Indian Minister purported to dissolve the Jaffna Municipal Council, the Brighton Watch Committee and the Sinhalese Minister of Local Government would respectively take no notice. Since the authors of these decisions would have no physical power to carry them out, no legal consequences would be produced.

This position has some support in New Zealand cases, such as *AJ Burr Ltd v Blenheim Borough Council*[42] where Cooke J stated that except in cases of "flagrant invalidity", a decision is generally recognised as operative until set aside.

Similarly, those who begin with the absolute view of invalidity are forced to note that objectively invalid decisions are operative for some purposes. Justice Finkelstein, apparently an absolutist, nevertheless stated in *Leung*:[43]

> There is no doubt that an invalid administrative decision can have operational effect. For example it may be necessary to treat an invalid administrative decision as valid because no person seeks to have it set aside or ignored. The consequence may be the same if a court has refused to declare an administrative decision to be invalid for discretionary reasons.

This debate looks esoteric. But it can have significant practical ramifications, in particular in relation to revocation of decisions. Can a decision maker who has made an error, in particular a jurisdictional error, simply ignore the decision and make it again? Or do they need to await a judicial determination of invalidity before they can act?

The decision in *Bhardwaj* dealt with this issue.

Bhardwaj

Mr Bhardwaj's student visa was cancelled by a delegate of the Minister for Immigration and Multicultural Affairs under the *Migration Act*. He applied for review of that decision by the Immigration Review Tribunal. The Tribunal invited him to attend a hearing on 15 September

1998. Late on 14 September 1998 the Tribunal received a letter from the Mr Bhardwaj's agent requesting an adjournment of the hearing on the ground that he was ill. That letter did not come to the attention of the member of the Tribunal to whom the review had been assigned, and on 16 September 1998 the Tribunal affirmed the cancellation decision (the September decision). The Tribunal communicated its decision to Mr Bhardwaj and his agent the next day. His agent drew the attention of the Tribunal to the letter requesting an adjournment, after which a new hearing was arranged, at which Mr Bhardwaj presented evidence. On 22 October 1998 the Tribunal revoked the cancellation decision and published a new decision (the October decision).

The Minister applied to have the October decision set aside by the Federal Court under Part 8 of the *Migration Act* on the basis that the Tribunal had no power to review the cancellation decision after making the September decision. That application was dismissed by a single judge[44] and by a majority of the Full Court of the Federal Court on appeal.[45] The matter came before the High Court after the Minister was granted special leave to appeal.

The issue was whether the Tribunal was able to reconsider Mr Bhardwaj's review application and make the October decision, in particular in light of the statutory scheme in the *Migration Act*.

Part 5 of the *Migration Act* concerned review by the Tribunal. Unless the Tribunal made a decision on the papers favourable to the respondent, s360 required the Tribunal to give the respondent an opportunity to appear before it and give evidence and present arguments. Sections 367 and 368 made provision in relation to the Tribunal's "decision on review", in particular specifying how the Tribunal was to record the reasons for its decision. Part 8 of the Act provided for review by the Federal Court of various decisions, including decisions of the Tribunal, to the exclusion of most other jurisdiction of that Court (s485). Review under Part 8 was on limited grounds, so that, for example, breach of the rules of natural justice was not a ground of review (s476(2)(a)). Applications for review under Part 8 were strictly required to be made within 28 days (s478).

The Minister argued that the statutory scheme for review of decisions under Parts 5 and 8 of the Act then in force manifested an intention to preclude the reconsideration undertaken by the Tribunal, and that this was a contrary indication for the purposes of s33(1) of the *Acts Interpretation Act.* The Minister accepted that the Tribunal had denied Mr Bhardwaj an opportunity to answer the case against him, but considered that Mr Bhardwaj's only remedy was to challenge the September decision before a court.

Mr Bhardwaj argued that it was consistent with general principles relating to administrative decisions reached in breach of the rules of natural justice for the Tribunal to reconsider the September decision, and that the September decision was not a "decision on review" for the purposes of ss367 and 368 of the *Migration Act* and therefore had no legal effect.

Majority reasoning

By a 6-1 majority (Kirby J dissenting), the High Court dismissed the Minister's appeal.[46] The majority judges all held that the Act permitted the action taken by the Tribunal in making the October decision. All the majority judges held that the Tribunal had failed to discharge its statutory function in making the September decision, such that the Tribunal's review function remained unperformed. The Court held that nothing in the Act or the principles of administrative law required that a purported decision involving such an error should be treated as valid unless and until set aside by a court. Thus it was open to the Tribunal to reconsider the matter and make the October decision.

The finding of the majority of the High Court apparently places it well within the absolute invalidity school, the first position which we discussed above. The Court held that it was open to the Tribunal, indeed that it was the duty of the Tribunal, to treat the September decision as invalid and to remake it properly. Justices Gaudron and Gummow stated:[47]

> There is, in our view, no reason in principle why the general law should treat administrative decisions involving jurisdictional error as binding or having legal effect unless and until set aside. A decision that involves jurisdictional error is a decision that lacks legal foundation and is properly regarded, in law, as no decision at all. Further, there is a certain illogicality in the notion that, although a decision involves jurisdictional error, the law requires that, until the decision is set aside, the rights of the individual to whom the decision relates are or, perhaps, are deemed to be, other than as recognised by the law that will be applied if and when the decision is challenged. A fortiori in a case in which the decision in question exceeds constitutional power or infringes a constitutional prohibition.

Justice McHugh generally agreed with the judgment of Gaudron and Gummow JJ. Justice Hayne eschewed the doctrine of "absolute nullity", but similarly found that the Tribunal was able to ignore the September decision, notwithstanding that no court had set it aside, and make its October decision. Chief Justice Gleeson in a separate judgment held that the Tribunal in its September decision had failed to implement its own intention, to comply with the statutory requirements and to fulfil its statutory function; it was therefore able to make its October decision. Justice Callinan, also in a separate judgment, held that the Tribunal had failed to exercise its jurisdiction in its September decision, and it was therefore able to do so in its October decision.

The difficulty of the decision lies in establishing the preconditions for such action by decision makers. On one view the Court was simply responding to the blatant error of the Tribunal in failing to provide procedural fairness in relation to its September decision. If so, the principles enunciated in the case may be limited to similar circumstances of such blatant errors, and have no more general application. But members of the Court do, to varying degrees, discuss the case on the basis of broader principles, and in particular the contest between absolute and relative invalidity. The general utility of the case rests on identifying such broader principles, and in particular the necessary preconditions for the ability to ignore an administrative decision. In our view, an analysis of these preconditions goes some way to whittling away the apparent strong support for the absolute invalidity position.

Nature of the error

The Tribunal's error was characterised differently by the members of the Court.

Chief Justice Gleeson saw it not just as a denial of procedural fairness, that is a jurisdictional error, but as a failure to conduct a review of the decision:

> In the present case there was a denial of procedural fairness; but there was more to it than that. There was an error of the kind described as "error in fact" in the context of proceedings by writ of error: the non-fulfilment or non-performance of a condition precedent to regularity of adjudication such as would ordinarily induce a tribunal "to stay its hand if it had knowledge, or to re-open its judgment had it the power." [48]

Justice Callinan held that the September decision was bad in a "jurisdictional sense"; it was something more than a breach of the rules of natural justice, it was a failure to exercise a jurisdiction which it was bound to exercise.[49]

The remaining majority Justices characterised the Tribunal's error as a jurisdictional error, or at least regarded a jurisdictional error as sufficient to enable a decision maker to ignore the decision. Gaudron and Gummow JJ stated:[50]

> To say that the September decision was not a "decision on review" for the purposes of ss 367 and 368 of the Act is simply to say that it clearly involved a failure to exercise jurisdiction, and not merely jurisdictional error constituted by the denial of procedural fairness. Either of these grounds would entitle Mr Bhardwaj to have the September decision quashed by this Court as an incident of relief by way of mandamus or prohibition under s 75(v) of the Constitution. This notwithstanding, the question whether the Tribunal could disregard its September decision depends on the scheme of Pts 5 and 8 of the Act.

In essence, the Tribunal had denied Mr Bhardwaj something the Act required him to be given, namely an opportunity to answer the case against him.

Justice Hayne characterised the error as a jurisdictional error; what the Tribunal did did not constitute performance of its duty under the Act.[51] As Justice McHugh agreed with the judgment of Gaudron and Gummow JJ, this provides a majority of four Justices for the view that jurisdictional error is sufficient to enable the decision to be ignored.

Mr Bhardwaj had put his case in part on the basis that as a general rule, an administrative tribunal may cure a breach of natural justice by subsequently providing a proper hearing to the person thereby affected.[52] Gaudron and Gummow JJ, with whom McHugh J generally agreed, and Hayne J did not limit their reasoning to natural justice. Rather they based their reasoning on the existence of jurisdictional error, not limited to procedural unfairness.

This approach builds on the distinction between jurisdictional error, which involves an administrative body acting in excess of its powers, and non-jurisdictional error, where the body has acted within power but has made an error of law. This is a distinction which has all but disappeared in England. But it is a distinction which has been articulated and emphasized by the High Court, most notably in *Craig v South Australia.*[53] An administrative decision maker will make a jurisdictional error where they act in bad faith or beyond power, fail to accord natural justice, misconstrue the statute or a jurisdictional fact, fail to take into account a relevant matter or rely on an extraneous consideration.[54] This encompasses most legal errors made by administrative bodies, and therefore leaves few non-jurisdictional errors. Significantly, the constitutional writs in s75(v) of the Constitution are available to remedy jurisdictional errors by Commonwealth decision makers.

The result, in this context, of a broad view of jurisdictional error is to open the door for decision makers to ignore their decisions and make them again on the basis of a broad range of circumstances.

Privative clause

Whether there is jurisdictional error will depend on the nature of the decision made, and in particular whether it is subject to any privative clause. On one view, a privative clause may expand the jurisdiction of the decision maker, and therefore contract the bases of jurisdictional error. In contracting the bases for jurisdictional error, a privative clause may also contract the bases for ignoring a decision as invalid. We note however that the High Court has recently rejected such a view, at least in part and in relation to the privative clause in s474 of the *Migration Act*.[55] Nonetheless it must be the case that the existence of jurisdictional error in a particular circumstance will depend on the form of the legislation under which the decision has been made.

Judicial review

Availability of judicial review

The majority in *Bhardwaj* seems to suggest that the fact that judicial review of the September decision was available in the High Court was a relevant factor in allowing the Tribunal to treat that decision as invalid. This consideration may have been simply in support of the finding of jurisdictional error, or the finding that the *Migration Act* did not stand in the way of the Tribunal's October decision (which we discuss further below). But the discussion goes beyond this, and suggests that access to judicial review is itself a relevant factor.

For example, Gaudron and Gummow JJ noted[56] that it was not disputed by the Minister that the September decision was made in circumstances in which Mr Bhardwaj was denied a reasonable opportunity to answer the case against him. It thus involved a breach of the rules of natural justice "and may be set aside by this Court pursuant to s75(v) of the Constitution".[57] This comment suggests that judicial review needs to be available for a decision maker to treat a decision as invalid. The existence, for example, of a limitation period which has expired, would be relevant to whether judicial review was available, and may therefore be relevant to whether a decision can be ignored as invalid.

Availability of successful judicial review

It is possible that these comments go even further, and suggest that what is required is not only that judicial review for the error be available, but also an assessment that that review will be successful and will result in the decision being held invalid.

Justice Hayne noted that the matter proceeded on an assumption that "if application had been made either to the Federal Court …, or to this Court for a writ of prohibition, … [Mr Bhardwaj] would have been entitled to have the September decision set aside".[58] Hayne J said in relation to this consideration:[59]

> This is not to adopt what has sometimes been called a "theory of absolute nullity" or to argue from an a priori classification of what has been done as being "void", "voidable" or a "nullity". It is to recognise that, if a court would have set the decision aside, what was done by the Tribunal is not to be given the same legal significance as would be attached to a decision that was not liable to be set aside. In particular, it is to recognise that if the decision would be set aside for *jurisdictional error*, the statutory power given to the Tribunal has not been exercised.

The Tribunal's October decision is supported on the basis that a court "would have set the [September] decision aside". Where a decision "would be set aside", the power has not been exercised. Justice Hayne makes other similar comments:[60]

> Once it is recognised that *a* court could set it aside for jurisdictional error, the decision can be seen to have no relevant legal consequences.
>
> …
>
> It may be that other considerations would arise if there were no available remedy to quash the decision. It may be, as H W R Wade said, meaningless to speak of an act being void, or a nullity, where the law will give no remedy to any person in respect of that act. It is unnecessary to express a conclusion on this question in this case.

Other judgments did not articulate this issue as clearly, but made relevant comments.[61]

In summary, the judgments seem to approach the issue on the basis that the September decision would have been held invalid by a court. That is, not only was the availability of judicial review of the Tribunal's September decision a precondition to the Tribunal's October decision, but the availability of successful judicial review was a precondition.

On this reasoning, factors which would lead a court to exercise its discretion not to grant a remedy will also be relevant in deciding whether an administrator can treat a decision as invalid and ignore it. If a court would not hold the decision invalid because of discretionary considerations, then the ability of a decision maker to treat it as invalid is similarly limited.[62] Whilst it is unusual for a court to decline to hold invalid a decision infected by jurisdictional error, this is clearly possible, especially given the breadth of the concept of jurisdictional error for administrative decisions.

If this is so, whilst the Court has affirmed the absolute theory of invalidity, it has in effect moved the absolute and relative views closer together. The Court has, like others, adopted a middle position. The Court has affirmed a decision maker's right to treat a decision infected by jurisdictional error as invalid and ignore it, but in doing so has suggested that the availability of successful judicial review is a precondition for the decision maker doing so. In practice such a precondition will require a court decision, or a blatant error, or perhaps the agreement of the parties. A complete failure to accord natural justice, and fraud, are likely to be such blatant errors. But if this analysis is correct, beyond such situations the case is of limited practical relevance; whilst the High Court can say that judicial review would have been successful, it is generally difficult for decision makers and their advisers to take that position.

Collateral challenge

There is also a question as to whether any requirement for judicial review to be available could be met by the availability of collateral challenge. As we have noted, collateral challenge generally means challenge in proceedings where the validity of the administrative act is merely an incident in determining other issues.[63] The High Court recently confirmed the availability of collateral challenge in relation to administrative decisions infected by jurisdictional error in *Ousley v The Queen*.[64] Whilst some of the Justices noted the policy issues raised by collateral challenge, none suggested that the availability of collateral challenge was in fact limited by the unavailability of judicial review, or the failure to utilise available judicial review.[65]

It may be that the Court's discussion in *Bhardwaj* focuses on the availability of judicial review in the High Court as a factor in allowing the decision maker to treat the decision as invalid simply because such review was available in that case, and not because it is a necessary precondition. It may be that the Court would view the availability of collateral challenge of administrative decisions in the same light as the availability of direct judicial review of decisions under s75(v) of the Constitution. This result would mean that the references to the availability of judicial review in the High Court were an indication on the facts in *Bhardwaj* that the September decision could properly be treated as invalid, but not a necessary precondition for that treatment. But this result is not articulated in the leading judgments.

Notwithstanding the lack of a discussion about collateral challenge, the decision in *Bhardwaj* is in effect an affirmation of its availability. The Minister sought review of the October decision. To support the validity of that decision, Mr Bhardwaj challenged, collaterally, the validity of the September decision. Mr Bhardwaj's success flowed from the fact that the September decision was held to be invalid, pursuant to that collateral challenge. The issue of whether it was open to the Federal Court to adjudicate such a collateral challenge, given the limitations placed upon it in relation to judicial review of *Migration Act* decisions, is discussed below.

Agreement of the parties

There is one important factor which the majority Justices do not directly comment on. The Tribunal, at least impliedly, thought that the September decision was invalid. Mr Bhardwaj also, at least impliedly, thought the decision was invalid. There is a line of thought that where the relevant parties agree that a decision is invalid they can treat it as such.[66] This thinking was expounded in particular in the decision of the Full Court of the Federal Court in *Comptroller-General of Customs v Kawasaki Motors Pty Ltd.*[67] It is a line of thought which resonates with the practical issues which arise in relation to variation or revocation of administrative decisions.

As we have noted, Gaudron and Gummow JJ stated in *Bhardwaj*[68] that it was not disputed by the Minister that the September decision involved a breach of the rules of natural justice "and may be set aside by this Court pursuant to s75(v) of the Constitution". Justice Hayne noted that the matter proceeded on an assumption that "if application had been made either to the Federal Court …, or to this Court for a writ of prohibition, … [Mr Bhardwaj] would have been entitled to have the September decision set aside".[69] On one view the case may therefore stand for the unarticulated proposition that if the parties to a decision agree that a court would set aside the decision as invalid, then they can treat it as invalid and ignore it. The relevance of agreement to the ability to vary or revoke a valid decision is considered in section 3 below.

Chandler and functus officio

As mentioned in the introduction, the Court in *Bhardwaj* generally rejected any blanket principle that once a power to make an administrative decision had been purportedly exercised, it was necessarily spent;[70] that is it rejected some general principle of *functus officio* for administrative decisions analogous to that for courts.

The majority judgments relied to a significant extent in this area on the decision of the Canadian Supreme Court in *Chandler v Alberta Association of Architects.*[71] That case concerned a decision of the Practice Review Board of the Alberta Association of Architects, which after a hearing into the practices of a firm of architects who had gone bankrupt made various findings and orders, in particular findings of unprofessional conduct, and fines and suspensions for that conduct. The Court allowed an application for certiorari and quashed the findings and orders; the Practice Review Board was only responsible for reporting and recommending to a Council, and it was another body, the Complaint Review Committee, which should have dealt with disciplinary matters. The Board indicated that it wanted to continue its hearing and make appropriate recommendations. The decision in *Chandler* considered whether it could. It should be noted that *Chandler* says nothing about the absolute or relative views of invalidity. It did not need to because a court had already held the findings and orders of the Board were invalid. Rather the case considered whether an administrative decision maker who had made an invalid decision could proceed to make a valid decision.

The Supreme Court of Canada held that there was no general doctrine of *functus officio* for administrative decision makers which prevented the Board remaking an invalid decision. Sopinka J held that a tribunal cannot generally revisit its own decision simply because it had changed its mind. But where a tribunal had failed to discharge its statutory duty, and there were appropriate indications in the enabling statute, it could reopen its decision so as to discharge the function committed to it.[72] Any principle of *functus officio* in relation to administrative decisions must be "more flexible and less formalistic" in respect of the decisions of administrative tribunals which are subject to appeal only on a point of law.[73]

This thinking is picked up by the majority in *Bhardwaj*. Chief Justice Gleeson stated:[74]

> … circumstances can arise where a rigid approach to the principle of *functus officio* is inconsistent with good administration and fairness. The question is whether the

> statute pursuant to which the decision maker was acting manifests an intention to permit or prohibit reconsideration in the circumstances that have arisen.

The judgment supports the view, set out in our introduction, that in contrast to judicial decisions, there is no general principle or presumption that administrative decisions cannot be varied or revoked.

Presumption of validity

A further distinction between judicial decisions and administrative decisions emerges in relation to the presumption of validity. As Justice Hayne pointed out in *Bhardwaj*, judicial decisions are valid until they are set aside on appeal, even if they are subject to jurisdictional error.[75] This has recently been confirmed by the High Court in *Re Macks; ex parte Saint,*[76] in relation to judicial decisions made under the invalid cross-vesting scheme. Judicial decisions can therefore be presumed to be valid until set aside. The relative theory of invalidity applies this type of thinking to administrative decisions.

Administrative decisions can be set aside in any relevant appeal, or in judicial review proceedings, or in the context of collateral challenge. In the absence of any such challenge, administrative decisions can be presumed to be valid. But the judgment in *Bhardwaj* suggests that this is a much weaker presumption than in relation to judicial decisions. As Justice Hayne noted:[77]

> Where there is a challenge, the presumption may serve only to identify and emphasise the need for proof of some invalidating feature before a conclusion of invalidity may be reached. It is not a presumption which may be understood as affording all administrative acts and decisions validity and binding effect until they are set aside. For that reason, there is no useful analogy to be drawn with the decisions of the Court concerning the effect of judgments and orders of the Federal Court of Australia made in proceedings in which that Court had no constitutionally valid jurisdiction.

Effect of the Migration Act

The argument of the Minister flowed in particular from the restricted regime for judicial review under the *Migration Act*. There was no provision of the *Migration Act* which expressly purported to give any legal effect to decisions of the Tribunal that involved jurisdictional error. But it was argued that the provisions which limited the grounds upon which the Federal Court may set aside a Tribunal decision,[78] which required that applications for judicial review be made within 28 days,[79] and which expressly provided that the Federal Court had no jurisdiction with respect to judicially reviewable decisions other than that conferred by Part 8,[80] had that effect. The argument of the Minister was that, as the Federal Court could not have held the decision invalid because of these provisions, the Tribunal could not do so.

Gaudron and Gummow JJ held that in effect these restrictions on the Federal Court did not require it to find the September decision, infected by a jurisdictional error, was valid.

> As the result of the decision in *Abebe v Commonwealth*, the Parliament may limit the body of law to which the Federal Court may have regard when reviewing a decision under Pt 8 of the Act. However, it does not follow that the Parliament may require it to act on the basis that the law to be applied is contrary to that which would be applied in this Court if an application were made for prohibition or mandamus under s 75(v) of the Constitution.
>
> Assuming that Ch III of the Constitution does not preclude the Parliament from requiring the Federal Court to act on the basis that the law is contrary to that which

> would be applied by this Court in proceedings under s 75(v) of the Constitution, there are nonetheless good reasons why the Act should not be construed as impliedly so requiring. To so construe the Act would be to construe it on the basis of a legal fiction and to subvert the function of the Federal Court in review proceedings. It is impossible to impute such an intention to the Parliament. The construction for which the Minister contends must be rejected.[81]

The restrictive provisions in the *Migration Act* did not have the effect of requiring the Federal Court to treat an invalid decision as valid. Because the Federal Court was not so limited, the Tribunal itself was not so limited.

Justice Hayne supports the general conclusion of Gaudron and Gummow JJ:

> … the fact that the Federal Court had only limited jurisdiction to review the decision does not lead to the conclusion that the September decision is to be treated as having some effect.[82]

It should be noted that Gaudron and Gummow JJ were in the minority in *Abebe v Commonwealth*.[83] But the basic position of Gaudron and Gummow JJ is clearly consistent with *Abebe*. As the majority there held, the Parliament is able to limit the basis upon which a federal court can review administrative decisions; the Parliament is not obliged by the Constitution to give the court authority to determine every legal right inherent in a controversy. But the fact that a court does not have jurisdiction to determine particular matters or rights cannot affect those matters or rights; nor can this require the court to explicitly or implicitly find that those matters or rights are other than they would be found to be by a court whose jurisdiction was not so limited.

The judgments suggest that the *Migration Act* could have removed the ability of the Tribunal to remake its invalid decision, and that other legislation could also do this.[84] Gaudron and Gummow JJ though suggest that a legislative provision should not be construed so as to give an administrative decision greater effect than it would otherwise have unless that implication is strictly necessary.[85]

Additional considerations

Some of the Justices in *Bhardwaj* also alluded to some additional considerations relevant to determining whether a decision maker can ignore an invalid decision. These were not discussed in any detail but nonetheless may be important factors in limiting the range of decisions that can be ignored for invalidity.

Chief Justice Gleeson held that he would:

> … accept that it is inconsistent with the scheme of the Act to conclude that the Tribunal, upon being persuaded that it has denied procedural fairness, at any time after it has made or purported to make a decision, and regardless of what a person affect by the decision has done or failed to do, may treat the decision as legally ineffective and consider afresh the matter that was originally before it.[86]

This suggests that there may be a time limitation on when a decision maker can decide to ignore an invalid decision. The conduct of the person affected by the decision may be relevant. So if they fail to promptly indicate that an error has been made, the decision maker may no longer be entitled to ignore it.

In addition, Hayne J noted that it was relevant that no question arose "about the rights or duties of other persons who may have acted in reliance on one or other of the two

decisions".[87] This indicates that where third parties are affected, a court may be more reluctant to accept that a decision maker may ignore an invalid decision.

A prudent course

These factors can raise issues of considerable difficulty. Notwithstanding the legal position, Justice Hayne made some comments about the prudence of administrators acting without a judicial determination of invalidity:

> The question that now arises is *not* one concerning good administrative practice. It is not the province of the courts to say whether particular administrative practices are prudent or efficient and yet there would be little dispute that characteristics of prudence and efficiency are relevant to good administrative practice. It is, therefore, not to the point to ask whether the Tribunal was *wise* to make its October decision without first having the comfort and certainty of a court order holding the September decision to have been not a lawful performance of the Tribunal's duties any more than it is to the point to ask about the efficiency of adopting the course that was followed in this matter.[88]

Minority reasoning

Kirby J in dissent gave greatest attention to the competing theories of invalidity. He noted the support for the relative theory in modern case law, in particular overseas.[89] He noted the rejection of the absolute theory in relation to judicial decisions, but suggested that administrative decisions may be in a different category:

> …the assumption upon which s 75(v) is written appears to be that even fundamentally flawed decisions by officers of the Commonwealth, without constitutional power or otherwise contrary to federal law, will remain valid for some purposes and have to be obeyed until set aside by a court, at the very least to the extent of engaging the jurisdiction of this Court under the Constitution.[90]

But he draws back from making a concluded finding, in particular in light of issues raised by privative clauses. These issues provide:

> a strong reason for caution before embarking upon general propositions about the invalidity of the September decision of the Tribunal in this case. The occasion to elucidate the operation of general theories of invalidity in the context of federal legislation in Australia would be a case where the Parliament has purported, by a privative clause, to circumscribe or expel constitutional review in this Court.[91]

Justice Kirby held that, on its proper construction, the Act forbade the Tribunal from making the October decision. In his view, the Act envisaged a single exercise of the "review" performed by the Tribunal which, perfect or imperfect, would be given effect in a "decision", He referred to the "explicit provisions of considerable detail" constituting a "formal process" relating to such a "decision" and said that these provisions either had to be obeyed or they followed automatically by force of the Act itself. In his view the Act evinced a contrary intention for the purposes of s33(1) of the *Acts Interpretation Act*. Parliament had decided that there should be a high degree of clarity and certainty in relation to migration decisions, even if the result was administrative inflexibility. He also noted that if a decision unfavourable to a person could be treated as provisional, then so also could a decision favourable to a person.[92]

Conclusion

Where does that leave decision makers who wish to ignore a decision on the basis that it is invalid? There is a question as to what extent the decision in *Bhardwaj* is based on particular facts, and indeed somewhat extreme facts, and to what extent it elucidates general principles.

But in summary the following appears to emerge from the judgments as preconditions to a decision maker treating a decision as invalid.

- First, there must be at least a jurisdictional error in the decision.

- Second, the discussion in *Bhardwaj* suggests that there must be access to judicial review for that error. But it could well be that the availability of collateral challenge to the decision is enough. The fact that some form of judicial review is restricted, and would not provide a remedy for the error, is irrelevant, provided at least some other form of review would.

- In addition it may be that there needs to be an assessment not only that judicial review could be sought, but also that it would be successful. An agreement with the affected person to this effect would probably be sufficient. Factors which would lead a court to decline a remedy would be relevant therefore to the decision maker's consideration.

- Third, there needs to be no legislative provision giving such a "decision" effect, and thereby preventing the decision maker from so acting.

As Justice Hayne implies, in cases of doubt, the prudent course will be for a decision maker to await a judicial determination of whether a decision is invalid and can be ignored.

3 Is there a statutory power to vary or revoke?

In *Bhardwaj*, Gaudron and Gummow JJ (with whom McHugh J agreed in general) and Hayne J all decided that there was no need to rely upon s33(1) of the *Acts Interpretation Act* to support the Tribunal's action because, prior to the October decision, there had been no relevant exercise of power by the Tribunal. The reasoning of Gleeson CJ and Callinan J suggests that they would agree with this. But where there has been an exercise of power, it is necessary to go on and address the question of whether the decision maker can vary or revoke a decision.

In general, administrative decision-making takes place pursuant to a particular legislative power. The question of whether the legislation allows the decision maker to vary or revoke a decision is essentially a matter of statutory interpretation.[93] As discussed in the introduction, this is sometimes described as determining whether the decision maker is *functus officio.* The issue in each case is to interpret the extent of the statutory power conferred on the decision maker and whether this includes a power to vary or revoke. Consideration needs to be given to whether there is an express power, whether there are relevant general powers, in particular in s33 of the *Acts Interpretation Act*, and whether there is any implied power.

Express statutory power

In many statutes, decision makers are given an express power to vary or revoke a decision.[94] Such powers can be exercisable on the motion of the decision maker, on that of the person affected by the decision, or by both parties.[95]

A decision taken on the basis of such provisions will, like any administrative decision made pursuant to an enactment, generally be subject to judicial review. General principles of administrative law, such as the need to accord procedural fairness, to exercise the discretion for a proper purpose, and to take into account all and only relevant considerations, will apply. However, additional considerations may be relevant to the exercise of any power to reconsider. These include whether revocation or variation would be oppressive to any parties, including third parties, whether there has been unreasonable delay between the original decision and the reconsideration, and generally the need for finality in decision-making.[96]

Where an express statutory power is given to vary or revoke an administrative decision of a particular kind and on certain grounds, it is likely to be interpreted as excluding by implication the power to vary or revoke on other grounds, and also to exclude variation or revocation of other related decisions taken pursuant to the statute.[97]

A recent example of these principles is *Leung v Minister for Immigration and Multicultural Affairs.*[98] This case involved the revocation of a certificate of citizenship, prior to the making of a pledge of citizenship, due to the Minister receiving information which showed that the applicants had misrepresented their activities outside Australia and therefore did not satisfy the requisite statutory criterion. Heerey J based his judgment on whether a power to revoke could be implied into the statute. He concluded that there existed a limited power to revoke the certificate until the pledge of citizenship had been taken, but that after this date the power to revoke was limited by s50 of the *Australian Citizenship Act 1948* (Cth), which expressly allowed for revocation of citizenship status only for fraud.

Finally, there is an issue as to whether a power to vary or revoke can be exercised several times, or only once.[99] This will depend on the nature of the statutory power, and whether it is of a continuing nature (perhaps if it is premised on a change in circumstances) or if it appears to be exercisable only once (perhaps if it deals with correcting an error of fact or law).

General powers

Section 33(3) of the Acts Interpretation Act
Even without an express, specific power to vary or revoke, such a power may exist by operation of general legislation, or by implication. In the Commonwealth sphere, the most relevant general provision is s33(3) of the *Acts Interpretation Act*. This section provides:

> Where an Act confers a power to make, grant or issue any instrument (including rules, regulations or by-laws) the power shall, unless the contrary intention appears, be construed as including a power exercisable in the like manner and subject to the like conditions (if any) to repeal, rescind, revoke, amend, or vary any such instrument.

The ambit of s33(3) and whether it extends to giving administrative decision makers the power to revoke or vary a decision has been the subject of conflicting judicial interpretations.[100]

The most significant current issue that arises in relation to this provision is the scope of the word "instrument". In *Australian Capital Equity Pty Ltd v Beale,*[101] Lee J of the Federal Court held that s33(3) is limited to powers concerning instruments of a "legislative character" and did not apply to instruments of an "administrative character". Justice Lee's conclusion was based on the view that the sole and obvious purpose of the *Acts Interpretation Act* is to deal with legislative instruments and that having regard to the provision's history, it is possible to conclude that the parenthetic expression "(including rules, regulations or by-laws)" was intended to be an exhaustive provision. This view has been accepted in *Director of Public Prosecutions Reference No.2 of 1996*,[102] *Minister for Immigration and Multicultural Affairs v Sharma*,[103] *Dutton v The Republic of South Africa*,[104] and *Schanka v Employment National (Administration) Pty Ltd*.[105]

However, the reasoning of Lee J in *Beale*[106] has a number of very unsatisfactory elements. In our view the conclusion is not supported by a full consideration of the relevant issues of statutory interpretation. It was always inconsistent with the decision of Brennan J, sitting as the Administrative Appeals Tribunal in *Re Brian Lawlor Automotive Pty Ltd and The Collector of Customs, New South Wales*[107] and the decision of the Full Court of the Federal Court in *Barton v Croner Trading Pty Ltd*[108]*.* It has most recently been seriously questioned, and not followed, as a result of careful analysis by Emmett J in *Heslehurst v New Zealand*[109] and by

the Court of Appeal of the Supreme Court of Victoria in *R v Ng.*[110] It is not necessary in light of these recent decisions to canvass in detail all the factors in support of the view that s33(3) applies to administrative instruments, but we note these.

The term instrument is not defined in the *Acts Interpretation Act*. It therefore takes its general meaning of a document in writing of a formal legal kind. The general meaning is not limited to legislative documents.

The section partly defines the term by stating that it includes "rules, regulations and by-laws", which are generally instruments of a legislative nature. But this is an inclusive definition. To suggest that this is the limit of the meaning of the term is inconsistent with the clear words of the section. Further, the use of the word "any" suggests that the scope of "instruments" is not limited those listed in the parenthetic provision. Further again, the power is "to make, grant or issue any instrument"; the terms "grant" or "issue" are not generally appropriate to legislative instruments.

Some of these points, and the legislative history of s33(3), were discussed by Brennan J in *Re Brian Lawlor Automotive Pty Ltd v The Collector of Customs, New South Wales*[111]:

> By s6 of the Act Interpretation Act 1941 (No 7 of 1941) s33(3) was amended to its present form. The words "any rules, regulations or by-laws" were omitted and in their stead were inserted the words: "grant or issue any instruments (including rules, regulations or by-laws)". The instruments to which s33(3) now relates are instruments which are not necessarily rules, regulations or by-laws, and they are instruments which might be "granted" or "issued" rather than "made". Where pursuant to a statutory power, an authority grants or issues an instrument, other than a rule, regulation or by-law, the exercise of the power may well be an executive or administrative act rather than a legislative act. At all events, the granting or issuing of an instrument other than a rule, regulation or by-law is not necessarily an act of a legislative kind, and the granting or making of an executive or administrative instrument falls within the natural ambit of s33(3).[112]

The proceedings in *Lawlor* concerned legislation which provided that dutiable goods may be warehoused in a warehouse licensed by the Minister. Despite the fact that Brennan J decided that s33(3) extended to administrative instruments, he found that there was no power to revoke the licence in this case. The power to grant a licence in the *Customs Act 1901* (Cth) was not a power to grant or issue an instrument, but a power to create legal rights and liabilities. Importantly, there was no requirement that the licence be in writing. This decision was upheld by the Federal Court in *Collector of Customs (NSW) v Brian Lawlor Automotive Pty Ltd.*[113]

The second reading speech to the 1941 amendment of s33(3) also supports the broader view. The then Attorney-General, Mr Hughes, explained that the amendment was intended to expand the type of instruments the subject of s33(3). He stated that:

> if a power be conferred to make or issue any instrument under an act, then the power to repeal or amend the instrument at some later date is necessary, even though the instrument does not fall under the description of rules, regulations or by-laws.[114]

He cited proclamations and orders as examples of instruments that would now be covered. While the exact dividing line between legislative and executive instruments is difficult to draw, proclamations and orders, which are typically issued by the Governor-General or a minister, are closer to being executive than legislative instruments.[115] The decision of the Victorian Supreme Court of Appeal in *R v Ng* traces the provision further back to the original 1901

version of the Act, and to the parent provision in the *Interpretation Act 1899* (UK),[116] and concludes that the legislative history tends to support a broad interpretation of the word instrument.

The broad interpretation of s33(3) is also supported by *Barton v Croner Trading Pty Ltd*[117] where the Full Federal Court held:

> The word "instrument" is of wide import…In the *Acts Interpretation Act* the word is used to include, at least, any writing designed to carry into effect a statute: see for example, s33(3), s34B(2)(c), s46(a).

This case concerned proceedings, which could not be instituted "except with the consent in writing of the Minister, or of a person authorised by the Minister". The Court held that the Minister's authorisation was an instrument to which s46(b)[118] of the *Acts Interpretation Act* applied. Such an authorisation is clearly an executive instrument, and it is a presumption of legislative interpretation that words are used consistently within a statute.[119]

The broad interpretation is given additional weight by the current use of the word "instrument" in s25D of the *Acts Interpretation Act* to denote the document giving reasons for a decision by a tribunal, body or person. Further, s4 of the Act was amended in 1976 to include the phrase "to make an instrument of a legislative or administrative character (including rules, regulations or by-laws)." This not only clarifies that the parenthetic provision cannot be exhaustive, but also provides support for the view that "instruments" can be of either a legislative or administrative nature.

The suggestion that the *Acts Interpretation Act* is concerned only with legislative instruments is misconceived. The Act is concerned with interpreting Acts of Parliament and for shortening their language,[120] and applies to delegated legislation. But the power to make administrative decisions is contained in such primary or delegated legislation. Subsection 33(3) deals with the power to make instruments under such primary or delegated legislation, and establishes an interpretative presumption in relation to such powers. There is no reason to limit s33(3) to the power in legislation to make only legislative instruments. A wide range of factors suggests that s33(3) applies to power in legislation to make all instruments, administrative and legislative.

In our view, s33(3) provides a general statutory presumption in favour of a power to revoke or vary administrative instruments. The key issue in relation to the application of the provision is whether there is a contrary intention which overrides this presumption. We return to this issue below.

Section 33(1) the Acts Interpretation Act
Section 33(1) provides that:

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

A restrictive view of s33(1) is that its sole role is to clarify that a general power to grant social security benefits or citizenship, for example, can be exercised each time an application is made, rather than only once. This view is supported by Branson J in *Dutton v Republic of South Africa,*[121] where she held that s33(1) "does not refer to the withdrawal or cancellation of the exercise of a power".

However, a broader view has been given to s33(1) in *Minister for Immigration, Local Government and Ethnic Affairs v Kurtovic*[122] and applied by the Federal Court in *Bhardwaj*[123] In *Kurtovic* it was held that the revocation of a criminal deportation order, made pursuant to a recommendation of the Administrative Appeals Tribunal, did not prevent the Minister from making a second deportation order in respect of the same criminal offence. In his reasons[124], Gummow J held that s33(1) gave administrative decision makers the power to reconsider, revoke or remake a decision, unless the statute, upon a proper construction, indicated that the power was not to be exercised from time to time, but was spent by its first exercise.

This reasoning was applied by the Federal Court in *Bhardwaj* by Beaumont and Carr JJ, but with a qualified meaning of the phrase "as the occasion requires" in s33(1). Beaumont and Carr JJ held that "as the occasion requires" was satisfied by circumstances "where, in coming to that decision [the Tribunal] has by its own mistake failed to accord an applicant a fundamentally important right, the error is not in dispute between the interested parties, the error is material to the case before it and which reconsideration takes place within a reasonable time of the original decision."[125]

The above analysis indicates an acceptance by the courts that s33(3) and s33(1) of the *Acts Interpretation Act* give administrative decision makers the power to vary or revoke their decisions subject to a relevant contrary intention. The primary practical issue in relation to s33(3) or s33(1) of the *Acts Interpretation Act* is whether there is a contrary intention in the relevant statute. We consider this issue further below.

Implied Statutory Power

It is also necessary to consider whether, apart from s33(3) and s33(1) of the *Acts Interpretation Act,* a power to vary or revoke may be found in the statute by implication. Some of the recent judicial consideration has looked at the issue of whether there is an implied power without the lens provided by the *Acts Interpretation Act* provisions.[126] In our view it is more appropriate to begin with the general statutory powers. But we note that the question of whether there is a contrary intention for the purposes of these powers, and the question of whether there is there an implied power, give rise to much the same issues.

There is a significant issue as to what is the basic test for whether a power can be implied from statutory provisions. In *Austereo Ltd v Trade Practices Commission*[127] French and Beazley JJ accepted as a correct formulation the following passage from FAR Bennion *Statutory Interpretation*[128]:

> The question of whether an implication should be found within the express words of an enactment depends on whether it is proper or legitimate to find the implication in arriving at the legal meaning of the enactment, having regard to the accepted guides to legislative intention. … This may involve a consideration of the rules of language or the principles of law, or both together.

In deciding whether there is an implied power to vary or revoke, and in determining whether there is a contrary intention for the purposes of s33 of the *Acts Interpretation Act*, the Courts have looked for common factors. In doing so, they have been concerned to balance the conflicting policy considerations identified by French J in *Sloane v Minister for Immigration, Local Government and Ethnic Affairs:*[129]

> The implication into an express grant of statutory power of a power to reconsider its exercise would be capable, if not subject to limitation, of generating endless requests for reconsideration on new material or changed circumstances…. Against the difficulties that may arise from the implication of a power to reconsider the decision there is the convenience and flexibility of a process by which a primary decision

maker may be persuaded on appropriate and cogent material that a decision taken ought to be re-opened without the necessity of invoking the full panoply of judicial or express statutory review procedures.

Relevant factors for a contrary intention and implied power

Slips
One situation in which the courts have uncontroversially found a power to vary is where a decision maker wishes to correct a clerical error that does not change the form or substance of the previous determination.[130] It has in fact been argued that the power to correct clerical errors may be regarded as a necessary incident of the obligation to provide a written decision.[131]

Clear statutory intention
Another relevant factor is where there is a clear statutory indication that the power granted, once exercised, is spent. In some few cases, the legislation makes clear that there is no power to vary or revoke. Section 26 of the *Administrative Appeals Tribunal Act 1975* is such a provision.

For example where a statute provides that certain decisions are "final" or "final and conclusive", this evidences an intention contrary to the existence of a power to revoke or vary.[132] On the other hand, Beaumont and Carr JJ in the Full Court of the Federal Court in *Bhardwaj* held that the provisions in the *Migration Act* requiring that the Tribunal provide a mechanism that is "fair, just, economical, informal and quick", not be bound by "technicalities, [or] legal forms" and "act according to substantial justice and the merits of the case" were strong indications that the presumption in s33(1) of the *Acts Interpretation Act* applied, and of an implied power to revoke.[133]

Nature of the function
A further factor is the nature of the function exercised, which may either indicate that the power is continuing or that it is to be exercised only once.[134] The effect on third parties will be an important aspect of the nature of the power, and the effect of variation or revocation on them an important aspect of this factor. For example, where decisions involve granting a licence, funds or employment to one individual over others, the fact that allowing the decision maker to reconsider the decision at the request of an unsuccessful party could have a severe negative impact on the innocent successful party is an indication that the power should be exercised only once.

A further factor, according to one line of authority, is that where the decision maker is given the power to decide questions affecting existing legal rights, the exercise of the power will be irrevocable. Whereas, if the power is discretionary, the decision can be made, revoked or varied from time to time.[135] We note, however, that these are English authorities, which have seldom been applied in Australia, and which were decided in a context where there is no presumption of a power to revoke or vary administrative instruments in the *Interpretation Act 1978* (UK), and less concern for constitutional issues in relation to separation of judicial power (often characterised as concerning existing rights) and executive power (often concerning discretionary, or future, benefits or detriments).

Consequences
A related factor is the consequence of a power of amendment or revocation, or lack of power, in light of the statutory scheme. In *Heslehurst v New Zealand*[136] Justice Emmett considered whether there was a power to vary the name of the police officer who was to escort the surrendered person under a warrant issued under the *Extradition Act 1988* (Cth). He held that

there was no contrary intention, so that s33(3) of the *Acts Interpretation Act* allowed amendment. Justice Emmett stated:

> … if the contrary conclusion was reached, there would be, to use the words of Spender J [in *Edenmead Pty Ltd v Commonwealth*[137]], "startling consequences". Those startling consequences are relevant to the question of whether or not a contrary intention appears. If there were no power to amend the warrant in relation to the identity of the New Zealand escort officer, the court's power pursuant to s 34(1) could be effectively nullified simply because of the unavailability of the person identified.

Procedure

Another factor is the procedure and manner for making the decision. In the Full Federal Court consideration of *Bhardwaj*, Justice Lehane discussed the possible application of s33(1) of the *Acts Interpretation Act*. However Justice Lehane found that the strict time limits for the decision making process, detailed provisions governing the conduct of the process, and the limited form of judicial review made it "incongruous with that scheme for the Tribunal to have … a power from time to time, as occasion requires, to make (and revoke) decisions."[138] In the High Court, Kirby J also held, in his dissenting judgment, that on its proper construction the *Migration Act* evinced a contrary intention for the purposes of s33(1) of the *Acts Interpretation Act*. In Kirby J's view, the Act envisaged a single exercise of the "review" performed by the Tribunal which, perfect or imperfect, would be given effect in a "decision". He referred to the "explicit provisions of considerable detail" constituting a formal process relating to the decision.[139]

The fact that a majority of the High Court found in *Bhardwaj* that the Tribunal was able to ignore its September decision and make its October decision does not affect the relevance of these comments, or those of Beaumont and Carr JJ in relation to a clear statutory intention. The majority held that the September decision was invalid and could be ignored. They did not consider whether a valid decision could have been revoked, and the October decision made, because of an implied power to do so or the general powers in the *Acts Interpretation Act*.

Merits review

Another factor, which the courts have recognised as indicating a statutory intention contrary to the existence of a power to vary or revoke, is the availability of merits review, be this internal or through an administrative appeals tribunal.[140] In *Sloane,* French J held that:

> The existence of the regulation making power and the detailed provisions of s115 in relation to the review of decisions tend to suggest a legislative purpose of codifying and confining the bases upon which decisions made under the Act or the Regulations are able to be reviewed.[141]

Opportunity to reapply

A related factor is the existence of an opportunity to make a further primary application where some benefit has been denied.[142]

We note that, while the application of these last two factors are clearly relevant where the affected person is seeking reconsideration,[143] they appear less relevant where the decision maker wishes to reconsider the decision on their own motion. In some cases a decision maker can appeal their own decision, but in most cases they cannot.[144] Therefore, where the question is whether the decision maker can revoke or vary a decision on their own motion, the availability of merits review and the possibility of making a new application are less significant.

Nature of any error
The nature of any error made by the decision maker, a possible further factor, is likely to be less relevant after the High Court's decision in *Bhardwaj*, and the finding there that a jurisdictional error generally results in an invalid decision, which can be ignored and made again without the need for a power to revoke. The judgment of Madgwick J at first instance in *Bhardwaj*[145] suggests that judges may be more willing to find a power to revoke or vary in a statute with respect to serious legal error, in that case jurisdictional error involving a denial of procedural fairness, than with respect to less serious legal or factual errors, for example where more evidence has later come to hand. Further, it may be that a power to revoke or vary will be found more readily where there has been an error of law, even though less than a jurisdictional error, in contrast to where there has been no legal error.

Time
In our view another factor is that any variation or revocation needs to be timely. There is unlikely to be found an implied power to vary or revoke at any time after a decision has been made. There may be other similar factual considerations which in particular circumstances tell against an implied power, and in favour of a contrary intention for the purposes of the *Acts Interpretation Act* general powers.

Change in law
Where a decision is revoked on the basis of a change of law, it may offend any rule or presumption against retrospectivity in relation to the operation of the law.[146] This would be one circumstance where a power to revoke or vary a decision is unlikely.

Agreement of parties
An important issue in this context is the relevance of the decision maker and the party or parties affected agreeing to the variation or revocation. As a matter of practicality, this will clearly be relevant, since there is unlikely to be a legal challenge to this course. However, it is sometimes difficult to find a principled basis for this approach.

We have noted that in *Bhardwaj* there was agreement between Mr Bhardwaj and the Tribunal as to the course to be taken, and impliedly that the September decision was subject to jurisdictional error, and thus invalid and therefore able to be ignored. The Court confirmed the correctness of their agreed position, though it did not explicitly draw any relevance from their agreement.

There are significant further questions as to whether an agreement that a decision is tainted by non-jurisdictional error, or simply an agreement to vary or revoke the decision, is enough to support a power for that decision to be varied or revoked.

In *Re Kretchmer and Repatriation Commission*[147] where an application was dismissed pursuant to the *Administrative Appeals Tribunal Act 1975* (Cth) by an improperly constituted Tribunal, the Tribunal reviewed its decision and held that:

> We do consider, however, that if the Tribunal is of the view that no order of a properly constituted Tribunal made under s42A(2) in fact exists then there is no reason why in the circumstances of this particular case the Tribunal should not proceed to carry out its statutory duty to determine the application for review which has been instituted by the applicant and we intend to give directions to bring this about. Of particular relevance in this particular case is the attitude of the parties (who consented and the fact that)…this is not a case where the rights of third parties are involved.

Similarly in *Comptroller-General of Customs v Kawasaki Motors Pty Ltd,*[148] a case involving the decision of the Comptroller-General to revoke a previous revocation of a Commercial Tariff Concession order with the consent of the affected party, Hill and Heerey JJ held that:

> It would in our opinion be strange if an administrative order remained valid until set aside by an order of a court even though the decision-maker did not seek to uphold the order. Courts have long recognised the rule of policy that there is a public interest in the avoidance of litigation and the termination of litigation by agreement when it has commenced. The argument that disputed orders could not be treated, by agreement of all concerned, as void would directly conflict with that rule. Parties would be forced into pointless and wasteful litigation.

A decision can be set aside by a court even without a jurisdictional error. In particular the *Administrative Decisions (Judicial Review) Act* provides for review on grounds which are broader than jurisdictional error. If the parties agree that a court would set aside a decision on the basis of a non-jurisdictional error, then there is little legal risk in treating the decision as invalid and making it again. Such a course would appear to be supported by the *Kawasaki* decision.

But it is necessary to note that agreement generally cannot give a decision maker additional power. As Finkelstein J noted in *Leung*[149] it is hard to see how jurisdiction to ignore a decision can be conferred on a statutory decision maker merely by the consent of the persons who might be affected by the act. Further, it is hard to see how the power to revoke or vary a decision can be conferred on a statutory decision maker merely by the consent of the persons who might be affected by the act. Certainly agreement would not entitle the decision maker to reconsider and reach a new decision that would be otherwise be beyond power. The question of how and whether this needs to be policed may be one consideration militating against this principle.[150]

Notwithstanding this concern, it may be arguable that an implied power to vary or revoke exists, or that a contrary intention in relation to the general powers does not exist, where the relevant parties agree to the variation or revocation. This argument is not that the agreement gives the power. But that as a matter of statutory interpretation, a power can more easily be implied, and any contrary discounted, where there is agreement. This argument is stronger where there is a legal error, but may also be possible without error.

We also note a line of authority in England, which suggests that where an administrative decision maker realises that they have inadvertently denied a benefit to a person, they have a duty, independent of any statutory power, to consider whether the error should be corrected.[151] This duty is "subject to a discretion as to what action to take, exercised in accordance with the requirements of good administration".[152]

4 Can the decision maker be estopped from varying or revoking?

A further question, which arises with respect to the exercise of a power to revoke or vary an administrative decision, is whether the doctrine of estoppel applies to administrative decision-making. This will be of concern where a decision favourable to the affected person is revoked and they claim to have relied upon the decision to arrange their affairs, or where a third party claims to have relied upon a decision, which has later been varied. This is a complicated area and it is beyond the scope of this paper to cover it comprehensively. It is, however, worthwhile to note the judicial consideration of this issue in *Kurtovic*[153] by Gummow J, when a Justice of the Federal Court.

Gummow J found that the doctrine of estoppel cannot operate where a party asserts that an administrator is estopped from "rescinding" an *ultra vires* decision, that is a decision infected

by jurisdictional error. This would threaten to undermine the rule of law because it would enable public authorities to extend their powers simply by making representations beyond power.[154] Elements of this thinking are found in Gummow J's judgment, with Gaudron J, in *Bhardwaj*.

In the case of *intra vires* decisions, Gummow J held that estoppel will not be available where the decision is taken pursuant to a planning or policy level power, but may be available where the decision is taken pursuant to an operational or private exercise of government power.[155] The distinction between these two types of decisions is difficult to draw. However, it seeks to recognise that, where a discretionary power is provided for in a statute, there is a duty to exercise that discretion freely on the basis of a proper understanding of what is required in the public interest. If estoppel were permitted it would derogate from that statutory obligation.[156] Where the decision is solely operational or the government is acting in its private capacity, these concerns are less pertinent.

A final practical difficulty with the operation of estoppel in administrative law is the necessity to show detrimental reliance. In *Kurtovic,*[157] Gummow J held that emotional or psychological detriment would not suffice and that a change of position resulting from the representation would be necessary. While, in cases such as the granting of building licences, this may be relatively easy to show, in many administrative decisions, for example concerning entry permits or welfare benefits, it would be extremely difficult.

The application of estoppel to public law remains an uncertain and developing area. Without such a remedy, substantive fairness to the individual will not be assured in all circumstances. However, the requirement of procedural fairness upon any revocation of a decision, or failure to fulfill a representation, may go some way to remedy this. As Gummow J's judgment notes, some aspects of administrative decision making are similar to contractual decision making, but the two rest on very different legal foundations.[158]

Conclusion

The concept of good government according to law incorporates a concern to maintain the functionality of an administrative state providing services in the public interest, and a concern to protect the citizen against misuse of administrative power. Achieving a balance that satisfies these sometimes competing goals is a difficult task, especially in relation to the issue of whether a decision maker can revoke or vary their decision.

This paper suggests that an administrative decision maker who wishes to revoke or vary a decision, or who has been asked to do so by the affected person, should adopt a five-staged approach to determining whether they have the power to do so.

- First they should ascertain whether the decision is in fact perfected as if it is not, no power to revoke or vary will be necessary for a reconsideration to occur.

- Second they should consider whether the decision is subject to a jurisdictional error and can be ignored. The ability to ignore a decision is more likely to exist if judicial review is available and it is clear that a court would hold the decision invalid. A prudent course in cases of doubt would generally be to await a judicial determination before doing so. Agreement of the persons affected to this course limits the legal risk.

- Third, if there is a decision, which cannot be ignored, the decision maker should then look to whether there is an express power, a general power arising from ss33(1) or 33(3) of the *Acts Interpretation Act*, or an implied statutory power to revoke or vary. This is essentially a process of statutory interpretation, and we have noted a range of relevant factors in

determining whether there is a contrary intention for the purposes of ss33(1) or (3), or whether a power can be implied.

In relation to the general issues we discussed to begin with, this consideration has reinforced the importance of the concept of invalidity, flowing from jurisdictional error, in Australian administrative law. As with its consideration of other basic administrative law issues, the concept of jurisdictional error and invalidity are central to the High Court's approach in *Bhardwaj*. Jurisdictional error results in an invalid decision which can be ignored and made again. The decision clearly leans towards the absolute theory of invalidity, notwithstanding the limitations we have noted which bring it back to a middle position. A decision can be treated as invalid even though no court has formally decided this.

Generally this consideration notes a concern amongst the courts and the legislature to give to decision makers the flexibility to reach decisions which are within jurisdiction, fair and well considered, a concern generally given greater weight than the need for finality.

This consideration has also highlighted growing distinctions between administrative decisions and judicial decisions. Administrative decisions are not necessarily presumed valid until set aside by a court, and can be the subject of collateral challenge. Whether they can be varied or revoked is essentially a question of statutory power.

Endnotes

1 This paper has been developed from a paper written by Robyn Briese as an intern with the Australian Government Solicitor whilst a student at the Australian National University. A condensed version has been issued by the Australian Government Solicitor as a Legal Practice Briefing.

2 [2002] HCA 11 (14 March 2002); (2002) 187 ALR 117. The decision in *Pfeiffer v Stevens* [2001] HCA 71 (13 December 2001); (2002) 185 ALR 183 is also indirectly relevant to this issue.

3 *Minister for Immigration, Local Government and Ethnic Affairs v Kurtovic* (1990) 21 FCR 193; 92 ALR 93; *Sloane v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 37 FCR 429; *Jayasinghe v Minister for Immigration and Ethnic Affairs* (1997) 145 ALR 532; *Leung v Minister for Immigration and Multicultural Affairs* (1997) 150 ALR 76; *Semunigus v Minister for Immigration and Multicultural Affairs* (2000) 96 FCR 533.

4 E Campbell, "Revocation and Variation of Administrative Decisions" (1996) 22(1) *Mon LR* 30; E Campbell "Effect of Administrative Decisions Procured by Fraud or Misrepresentation" (1998) 5 *AJ Admin L* 240; M Allars "Perfected Judgments and Inherently Angelical Administrative Decisions: The Powers of Courts and Administrators to Re-open or Reconsider Their Decisions" (2001) 30 *AIAL Forum* 1, 21(1) *Australian Bar Review* 50.

5 E Campbell, "Revocation and Variation of Administrative Decisions" (1996) 22(1) *Mon LR* 30 at 30-31.

6 *Sloane v Minister for Immigration and Ethnic Affairs* (1992) 37 FCR 429, French J at 443.

7 See generally F C Hutley "The Cult of Nullification in English Law" (1978) 52 *ALJ* 8.

8 *Leung v Minister for Immigration and Multicultural Affairs* (1997) 150 ALR 76 at 84.

9 *Minister for Immigration, Local Government and Ethnic Affairs v Kurtovic* (1990) 21 FCR 193, Gummow J at 211.

10 [2002] HCA 11 at [8]; 187 ALR 117 at 119.

11 (1990) 21 FCR 193 at 211.

12 (1992) 37 FCR 429 at 443.

13 (1997) 145 ALR 532 at 542.

14 E Campbell, "Revocation and Variation of Administrative Decisions" (1996) 22(1) *Mon LR* 30 at 38-40; E H Shopler, "Power of administrative agencies to reopen and reconsider final decisions as affected by lack of specific statutory authority" 73 *ALR 2d* 939 at 941.

15 See E Campbell, "Revocation and Variation of Administrative Decisions" (1996) 22(1) *Mon LR* 30 at 38-40 for a discussion of statutory requirements to perfect a decision.

16 [1999] FCA 422 at [19]-[20]. These comments were upheld by the Full Court, see *Semunigus v Minister for Immigration and Multicultural Affairs* (2000) 96 FCR 533.

17 (2000) 96 FCR 533 at 536.

[18] (2000) 96 FCR 533 at 547.

[19] E Campbell, "Revocation and Variation of Administrative Decisions" (1996) 22(1) *Mon LR* 30 at 40; see also W Wade and C Forsyth, *Administrative Law* (7th ed 1994) at 262.

[20] [2002] HCA 11 at [101]; 187 ALR 117 at 142.

[21] B Selway, "The Rule of Law, Invalidity and the Executive" 9(2) *PLR* 196 at 201-203, for a discussion of the implications of *ultra vires* decisions see M Aronson and B Dyer, *Judicial Review of Administrative Action* (1996) at 642-659; W Wade and C Forsyth, *Administrative Law* (7th ed. 1994); PP Craig, *Administrative Law* (1994) at 451-475.

[22] (1946) 74 CLR 461 at 483.

[23] At 479.

[24] In *Boyle v Charge* (1987) 73 ALR 446 at 453 Justice Neaves of the Federal Court stated that:

> Finally, and most importantly, as the condition precedent to the granting of the approval did not, in fact, exist, with the consequence that the approval was ineffective in law, for the court to decline relief would not have the effect of giving to the instrument of approval any greater efficacy than it would otherwise have.

In other words, a decision may be invalid, not only in the absence of any court consideration, but even if a court considers the matter and decides not to grant a remedy.

[25] *Ousley v The Queen* (1997) 192 CLR 69, McHugh J at 99.

[26] (1946) 74 CLR 461 at 483.

[27] (1997) 192 CLR 69 at 100, quoting Dixon J in *Posner*.

[28] (1997) 150 ALR 76 at 88.

[29] It is in the area of fraud and misrepresentation that courts appear most willing to declare that a decision so procured can simply be ignored; see *Lazarus Estates v Beasley* [1956] 1 QB 702; *Jones v Commissioner of Police* (1990) 20 ALD 532; E Campbell, "Effect of Administrative Decisions Procured by Fraud or Misrepresentation" (1998) 5 *AJ Admin L* 240 at 244-247; but see also G Ganz, "Estoppel and Res Judicata in Administrative Law" (1965) *PL* 237 at 246.

[30] Sykes, Lanham, Tracey and Esser state in *General Principles of Administrative Law* (4th edition, Butterworths, 1997) at 447:

> The concept of "void" seems to be simple, and **is** simple. The meaning is that the decision is a nullity and has been a nullity from the time of its purported birth and no order of the court is necessary to establish the invalidity.

[31] It is clear however that administrative decision makers must decide questions of law in making their decisions: *Drake v Minister for Immigration and Ethnic Affairs* (1979) 24 ALR 577 at 584-585.

[32] (1979) 143 CLR 242 at 277.

[33] *Smith v East Elloe Rural District Council* [1956] AC 736; *F Hoffman-La Roche & Co AG v Secretary of State for Trade and Industry* [1975] AC 295; *Wattmaster Alco Pty Ltd v Button* (1987) 70 ALR 330.

[34] (1997) 192 CLR 69 at 130-131:

> The more appropriate principle is that the validity of an administrative act or decision and the legality of the steps taken pursuant to it are presumed valid until the act or decision is set aside in appropriate proceedings.

[35] (1987) 17 FCR 26 at 33.

[36] Aronson and Dyer in *Judicial Review of Administrative Action* (2nd edition. LBC, 2000) conclude on this issue at 409:

> The truth is that there is no such thing as a complete nullity; it always takes a court decision to say so.

See also in particular M Taggart, "Rival Theories of Invalidity" in M Taggart (ed), *Judicial Review of Administrative Action in the 1980s – Problems and Prospects* (1986) 70.

[37] *Administrative Decisions (Judicial Review) Act* s16.

[38] HWR Wade, "Unlawful Administrative Action: Void or Voidable?" (1968) 84 *LQR* 499 at 508.

[39] A Robertson "Administrative Law Remedies: Some discretionary considerations" (2002) 22(2) *Aust Bar Rev* 119.

[40] *Reid v Rowley* [1977] 2 NZLR 472, Cooke J; M Taggart, "Rival Theories of Invalidity" in M Taggart (ed), *Judicial Review of Administrative Action in the 1980s – Problems and Prospects* (1986) 70 at 85-88.

[41] HWR Wade, "Unlawful Administrative Action: Void or Voidable" (1968) *LQR* 499 at 517.

[42] (1980) 2 NZLR 1 at 4.

[43] (1997) 79 FCR 400 at 413.

[44] *Minister for Immigration & Multicultural Affairs v Bhardwaj* [1999] FCA 1806 (22 December 1999), on the basis that the September decision had not been lawful and was therefore open to collateral challenge in the Federal Court.

[45] *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2000) 99 FCR 251, on the basis that the Tribunal had the power to make the October decision because of s33(1) of the *Acts Interpretation Act*.

[46] [2002] HCA 11 (14 March 2002); (2002) 187 ALR 117.

[47] At [51]; ALR 129.

[48] [2002] HCA 11 at [14]; ALR 121.

[49] [2002] HCA 11 at [162] - [165]; ALR 156-157.

[50] [2002] HCA 11 at 44; ALR 127.

[51] [2002] HCA 11 at [149]; ALR 153.

[52] [2002] HCA 11, Gleeson CJ at [5]; ALR 119; Gummow and Gaudron JJ at [39]; ALR 125; see *Ridge v Baldwin* [1964] AC 40, Lord Reid at 79.

[53] (1995) 184 CLR 163; C Finn, "Jurisdictional Error: Craig v South Australia" (1996) 3 *AJ Admin L* 177 at 178; *Re Australian Industrial Relations Commission; Ex parte CFMEU* (1999) 164 ALR 73, and *Corporation of the City of Enfield v Development Assessment Commission* (2000) 199 CLR 135.

[54] *Craig v South Australia* (1995) 184 CLR 163 at 177.

[55] *Plaintiff S157 of 2002 v The Commonwealth* [2003] HCA 2, 4 February 2003.

[56] [2002] HCA 11 at 42; ALR 126.

[57] Gaudron and Gummow JJ also stated that the *Migration Act* only limits the grounds upon which a decision may be challenged and the time within which it may be challenged in the Federal Court. It did not then limit the basis upon which a decision may be challenged for jurisdictional error in the High Court or the time within which it may be challenged. In relation to non-jurisdictional errors of law, Gaudron and Gummow JJ noted at [50]; 128 that once judicial review was unavailable, the decision was effective for all purposes. The illogicality referred to at [51]; 129 in the subjective view of invalidity operates "until the decision is set aside"; it does not reflect "the law that will be applied if and when the decision is challenged".

[58] [2002] HCA 11at [147]; ALR 152.

[59] At [142]; 154.

[60] At [155] and [157]; 155.

[61] Chief Justice Gleeson specifically noted that the High Court has recently decided in *Re Refugee Review Tribunal; ex parte Aala* (2000) 204 CLR 82 that failure to accord procedural fairness resulted in an excess of jurisdiction sufficient to attract prohibition, but that the remedy was discretionary. Whilst not pursuing this thought, this indicates a concern that discretionary considerations are a break on moving too far towards an absolute view of invalidity.

As we have noted, the illogicality referred to by Gaudron and Gummow JJ at [51]; 129 arises in the situation "until the decision is set aside", suggesting that what is required before a decision maker can treat a decision as invalid is not only the availability of judicial review, but an assessment that a court will set aside the decision.

[62] See also the comments at [2002] HCA 11 at [13]; ALR 120 by Gleeson CJ in relation to time, and at [143]; 151 by Hayne J in relation to the effect on third parties, both factors traditionally relevant to the exercise of judicial discretion to grant a remedy.

[63] *Ousley v The Queen* (1997) 192 CLR 69, McHugh J at 99.

[64] (1997) 192 CLR 69. There is a disagreement within the Court as to what that means in the case of a decision to grant a warrant.

[65] See generally M Aronson, "Criteria for Restricting Collateral Challenges" (1998) 9(4) *Pub L Rev* 237.

[66] M Akehurst, "Revocation of Administrative Decisions" (1982) *PL* 613 at 616-617; E Campbell, "Revocation and Variation of Administrative Decisions" (1996) 22(1) *Mon LR* 30 at 53; see also *Re 56 Denton Road, Twickenham* [1953] 1 Ch 51.

[67] (1991) 103 ALR 661 at 671.
[68] [2002] HCA 11 at 42; ALR 126.
[69] [2002] HCA 11 at [147]; ALR 152.
[70] [2002] HCA 1, Gleeson CJ at [5]; ALR 119.
[71] [1989] 2 SCR 848.
[72] [1989] 2 SCR 848 at 862.
[73] [1989] 2 SCR 848 at 863.
[74] [2002] HCA 11 at [8]; ALR 119.
[75] [2002] HCA 11 at [151]; ALR 154.
[76] (2000) 204 CLR 158.
[77] [2000] HCA 11 at 151; ALR 154.
[78] Section 476.
[79] Section 478(1).
[80] Section 485(1) and (3).
[81] [2002] HCA 11 at [59], [60]; ALR 131.
[82] [2002] HCA 11 at [153]; ALR 155.
[83] (1999) 197 CLR 510.
[84] [2002] HCA 11, Gleeson CJ at [8]; ALR 119; Gaudron and Gummow JJ at [44], [54]; ALR 127, 130.
[85] [2002] HCA 11 at [48]; ALR 128.
[86] [2002] HCA 11 at [13]; ALR 120.
[87] [2002] HCA 11 at [143]; ALR 151.
[88] [2002] HCA 11 at 150; ALR 153.
[89] [2002] HCA 11 at [103], [105]; ALR 142, 143.
[90] [2002] HCA 11 at [108]; ALR 143.
[91] [2002] HCA 11 at [110]; ALR 144.
[92] [2002] HCA 11 at [114] - [116]; ALR 145.
[93] *Minister for Immigration, Local Government and Ethnic Affairs v Kurtovic* (1990) 21 FCR 193 at 211; *Sloane v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 37 FCR 429 at 443; *Jayasinghe v Minister for Immigration and Ethnic Affairs and Another* (1997) 145 ALR 532 at 541.
[94] See E Campbell, "Revocation and Variation of Administrative Decisions" (1996) 22(1) *Mon LR* 30 at 57-63 for a detailed description of the reasons for conferring these powers and the consequences thereof.
[95] See for example the *Veterans Entitlement Act 1986* (Cth) s. 31 and s. 118ZP; the *Safety Rehabilitation and Compensation Act 1988* (Cth) s. 62.
[96] *Shipp v Herfords Pty Ltd* [1975] 1 NSWLR 412; E Campbell, op cit at 59-60; M Akehurst, "Revocation of Administrative Decisions" (1982) *PL* 613 at 625; A O Ginnow and L Fingerman (eds), "Administrative Law and Procedure: Rehearing, Modification, Costs and Fees" 73A *Corpus Juris Secundum* 151 at 152.
[97] *Pearce v City of Coburg* [1973] VR 583 at 587-588; E Campbell, op cit at 56; M Akehurst, op cit at 623.
[98] (1997) 150 ALR 76.
[99] E Campbell, op cit at 61; *R v Moodie and Others; Ex parte Mithen* (1977) 17 ALR 219.
[100] There are similar though not identical provisions to s33(3) in State and Territory legislation and in New Zealand, Canada and England legislation. The South Australian (*Acts Interpretation Act 1915* (SA) s39), English (*Interpretation Act 1978* (UK) s14) and Canadian (*Interpretation Act* (Canada) s4) provisions make it clear that the power to revoke or vary applies only to legislative instruments. The Queensland (*Acts Interpretation Act 1954* (Qld) s24AA), Victorian (*Interpretation of Legislation Act 1984* (Vic) s41A), New South Wales (*Interpretation Act 1987* (NSW) s43), Western Australia (*Interpretation Act 1984* (WA) s55), Northern Territory (*Interpretation Act* (NT) s43) and New Zealand (*Interpretation Act 1999* (NZ) ss13 and 15) provisions make it is clear that the power applies to both administrative and legislative instruments, although in the case of WA and NZ the power to revoke or vary can only be exercised where there is an error in the first exercise of the power. The NSW provision provides for the revocation or amendment of any administrative decision whether it is in writing or not. The ACT provision (Legislation Act 2001 (ACT) s180) applies to a power to make a decision which presumably includes a decision of an administrative nature. Only the Tasmanian (*Acts Interpretation Act 1931* (Tas) s22) provision appears to be as unclear as the Commonwealth one.
[101] (1993) 114 ALR 50.

[102] (1997) 141 FLR 414.
[103] (1990) 90 FCR 513; 161 ALR 53.
[104] (1999) 162 ALR 625.
[105] (2001) 110 IR 97.
[106] (1993) 114 ALR 50 at 59-63.
[107] (1978) 1 ALD 167.
[108] (1984) 54 ALR 541 at 557.
[109] (2002) 189 ALR 99.
[110] [2002] VSCA 108 (2 August 2002).
[111] (1978) 1 ALD 167.
[112] (1978) 1 ALD 167 at 172.
[113] (1979) 24 ALR 307.
[114] *Commonwealth Hansard,* House of Representatives, 19 March 1941, Volume 166, at 126-127.
[115] D C Pearce and R S Geddes, *Statutory Interpretation in Australia* (5th ed 2001) at 2.
[116] [2002] VSCA 108 at [52].
[117] (1984) 54 ALR 541 at 557.
[118] Sections 46(a) and 46(b) are now sections 46(1)(a) and 46(1)(b).
[119] D C Pearce and R S Geddes, *Statutory Interpretation in Australia* (5th ed 2001) at 90-93.
[120] Long title to the *Acts Interpretation Act*.
[121] (1999) 162 ALR 625 at 636.
[122] (1990) 92 ALR 93.
[123] (2000) 99 FCR 251.
[124] (1990) 92 ALR 93 at 112.
[125] (2000) 99 FCR 251 at 15, see also *Minister for Immigration and Multicultural Affairs v Bhardwaj* [1999] FCA 1806 (22 December 1999). In W Wade and C Forsyth, *Administrative Law* (7th ed 1994) at 261-262, the authors suggest that it is misleading to construe the English equivalent to s33(1) literally if the power under consideration is one which affects legal rights. The authors argue that courts will be inclined to hold a decision, validly made under such a power, irrevocable due to the importance accorded to finality.
[126] *Jayasinghe v Minister for Immigration and Ethnic Affairs* (1997) 145 ALR 532 at 541; *Sloane v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 37 FCR 429; *Leung v Minister for Immigration and Multicultural Affairs* (1997) 150 ALR 76, Heerey J at 77-79.
[127] (1993) 41 FCR 1 at 36-37, 115 ALR 14; see also *Jayasinghe v Minister for Immigration and Ethnic Affairs* (1997) 145 ALR 532 at 547.
[128] 2nd edition, 1992, at 367.
[129] (1992) 37 FCR 429 at 443
[130] R A MacDonald, "Reopenings, Rehearings and Reconsiderations in Administrative Law: *Re Lornex Mining Corporation and Bukwa"* (1979) 17(1) *Osgoode Hall LJ* 207 at 221; E H Shopler, "Power of administrative agencies to reopen and reconsider final decisions as affected by lack of specific statutory authority" 73 *ALR 2d* 939 at 941.
[131] *Re Scivitarro and Ministry of Human Resources* (1982) 134 DLR (3d) 521; see also *Re Brown and Acting Commissioner for Superannuation* (1981) 3 ALD 185; E Campbell, "Revocation and Variation of Administrative Decisions" (1996) 22(1) *Mon LR* 30 at 46-47.
[132] E Campbell, "Revocation and Variation of Administrative Decisions" (1996) 22(1) *Mon LR* 30 at 56-57; E H Shopler, "Power of administrative agencies to reopen and reconsider final decisions as affected by lack of specific statutory authority" 73 *ALR 2d* 939 at 956; see also R A MacDonald, "Reopenings, Rehearings and Reconsiderations in Administrative Law: *Re Lornex Mining Corporation and Bukwa"* (1979) 17(1) *Osgoode Hall LJ* 207 at 211-212; see also *Jayasinghe v Minister for Immigration and Ethnic Affairs* (1997) 145 ALR 532 at 547 in relation to a reference to "finally determined".
[133] (2000) 99 FCR 251 at [34] - [37].
[134] E H Shopler, "Power of administrative agencies to reopen and reconsider final decisions as affected by lack of specific statutory authority" 73 *ALR 2d* 939 at 952-953; see for example *Minister for Immigration, Local Government and Ethnic Affairs v Kurtovic* (1990) 21 FCR 193, where Neaves and Gummow JJ held that the power to make a deportation order once the conditions for such an order were satisfied was of a continuing nature.
[135] *Re 56 Denton Road, Twickenham* [1953] 1 Ch 51; *Rootkin v Kent County Council* [1981] 1 WLR 1186; see also M Akehurst, "Revocation of Administrative Decisions" (1982) *PL* 613.

[136] (2002) 189 ALR 99 at 107.
[137] (1984) 4 FCR 348 at 353; 59 ALR 359.
[138] *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2000) 99 FCR 251 at 265; see also *Minister for Immigration & Multicultural Affairs v Bhardwaj* [1999] FCA 1806 (22 December 1999), Madgwick J at [12].
[139] [2002] HCA 11 at [113] - [119]; 187 ALR 117 at 145-146.
[140] *Sloane v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 37 FCR 429; *Re Cotterell and Repatriation Commission* [2000] AATA 444; see also *Re Lornex Mining Corp Ltd and Bukwa* (1976) 69 DLR (3d) 705, where the British Columbia Supreme Court (Verchere J) held that the Human Rights Commission had the power to reconsider a matter because there was no right of appeal.
[141] (1992) 37 FCR 429 at 444.
[142] *Jayasinghe v Minister for Immigration and Ethnic Affairs* (1997) 145 ALR 532 at 547.
[143] See *Yilmaz v Minister for Immigration and Multicultural Affairs* (2000) 100 FCR 495.
[144] For example, s60 of the *Therapeutic Goods Act 1989* (Cth) provides that a person whose interests are affected by an initial decision may seek a review. It is unlikely that the decision maker's concerns would fall within that definition.
[145] [1999] FCA 1806 (22 December 1999).
[146] R A MacDonald, "Reopenings, Rehearings and Reconsiderations in Administrative Law: *Re Lornex Mining Corporation and Bukwa"* (1979) 17(1) *Osgoode Hall LJ* 207 at 223.
[147] (1988) 16 ALD 206 at 210.
[148] (1991) 103 ALR 661 at 671.
[149] (1997) 150 ALR 76 at 88.
[150] For criticisms of the concept of revocation by agreement, see S Lloyd, "The *Kawasaki Cases:* Validity of Administrative Orders, Natural Justice and Interest Payments" Newsletter (1992) No. 9 Administrative Review Council. See also *R v Hertfordshire County Council; ex parte Cheung,* 26 March 1986, TLR 4 April 1986.
[151] *R v Kensington and Chelsea Rent Tribunal; Ex parte McFarlane* [1974] 1 WLR 1486; *R v Hertfordshire County Council; Ex parte Cheung,* 26 March 1986, TLR 4 April 1986 (note that in this case the error of law came to light in a test case which showed that previous unlitigated cases were based on an erroneous view of the law).
[152] *R v Hertfordshire County Council; Ex parte Cheung,* 26 March 1986, TLR 4 April 1986.
[153] (1990) 21 FCR 193, 92 ALR 93.
[154] *Minister for Immigration, Local Government and Ethnic Affairs v Kurtovic* (1990) 21 FCR 193, Gummow J at 207-211.
[155] *Minister for Immigration, Local Government and Ethnic Affairs v Kurtovic* (1990) 21 FCR 193 at 214-216.
[156] A Abadee, "Keeping Government Accountable for its Promises: The Role of Administrative Law" (1998) 5 *AJ Admin L* 191 at197.
[157] (1990) 21 FCR 193 at 216-218.
[158] For a more detailed analysis of the doctrine of estoppel, see J Thomson, "Estoppel by Representation in Administrative Law" (1998) 26 *Fed L Rev* 83; for an American perspective see J F Rydstrom, "Modern Status of the Applicability of Doctrine of Estoppel Against Federal Government and its Agencies" 27 ALR FED 702.

WHEN MAY A DECISION MAKER REMAKE AN ADMINISTRATIVE DECISION

*Denis O'Brien**

Australian Institute of Administrative Law Seminar, Canberra, 10 October 2002.

Introduction

In the interpretation of statutory powers and duties there is a rule that, "unless the contrary intention appears, the power may be exercised and the duty shall be performed from time to time as occasion requires".[1] However, if the power is a power to determine questions affecting legal rights[2] or if the power is of "such a character that it is not exercisable from time to time and it will be spent by the taking of the steps or by the making of the statements or representations in question", [3] the courts have tended to say that the decision, if validly made, is irrevocable and cannot be remade.

The decision maker is said in these circumstances to be *functus officio.* The duty imposed on the decision maker to perform his or her function has been discharged so that nothing further remains to be done. This result is supported by the same arguments as support finality for the decisions of courts. Whether a decision maker is *functus* or whether, on the other hand, a particular decision can be remade depends on the statutory context. In *Minister for Immigration v Kurtovic*[4] the Full Court of the Federal Court held that the power conferred on the Minister to order the deportation of a non-citizen convicted of a serious criminal offence was not, on its proper construction, spent upon its initial exercise. As a result, the Minister could again order the deportation of a non-citizen whose previous deportation he had revoked.

The discussion so far has concerned situations where the original decision was validly made. But what if the original decision was not validly made? Can such a decision be remade? There is a line of cases, of which *Minister for Immigration and Multicultural Affairs v Bhardwaj*[5] is the most recent, which indicate that it can.

In *Comptroller - General of Customs v Kawasaski Motors Pty Ltd*,[6] Beaumont J said:

> Some administrative decisions once communicated may be irrevocable. But where it appears to a decision-maker that his or her decision has proceeded upon a wrong factual basis or has acted in excess of power, it is appropriate, proper and necessary that the decision-maker withdraw his or her decision. [7]

That was a case in which the decision to revoke a Commercial Tariff Concession Order was made with the consent of the party directly affected.

In *Leung v Minister for Immigration and Multicultural Affairs*[8] Finkelstein J said:

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> But what if the decision is invalid? Can the decision be ignored if the consent of all interested parties is obtained or is there some other principle that governs the situation? In my opinion, the true principle is this. To ignore an invalid decision is not to revoke it. It is merely to recognise that that which purports to be a decision does not have that character. To decide that matter again is not a reconsideration of it. It is in fact the original exercise of the power to make the decision. Hence, the rule embodied in the expression "functus officio" has no application to such a case. Nor is there any need to find either an express or an implicit power of reconsideration. Those doctrines, to the extent that they are applicable to administrative decision-making, only apply to validly made administrative decisions.[9]

Leung's case concerned the power of the Minister to revoke a grant of Australian citizenship after it was discovered false representations had been made in the application for citizenship. The revoking of a favourable decision, such as was involved in that case, will clearly be controversial.

Against that background the recent decision of the High Court in *Bhardwaj* is now considered.

Facts in *Bhardwaj*

A delegate of the Minister cancelled Bhardwaj's student visa. Bhardwaj applied to the Immigration Review Tribunal (IRT) for a review of the decision. The IRT invited him to attend a hearing before it on 15 September 1998. Late in the afternoon of 14 September 1998 the IRT received from Bhardwaj's agent a letter stating that his client was ill and requesting an adjournment.

By an administrative oversight, the letter did not come to the attention of the IRT. It dealt with the matter adversely to Bhardwaj and notified him and his agent on 17 September 1998 (September decision). The reason given for the decision was that Bhardwaj had not provided any information which suggested that the cancellation of his visa was unfair or inappropriate.

Once Bhardwaj's agent was informed of the decision, he drew the IRT's attention to the earlier letter. As a result, a new hearing date was arranged. On 22 October 1998 the IRT published a decision revoking the cancellation of the visa (October decision).

The Minister brought proceedings in the Federal Court seeking to have the October decision set aside on the ground that the IRT "had previously made a decision in respect of the same application and was *functus officio*". The Minister's application failed before Justice Madgwick. The Minister's subsequent appeal to the Full Court of the Federal Court was dismissed.

Decision of the High Court

The High Court (by majority) (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ, Kirby J dissenting) also dismissed the Minister's appeal.

Relying on a statement made by Lord Reid in *Ridge v Baldwin*,[10] Gleeson CJ said that there is nothing in the nature of an administrative decision which requires the conclusion that a power to make a decision, once purportedly exercised, is necessarily spent. However, he said that that general proposition must yield to the legislation under which a decision maker is acting. Furthermore, the requirements of good administration and the need for people affected by decisions to know where they stand, mean that finality is a powerful consideration.

His Honour observed that, in the present case, the *Migration Act* provided for judicial review of the IRT's decisions, albeit within a closely confined structure. However, in circumstances where the IRT had not only failed to accord procedural fairness, but had also failed to perform the function conferred on it of conducting a review, it was not inconsistent with the statutory

scheme for the IRT to give Bhardwaj the opportunity to appear and give evidence and present argument.

Gaudron and Gummow JJ said that the failure of the IRT to give Bhardwaj a reasonable opportunity to present evidence and argument had the consequence that the IRT had not conducted a review as required by the Act; it had failed to exercise jurisdiction.

Their Honours said that it was unhelpful to describe erroneous administrative decisions as void, voidable, invalid, vitiated or even as nullities. The real issue was whether the rights and liabilities of the individual to whom the decision related were as specified in that decision. A decision that involves jurisdictional error is a decision that lacks legal foundation and is properly regarded, in law, as no decision at all. In their Honours' view, once that was accepted, it followed that, if the duty of the decision-maker was to make a decision with respect to a person's rights but, because of jurisdictional error, the decision-maker proceeded to make what was, in law, no decision at all, then, in law, the duty to make a decision remained unperformed. Their Honours concluded that there was nothing in the *Migration Act*, and no implication to be drawn from the terms of the Act, which purported to give any legal effect to decisions of the IRT which involved jurisdictional error.

McHugh J agreed with Gaudron and Gummow JJ that the IRT was authorised to make the October decision because its September decision was of no force or effect by reason of jurisdictional error.

Hayne J agreed that the error committed by the IRT in reaching its September decision was a jurisdictional error. What the IRT did was not authorised by the Act and did not constitute the performance of its duty under the Act. He said that a jurisdictional error of the kind made by the IRT was fundamentally different from a case where, for whatever reason, a decision-maker had second thoughts about such matters as findings of fact. Once it was recognised that, in the September decision, the IRT had not performed the duty imposed on it (namely to review in accordance with the statutory procedures, including allowing the respondent to be heard), it was clear that not only was there no bar to the IRT completing its task by the steps it took in October, it was duty bound to do so.

The judgment of Callinan J was to similar effect.

Kirby J dissent

In his dissenting judgment, Kirby J said that the language of the *Migration Act* made it impossible to postulate a residual power of the IRT to revoke an earlier decision that formally complied with the Act. The Act made it quite clear that, if there were any defects in a decision of the IRT, the remedy was through the Federal Court judicial review mechanism, for which the Act provided.

His Honour also referred to administrative practicalities. If a decision unfavourable to an applicant could be ignored, or treated as provisional by the IRT or anyone else on the ground that it was not really a “decision”, a favourable decision could equally be left uncertain. The result would be confusion or even chaos in the administration of the Act.

Implications of *Bhardwaj*

One cannot help but feel that the decision of the High Court in *Bhardwaj* may have been influenced by the fact that, under the truncated judicial review regime applying under the *Migration Act,* the Federal Court is denied the power to set aside a decision of the IRT on the ground of denial of procedural fairness. The decision may reflect the High Court's continuing

concern with the review regime applying in the migration area. One may speculate whether or not the result would have been the same if the original decision had been made by a decision-maker whose decisions were subject to judicial review in the ordinary way.

Be that as it may, the case stands squarely for the proposition that, if a jurisdictional error has been made in the making of a decision, eg, the decision-maker has exceeded his or her power or has breached the rules of procedural fairness, the decision may be remade because it was, in law, not a decision at all.

Is the case likely to lead to agency decision-makers being placed under greater pressure to change decisions which persons affected argue to be wrong in some way? Perhaps, although one could expect that, if an agency considers its decision to be correct, it will stand firm, requiring disaffected persons to exercise their right to seek review on the merits (if such a right exists) or judicial review in the Federal Court. One can imagine decision-makers being somewhat reluctant to assume the mantle of the judicial branch and make decisions about whether a particular decision was legally invalid.

In my view, the *Leung* case has the potential to be more troubling than *Bhardwaj*, suggesting as it does the possibility of agencies exercising an implied power to revoke favourable administrative decisions. It would be far more satisfactory and less productive of administrative uncertainty if a power to revoke or cancel were only exercised pursuant to statutory authority where the conditions for the exercise of the power were specifically set out.

Conclusion

Following the decision in *Bhardwaj,* it would seem that, regardless of the effect of section 33(1) of the *Acts Interpretation Act* 1901, a power to reconsider an administrative decision can be implied if the decision is invalid because:

- it has proceeded upon a wrong factual basis (*Comptroller-General of Customs v Kawasaki Motors Pty Ltd*); or
- the decision was infected with jurisdictional error, whether as a result of a failure to accord procedural fairness or otherwise (*Leung* and *Bhardwaj*).

These circumstances do not involve invocation of the doctrine of *functus officio* because the decision was not in fact a decision at all.

Endnotes

1 See, eg, *Acts Interpretation Act* 1901 (Cth), s33(1)
2 *Re 56 Denton Road, Twickenham* [1953] 1 Ch 51
3 *Minister for Immigration v Kurtovic* (1990) 92 ALR 93 per Gummow J at 112
4 (1990) 92 ALR 93
5 (2002) 187 ALR 117
6 (1991) 103 ALR 661
7 At 667
8 (1997) 150 ALR 76
9 At 88
10 [1964] AC 40 at 79

PARLIAMENTARY PRIVILEGE RULES, UK?

Stephen Argument*

Introduction

While it is a well-established and fundamental principle in Australia, parliamentary privilege is often criticised, usually in situations where it has arguably been abused by the parliamentarians who rely on it. In a recent UK case, the principle has been challenged on the basis of its alleged incompatibility with the rights and freedoms of individuals.

In late December 2002, the European Court of Human Rights (ECHR) handed down its decision in *Case of A v The United Kingdom*,[1] in which a UK citizen argued that the absolute immunity afforded to UK parliamentarians by parliamentary privilege was a breach of her rights and freedoms under the European Convention for the Protection of Human Rights and Fundamental Freedoms (the Convention). Among other things, the applicant, "A", argued that the immunity prevented her from taking legal action in respect of statements made about her in Parliament, in violation of her right of access to court under Article 6.1 of the Convention and her right to privacy under Article 8 of the Convention, as well as discriminating against her contrary to Article 14 of the Convention.

The ECHR ruled against A.

The facts

A lived with her two children in a house owned by the local housing association. The house was in the parliamentary constituency of Mr Michael Stern MP. In mid-1996, Mr Stern initiated a debate in the House of Commons on the subject of municipal housing policy and, in particular, on the performance of the local housing authority that owned A's house. In the course of his speech, Mr Stern referred specifically to A several times, giving her name and address and referring to members of her family. He suggested that A was "the neighbour from hell", implying that the incidence of burglary, drug crimes, vandalism, violence and other crimes in the area had increased since A and her family had moved in. He also stated that A's brother was currently in prison and had given A's address as his permanent address.

Shortly before the debate, Mr Stern issued a press release to several newspapers, subject to an embargo prohibiting disclosure until the precise time when his speech commenced. The contents of the press release were substantially the same as those of his speech. Both local and national newspapers carried articles the following day, consisting of purported extracts of the speech (although these were based upon the press release). The articles included photographs of A and mentioned her name and address. The main headline in one was “MP Attacks ‘Neighbours From Hell’” and, in another, “MP names nightmare neighbour”.

A was approached by journalists and television reporters asking for her response to Mr Stern’s allegations. Her comments were summarised in each newspaper the same day,

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although they were not given as much prominence. A subsequently received hate-mail addressed to her at the address. She was also stopped in the street, spat at and abused by strangers as “the neighbour from hell”. Eventually, A had to be re-housed and her children had to change schools.

A denied the truth of the majority of the allegations. At no point did Mr Stern ever try to communicate with her regarding the complaints made about her by her neighbours, nor did he ever attempt to verify the accuracy of his comments, either before or after the parliamentary debate.

Parliamentary privilege

A's only avenue of complaint was, through Mr Stern, to the Speaker of the House. The Speaker's representative advised A that Mr Stern’s remarks were protected by absolute parliamentary privilege, pointing out that "[s]ubject to the rules of order in debate, Members may state whatever they think fit in debate, however offensive it may be to the feelings or injurious to the character of individuals, and they are protected by this privilege from any action for libel, as well as from any other molestation." In short, A had no right of legal redress against Mr Stern, as he was absolutely protected by parliamentary privilege.

The relevant privilege emanates from Article 9 of the *Bill of Rights 1688*,[2] which states:

> ... the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament.

The effect of the privilege was described in 1869, by Lord Chief Justice Cockburn, as follows:

> It is clear that statements made by Members of either House of Parliament in their places in the House, though they might be untrue to their knowledge, could not be made the foundation of civil or criminal proceedings, however injurious they might be to the interest of a third party.[3]

The law in the various Australian jurisdictions is essentially identical and also relies on Article 9,[4] though its operation in the Commonwealth sphere is also spelt out in the *Parliamentary Privileges Act 1987*.

What the Court found

The ECHR ruled that parliamentary privilege was an "essential constitutional principle", stating that it was "of utmost importance that there should be a national public forum where all manner of persons, irrespective of their power or wealth, can be criticised". It found that Members should not be exposed to the risk of being brought before the courts to defend what they said in the Parliament. The ECHR noted that similar principles applied in various other European Union jurisdictions.

Qualified privilege operated to protect any press coverage of the parliamentary debate, as long as the coverage accurately reflected what had occurred in the Parliament and as long as the publishers did not act maliciously.

In relation to the possibility that the privilege might be abused, the ECHR ruled that abuse of the privilege was a matter for internal self-regulation by the Parliament, not a matter for investigation and regulation by the courts.

The ECHR noted that the Speaker of each of the UK Houses of Parliament exercised control over debates and that each House had its own mechanisms for disciplining Members who deliberately made false statements in the course of debates. The Court noted that deliberately misleading statements are punishable by Parliament as a contempt. It also noted the existence of other avenues for a person to have corrected remarks made about him or her in the Parliament, such as petitioning the relevant House, through a Member.

Third party interventions were made in the case on behalf of the Austrian, Belgian, Dutch, Finnish, French, Irish, Italian and Norwegian governments. The ECHR concluded that the privilege available to parliamentarians in the UK was "consistent" with that available in other European states. Indeed, the Court found that the privilege available in the UK was, in fact, narrower than that available in some states, in that the privilege did not extend beyond statements made in the course of parliamentary proceedings.[5]

In the final analysis, the ECHR found that parliamentary privilege was of fundamental importance to the operation of the Parliament and that the disadvantage that it imposed on individuals was not disproportionate to that fundamental importance.[6] The Court conceded that the allegations against A were "extremely serious and clearly unnecessary in the context of a debate about municipal housing policy", noting that the repeated references to A's name and address were "particularly regrettable".[7] It concluded, however, that using the circumstances of a particular case to create exceptions to the immunity would "seriously undermine the legitimate aims pursued" by the immunity.[8] On that basis, A's claim failed.

A lone voice in dissent

Judge Loucaides, from Cyprus, was a lone dissenter in the matter. In disagreeing with the majority, His Honour stated:

> I believe that, as in the case of the freedom of the press, there should be a proper balance between freedom of speech in Parliament and protection of the reputation of individuals.

He noted that while the absolute privilege of parliamentarians had an ancient history, it was established when the legal protection of the personality of the individual was in its infancy and therefore extremely limited. While the latter had been greatly enhanced in the intervening period, the former had not. The implication is that parliamentary privilege has not developed with the times.

Judge Loucaides found that a balance needed to be achieved between the 2 competing principles, pointing to the balance that had to be achieved in the United States to ensure that the constitutional guarantee of freedom of speech was not allowed to become "a licence to defame" or "an obvious blueprint for character assassination".[9]

His Honour found that, on the facts of the present case, the absolute immunity was a **dis**proportionate restriction of A's right to access to a court, noting the following:

- the fact that the defamatory allegations, in which the applicant was named and her address identified, were (as the majority had found) "clearly unnecessary in the context of a debate about municipal housing policy";

- the severity of the defamatory allegations;

- the foreseeable harsh consequences for the applicant and her family, including even the publication of the photographs of the applicant and her children ;

- the (lack of) reaction of the MP to the letter from the applicant;
- the fact that the MP has never tried to verify the accuracy of his defamatory allegations and did not give the applicant an opportunity to comment on them before uttering them;

- the lack of any effective alternative remedies.

Judge Loucaides indicated that, even without these factors, he would support the view that the immunity was a disproportionate restriction on the right of access to a court because of its absolute nature, which precluded the balancing of competing interests.

In relation to the reference to similar privileges operating in other European states, His Honour noted that, in the majority, the privilege was not absolute, either because it did not apply to defamatory statements or because it could be lifted. He noted that, in the case of the Council of Europe, it could be waived by the country concerned.

What about Australia?

As already indicated, the law in Australia is much the same. The only difference is the existence in some Australian jurisdictions of mechanisms by which persons mentioned in parliamentary proceedings can seek to respond to incorrect or adverse statements made about them. As discussed in a recent newspaper article,[10] however, those mechanisms operate with differing levels of "success". As noted in that article, while the rights of redress are relatively accessible in the Senate, no-one has yet managed to make use of them in the House of Representatives.

The other issue is whether an Australian court would so readily have applied the immunity in this particular fact situation. Under the *Parliamentary Privileges Act 1987*, the privilege operates in relation to "proceedings in Parliament". That term is defined in subsection 16(2) of the Act as:

> all words spoken and acts done in the course of, or for purposes of or incidental to, the transacting of the business of a House or of a committee, and, without limiting the generality of the foregoing, includes:
>
> (a) the giving of evidence before a House or a committee, and evidence so given;
>
> (b) the presentation or submission of a document to a House or a committee;
>
> (c) the preparation of a document for purposes of or incidental to the transacting of any such business; and

(d) the formulation, making or publication of a document, including a report, by or pursuant to an order of a House or a committee and the document so formulated, made or published.

While the privilege in the UK operates on the same concept (albeit that there is no legislated definition of the term), there is no indication in the judgment that the ECHR considered whether the privilege properly applied in this instance, given the acceptance that the newspapers prepared their reports on the basis of the embargoed press release, rather than what Mr Stern actually said in the House. There is surely a real issue as to whether the privilege extended to the press release. One would hope that, in a similar situation, an Australian court would be more rigorous in considering this issue.[11]

Those issues aside, as recent incidences have shown, parliamentary privilege is just as powerful a protection in Australia as it is in the UK. The ECHR has found that even the rights and freedoms given to European citizens by the Convention do not operate to threaten the protection afforded to parliamentarians. There are no such rights and freedoms available to Australian citizens, so it would appear that the privilege is impregnable here.

Endnotes

1 Available at www.echr.coe.int/Eng/Judgments.htm

2 Often referred to as the *Bill of Rights* ***1689***, with the explanation being that at the time the Act was passed, the Christian dating system began its years at Easter and the Julian Calendar was in use, which meant February was at the end of the year 1688. In 1752 Britain adopted the New Style Gregorian calendar and the beginning of the year was re-set at 1st January. This caused February at the end of 1688 (in the old dating system) to become February at the *beginning* of 1689 (in the new dating system). This is an explanation for the dating of the *Bill of Rights* as either 1688 or 1689. As the Commonwealth *Parliamentary Privileges Act 1987* refers to the *Bill of Rights 1688*, this article uses that version.

3 *Ex parte Watson* (1869) QB 573 at 576.

4 See Campbell, E, "Parliamentary privilege and judicial review of administrative action", (2001) 29 *AIAL Forum* 24 at 29 (note 1).

5 See paras 37-57 and 84-5 of the judgment.

6 See para 83 of the judgment.

7 Para 88 of the judgment.

8 Ibid.

9 Referring to the US decision of *Philadelphia Newspapers Inc v Hepps*, 89 L Ed 2d 783 (1986).

10 A Ramsey, "Getting the House in order for Christmas", *Sydney Morning Herald*, 21 December 2002, p 25.

11 There is a deal of discussion of this issue in various Australian decisions. Unfortunately, the authorities are (with respect) largely unhelpful in terms of assisting in working out just how far the term "proceedings in Parliament" extends. A recent decision that discusses some of these authorities is *In the matter of the Board of Inquiry into Disability Services* [2002] ACTSC 28 (10 April 2002).

ADMINISTRATIVE REVIEW COUNCIL

Emeritus Professor Dennis Pearce AO*

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Establishment of the Council

The exercise of some means of control over the decisions of the executive that affect citizens, whether that executive be a King, a dictator or an elected government, has been a major pre-occupation of all societies throughout the ages. It was as a means of effecting some control over the Commonwealth executive that the administrative review system was adopted in the 1970s.

The Administrative Review Council (the "ARC") was established as a key element in that system. It has played an important role in the development and maintenance of the system as a check on the unchallenged exercise of executive power. At the 25 year mark in its history, the ARC is facing increasing pressure from the executive that would constrain its activities – as indeed is the whole administrative review system. It is appropriate at this time to look back across the life of the Council to see what it has achieved. But more importantly, it is necessary to consider where it is going and what role it should play in the future.

The Administrative Review Council was constituted on 11 November 1976 and first met on 15 December 1976. The functions of the Council are set out in s51 of the *Administrative Appeals Tribunal Act 1975* (the "AAT Act") which presently reads:

> (1) The functions of the Council are:
>
> (aa) to keep the Commonwealth administrative law system under review, monitor developments in administrative law and recommend to the Minister improvements that might be made to the system; and
>
> (ab) to inquire into the adequacy of the procedures used by authorities of the Commonwealth and other persons who exercise administrative discretions or make administrative decisions, and consult with and advise them about those procedures, for the purpose of ensuring that the discretions are exercised, or the decisions are made, in a just and equitable manner; and
>
> (a) to ascertain, and keep under review, the classes of administrative decisions that are not the subject of review by a court, tribunal or other body; and
>
> (b) to make recommendations to the Minister as to whether any of those classes of decisions should be the subject of review by a court, tribunal or other body and, if so, as to the appropriate court, tribunal or other body to make that review; and

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(c) to inquire into the adequacy of the law and practice relating to the review by courts of administrative decisions and to make recommendations to the Minister as to any improvements that might be made in that law or practice; and

(d) to inquire into:

(i) the qualification required for membership of authorities of the Commonwealth, and the qualifications required by other persons, engaged in the review of administrative decisions; and

(ii) the extent of the jurisdiction to review administrative decisions that is conferred on those authorities and other persons; and

(iii) the adequacy of the procedures used by those authorities and other persons in the exercise of that jurisdiction;

and to consult with and advise those authorities and other persons about the procedures used by them as mentioned in subparagraph (iii) and recommend to the Minister any improvements that might be made in respect of any of the matters referred to in subparagraphs (i), (ii) and (iii); and

(e) to make recommendations to the Minister as to the manner in which tribunals engaged in the review of administrative decisions should be constituted; and

(f) to make recommendations to the Minister as to the desirability of administrative decisions that are the subject of review by tribunals other than the Administrative Appeals Tribunal being made the subject of review by the Administrative Appeals Tribunal; and

(g) to facilitate the training of members of authorities of the Commonwealth and other persons in exercising administrative discretions or making administrative decisions; and

(h) to promote knowledge about the Commonwealth administrative law system; and

(i) to consider, and report to the Minister on, matters referred to the Council by the Minister.

(2) The Council may do all things necessary or convenient to be done for or in connexion with the performance of its functions.

(3) If the Council holds an inquiry, or gives any advice, referred to in paragraph (1)(ab), the Council must give the Minister a copy of any findings made by the Council in the inquiry or a copy of the advice, as the case may be.

It can be seen that this is a wide remit that embraces all aspects of review of government decisions and leaves it open for the Council to look into the full range of decision-making processes.

The three principal documents concerned with the establishment of the Council can be seen as predictive of its future life. The need for a council was recommended as part of the administrative review package proposed by the Commonwealth Administrative Review Committee (the "Kerr Committee") in its report of August 1971. The Kerr Committee recommended "that there should be a small permanent Administrative Review Council (the "ARC") which would carry on continuous research into discretionary powers with special reference to the desirability of subjecting their exercise to tribunal review, either in a specialist or

the general review tribunal [which the Committee had recommended be established]."[1] The Kerr Committee believed that the ARC should have senior administrative officials among its number in addition to lawyers and that there should be one member with either broad political experience or experience in the study of administrative law.[2]

The Committee saw the ARC as performing functions similar to those of the Council on Tribunals in the United Kingdom but having additional functions relating to making recommendations as to the administrative discretions which should be the subject of procedures for tribunal review, and whether such discretions should be reviewable by specialist tribunals or by the general review tribunal.[3] It was also proposed that the Council should consider the appropriateness of the inclusion of privative clauses in Commonwealth legislation and make reports from time-to-time to the Attorney-General.[4]

The Kerr Committee was clearly influenced in its recommendation for the establishment of an ARC by the experience in the United Kingdom of the Council on Tribunals. This body, which is still in existence, has as its task the general oversight of tribunals, including their procedures, membership, and performance. Complaints about the operation of tribunals can be taken to the Council. The Kerr Committee recommendations had the ARC proceeding in a somewhat different direction in that its principal task was to determine the range of matters that ought to be subject to tribunal review rather than monitoring the tribunals themselves.

It is important to put the work of the Kerr Committee in its context. The Committee had adopted as a basic premise that the exercise of discretion by a government agency should be subject to external review. At the time of the Kerr Committee, the only way to seek a review of the vast majority of government decisions was by means of judicial remedies or parliamentary oversight. The Kerr Committee quite rightly considered that the former were out of reach of most persons affected by government decisions and the latter was ineffectual. It was to overcome this position that the Committee recommended that tribunal review be extended and judicial review simplified. To give effect to the first proposal, it was first necessary to identify the decisions suitable for external review. The Kerr Committee considered that it was unable to identify these decisions and that this should be the task of the proposed ARC.

The response of the Government to the Kerr Committee's proposals relating to external review of government decisions was to appoint a committee called the Committee on Administrative Discretions (the "Bland Committee") to identify the decisions that ought to be subject to review by a tribunal. This Committee reported in October 1973.[5] It tried to identify every discretionary decision provided for in Commonwealth legislation and consider whether it was appropriate for external review. However, significant among the Bland Committee's recommendations was that it had in large measure done what the Kerr Committee proposed should be undertaken by the ARC and that there was no need for such a body. [6]

It is of relevance to note that the Kerr Committee comprised all lawyers, only one of whom had a connection with government. The Bland Committee comprised a majority of public servants.

Legislation to give effect to the first element of the review package, the establishment of the Administrative Appeals Tribunal, was introduced into the Parliament in 1975. The AAT Bill contained no provisions relating to the ARC. However, the Opposition indicated that it supported the establishment of an ARC. The Government bowed to this pressure and an amendment to the AAT Bill was introduced in the Senate to establish the ARC. The Minister representing the Attorney-General, Senator James McLelland, said:

> …the Council would exercise important functions in advising on developments that should be made from time to time in the area of administrative decision-making and the review of those decisions. The members of the Council will be appointed both from officials concerned in these matters and from other persons able to contribute to the work of the Council. It will be an important means of ensuring that the citizens' rights to the review of administrative decisions develop along with changes in this area of the law.

The AAT Bill, with the inclusion of Part V establishing the Council and setting out its functions, powers and membership, was assented to on 28 August 1975 and commenced on 1 July 1976. The provisions of the Act relating to the Council have been refined since then but the general concept of the Council as provided for in 1975 has continued unchanged.

At its first meeting, the Attorney-General, Mr R J Ellicott QC, who had been a member of the Kerr Committee, said:

> It is important that this Council be seen by the public as the expert body designed to be a watchdog for the citizen, to ensure our system is as effective and as significant in its protection of the citizen as it can be.[7]

As can be seen from this brief summary, the support for the establishment of the Council came from lawyers and parliamentarians. Opposition to such a body came from the Executive. This has largely been the story of the Council ever since.

Senate Committee Review of the Council

Before looking at the Council in detail it is pertinent to mention the review of the Council that occurred in 1996-97 as it impinges on the operations and work of the Council.

Following a suggestion from the Attorney-General, the Honourable Daryl Williams, the Senate in September 1996 referred to the Senate Legal and Constitutional Legislation Committee a general review of the Council with particular reference to:

- the benefits of having a separate and permanent administrative law advisory body;
- the membership structure of the ARC;
- the functions and powers of the ARC;
- the effectiveness of the ARC in performing its functions and any obstacles to that effectiveness;
- the need for any amendment to Part V of *the Administrative Appeals Tribunal Act 1977* (the "AAT Act").

The Committee reported in June 1997.[8] Its conclusions and recommendations were, in general, most favourable to the ARC. All its recommendations except one were subsequently accepted by the Government and amendments were made in 1999 to the AAT Act to give effect to those recommendations that required legislative intervention for them to be carried out. The recommendations of the Senate Committee are dealt with at the appropriate points in the discussion which follows.

It is worth observing, as a general comment, that the review seems to have been a fairly gentle one, perhaps stemming from the fact that the majority of members of the Legal and Constitutional Committee are lawyers. Only one genuinely critical submission was received by the Committee and that, interestingly, was from a practising barrister. His criticisms were directed to the administrative review system rather than the Council itself. All the non-institutional submissions were from lawyers and they were generally commendatory of the Council.

It is interesting to compare this review with that conducted by the Senate Standing Committee on Finance and Public Administration in 1991 of the Office of the Commonwealth Ombudsman.[9] The members of that Committee set out to be highly critical of the Office. However, somewhat reluctantly, they were obliged to concede that the Ombudsman was doing a very good job within the limits of funding made available to it. It would have been interesting to see what a committee less sympathetic to the concept of administrative review would have said of the Council. Perhaps the choice of committee is a reflection on the comparative impact that the Ombudsman and the Council have on the government.

The most obvious absence from the Legal and Constitutional Committees' recommendations relating to the Council was that of the need for an increase in funding. Since the date of the Committee's report, the Council's resources have been cut. It is fairly clear from the Committee report that this was not expected nor was it assumed that the Council would do less than it had been doing. The unstated assumption is that its resourcing would continue at its then current level. The absence of this issue being addressed has not been of assistance to the Council. (Again this was in contrast with the report on the Ombudsman which did recommend greater resources be provided to the Office: a recommendation implemented by the Government.)

Structure of the Council

The Council comprises part-time members supported by a small secretariat. From its commencement in 1976 until November 1979, the President of the AAT was also President (at that time called Chairman) of the ARC. The legislation was amended in 1979 to provide for the appointment of a separate Chairman. This was a significant but essential change in distancing the Council from the operation of the AAT as the interests of the Council and the AAT do not necessarily always coincide. The change also recognised that the increasing workload of the AAT did not allow its President sufficient time to further the work and interests of the ARC. However, the President of the AAT was retained as a member of the Council, an issue which is returned to below.

The Council has had six leaders since its establishment:

- Justice Gerard Brennan (then President of the AAT 1976 – 1979)
- Ernest Tucker (Company Director and business man) 1979 – 1987
- Professor Cheryl Saunders (Legal academic) 1987 – 1993
- Dr Susan Kenny (Practising barrister) 1993 – 1995
- Professor Marcia Neave (Legal academic) 1995 – 1999
- Bettie McNee (Commercial lawyer) 1999 – the present.

While the President of the Tribunal is a part-time position, performance of the role requires a significant commitment of time from the incumbent. The President has a considerable effect on the nature of the work of the Council and its relationship with government. The selection of the projects to be undertaken by the Council and the form and content of reports are heavily influenced by the President's choice and this has had an impact on the matters dealt with in the Council's reports.

The second significant internal factor that has impacted on the work of the Council has been the nature of the support secretariat provided to the Council. By 1980 a secretariat of six full-time positions had been established led by Dr Graham Taylor who was designated Director of Research and was a Senior Executive Service level officer.[10] The first three Directors were academics at the time of their appointment. The philosophy underlying the formative years of the administrative review system and affecting its later development was influenced by those appointments. Subsequent Directors have (except in one instance) all come from the public service, thereby establishing a pattern of greater executive influence in the Council, an issue returned to below.

The Fifth Annual Report (1980-81) of the Council noted, "the Council is a relatively new organisation and its secretariat has not yet developed to the point where its size is adequate to ensure continuity and stability of operations." In fact, the personnel establishment of the secretariat remained around this figure for many years. There seemed always to be difficulty in holding members for an extended period, largely because the secretariat is not regarded as part of the mainstream of the public service. Nonetheless, a number of very able and creative persons have spent periods at the Council secretariat and have contributed at a high level to the work of the Council. However, in 1998/1999 the size of the secretariat fell to only four, including an administrative officer.

Another subtle change, which might not be thought to have any great significance, but which is nonetheless indicative of the view taken of the status of the Council, was the decision in 1998 to require the Council to operate from the same premises as the Attorney-General's Department. At the time of the establishment of the Council, it was thought appropriate that it should operate from premises outside the Attorney-General's Department to indicate that it was a body that functioned independently of government. Financial constraints on the Department resulted in the abandonment of this principle and the removal of the Council to offices in the Department. Appearances are important and this action, as with the reduction in resources available to the Council, and the Director of Research becoming a de facto public service position, are indicative of a desire on the part of the executive to reduce the status of the Council and to include it within the general ambit of government activities.

Membership

The Kerr Committee said that the ARC should contain senior administrative officials in addition to lawyers in its membership. The body that ultimately came into being followed a somewhat different format.[11] It contains three ex-officio members – the President of the AAT, the Commonwealth Ombudsman and the President of the Australian Law Reform Commission (the "ALRC"). When first established, the legislation provided that the Council was to comprise not less than three and no more than seven other members. This provision was amended in 1977 to provide for a possible ten other members.

The qualification for membership is phrased in a somewhat curious negative fashion: that a person should not be appointed as a member "unless he or she has had extensive experience at a high level in industry, commerce, public administration, industrial relations, the practice of a

profession or the service of a government or of an authority of a government or has an extensive knowledge of administrative law or public administration". This qualification was expanded in 1999 as a result of a recommendation of the Senate Committee to provide an additional qualification for appointment that the person "has had direct experience, and has direct knowledge, of the needs of people, or groups of people, significantly affected by government decisions".

The first Council, apart from the ex-officio members, comprised four senior public servants, a barrister, an academic and a business man. On the second Council there were eight appointed members comprising four public servants, two businessmen, a barrister and the President of the RSL.

By 1988/1989, during which the Council held its 100th meeting, the mix was four public servants, two business representatives, one industrial relations specialist, one lawyer and one person with a background in law and social welfare.

The present Council presents a rather different structure. Its appointed members comprise two Commonwealth public servants, one state public servant, two barristers, one legal academic and the President who has primarily a legal background but also a familiarity with business.

While there is an overlap of skills and backgrounds in the categories, the membership of the Council since its establishment can be classified as follows:

- Public servants 23 (including 8 with legal background)
- Lawyers 14 (including 5 legal academics)
- Business 8
- Industrial relations 5 (including 1 academic)
- Academics: non-legal 4
- Welfare sector 2 (including 1 lawyer)
- RSL 1

The Secretary of the Attorney-General's Department has always been appointed as a member of the Council since its establishment thus creating what amounts to a further ex-officio member and reducing the available number of places for appointed members.

It can be seen that the Council has brought together a range of skills. However, its membership has been dominated by public servants and lawyers. Users of the system in the sense of persons likely to seek review of government decisions have been under represented, particularly in respect of the welfare sector. It was this deficiency that led to the amendment of s50 of the AAT Act in 1999 to allow appointment of persons who have direct knowledge of a sector affected by government decisions. Regrettably the power to make such an appointment has not yet been exercised.

The industrial relations sector has limited synergy with the administrative law system and it would appear to have been over represented in terms of members. This has apparently been recognised and there has been no appointee from this sector since 1996.

Members are appointed for 3 years and most serve one term. The figures on reappointments are interesting. Nineteen of the 57 persons appointed to the Council have been reappointed for a second term. Nine of the 23 public servants have had their office continued; 4 of the 8 business representatives; but only 3 of the 14 lawyers. Extended familiarity with the work of an organisation usually increases a member's influence. The ability of the public service members of the Council to have had this influence is manifested by these statistics.

The position of the senior public servants who have played a substantial role as members of the Council is an interesting one. There is no doubt that some came with the intention of being critical of the work of the Council and stayed to be its supporters. Others came not supportive and remained that way. When proposals impinged directly on the operation of the department from which the member was drawn, the reluctance to endorse proposed review mechanisms increased. While the presence of senior public servants almost certainly acted, from time-to-time, as a brake on what the Council recommended, it also brought clearly to Council members' attention, the likely response that the government would give to a recommendation. Regrettably, the endorsement of recommendations by senior public servants as members of the Council has not guaranteed that the recommendations would be accepted by the government and given effect. Nonetheless, the fact that a senior colleague was prepared to endorse a proposal served to give it much more clout than would have been the case if the recommendation came from persons who could be denigrated as unaware of the impact that their recommendation would have on the management of the public service.

However, the powerful influence of the executive through its membership of the Council has almost certainly resulted in the Council's reports and recommendations leaning towards the interests of the government. This has been exacerbated by the minimal voice given to users of the review system through Council membership. This is perhaps reflected in the fact that only 9 of the Council's 44 reports have been concerned directly with the welfare and income support sector.[12]

The public service representation on the Council has changed somewhat in the last few years. The Secretary of the Attorney-General's Department is, as usual, a member. However, there is now no member from a mainstream Commonwealth service delivery agency, that is to say, a body directly affected by the administrative review system. It is pertinent to ask whether this indicates that the Council is seen as less relevant to Commonwealth government decision-making than in earlier times?

The appointment of persons with a background in business was significant through most of the early years of the Council but more recently seems to have been given less importance. This is not surprising as the overwhelming number of matters considered by the Council involve either the welfare and income support sector or general government administration. The Commonwealth administrative review system does not impinge as heavily on the business sector as on the welfare, including immigration, sector.

The position of the three ex-officio members on the Council poses some questions. The President of the AAT and the Commonwealth Ombudsman are continually involved in the working of the administrative review system. It is apparent that they can bring to the Council a deal of experience that is relevant to the matters being considered by the Council. On the other hand, they can be the subject of Council inquiry and recommendation. In particular, what are established as independent review authorities could be said to be being subjected to oversight by another body. This, however, is expressly provided in the powers of the ARC.[13] Notwithstanding this statutory remit, one AAT President absented himself from the meetings of

the Council for a short period because he did not consider that he should be subjected to questioning about the role and the procedures of the Tribunal.

Julian Disney suggested that it might be desirable for the President of the AAT and the Ombudsman to cease to be members of the Council and that their role should be limited to providing regular reports and being invited to attend specific sessions of the Council to discuss their operations.[14] However, this view has not been followed up and the report of the Senate Committee referred to above made no recommendations that there be any change in the membership of these officers.

There is mutual advantage for both the Council and the two office holders in membership of the Council. The Council benefits from the hands-on experience of the review system provided by the AAT President and the Ombudsman. The holders of those offices benefit from the overview of the whole review system they gain through Council discussions. Any proposals for removal of these ex-offico members from the Council should be rejected.

There has been some discussion about the President of the ALRC continuing as a member of the Council. The Council itself, in its submission to the Senate Committee, indicated that, if there were to be changes to the membership of the Council, the relationship with the ALRC could be terminated. The Senate Committee indicated that it considered that the membership of the Council would benefit from being able to appoint a person or persons as Council members for the purposes of a particular project. In the Committee's view, such a change would obviate the need for the President of the ALRC to remain a permanent member of the Council. In its response, and in subsequent legislation, the Government accepted the first element of this recommendation but not the second. It is now possible for persons to be appointed as Council members for a particular project but no action was taken to remove the President of the ALRC from the Council. No person has been appointed to the Council for a particular project.

While there have been some questionable appointments to the Council from time-to-time over the years, taken overall, there has been a very high level of quality in Council members. Senior representatives from government, the legal profession and from business have been brought together to consider the structure and workings of the administrative review system. The quality of the reports and the advice to government provided by the Council reflects the ability and attention given to the projects by the Council members. The major issue still outstanding is the balance of membership. The present Council has fewer public service office holders than any previous Council. However, it still lacks welfare sector representation and, indeed, has three vacant membership positions. This may well reflect the lack of importance that the present Government places on the work of the Council.

Functions of the Council

When the Council was first established, its primary function was seen to be that of identifying the administrative decisions that should be subject to review and to oversight the procedures followed by the review bodies that made up the Commonwealth administrative review system. Section 51 of the AAT Act which set out the Council's functions reflected this understanding. However, it also included a necessary or convenient power to do things that related to the performance of these functions.

The Council did not at any time seem to feel under any great constraint arising from limitations that might have been thought to flow from the way in which its functions were specified. As is discussed below, it gradually expanded the range of matters on which it reported to embrace more generalised issues that were pertinent to the administrative law system. It also saw itself

as having a significant role in educating the community generally about their administrative law rights.

However, persons making submissions to the Senate Committee pointed out the narrow construction that could be put upon the statement of the Council's functions and recommended that they be expanded to cover the range of matters that were in fact being dealt with by the Council. Witnesses supported the scope of actions that the Council had undertaken and considered that it was appropriate to amend the legislation to ensure that there could be no doubt about the Council's power to engage in those activities. The Senate Committee agreed with these views. The result of this was an amendment of s51 of the AAT Act in 1999 to express broadly the functions of the Council to oversight the administrative law system and the procedures used by authorities of the Commonwealth in exercising administrative discretion. Similarly, the Act was amended to ensure that the Council's educational role was also given formal recognition.

If the changes had stopped there, it could quite reasonably have been said that the amendments did no more than recognise what the Council had, in practice, been doing. But the amendments went further. Section 51(1)(ab) reads:

> (ab) to inquire into the adequacy of the procedures used by authorities of the Commonwealth and other persons who exercise administrative discretions or make administrative decisions, and consult with and advise them about those procedures, for the purpose of ensuring that the discretions are exercised, or the decisions are made, in a just and equitable manner.

It can been seen that the Council is given a proactive role to inquire into procedures used by administrative decision makers at large – both Commonwealth authorities and other persons. This could include private contractors. The power is certainly expressed broadly enough to embrace the Council undertaking an audit of a particular agency's decision-making practices. It would clearly allow the Council to perform the watchdog role stated as its purpose by Attorney-General Ellicott at the first meeting of the Council.

Another investment of power, and one that had not so obviously been something which the Council had undertaken in the past, was the inclusion in s51(1)(d)(i) of the power to inquire into "the qualification required for membership of authorities of the Commonwealth, and the qualifications required by other persons, engaged in the review of administrative decisions" and also to inquire into "the extent of the jurisdiction to review administrative decisions that is conferred on those authorities and other persons".

It will be interesting to see how the Council exercises this power because qualifications for membership of the proposed Administrative Review Tribunal were the subject of considerable controversy. It appeared that the Government was proposing to reduce the level of qualification required for appointment to that body. It would be desirable for the Council to undertake a review of this sensitive issue as little attempt has been made to indicate what should be expected as the basic requirements for appointment to a Commonwealth review authority.

The functions of the Council as originally stated, were based on a self-motivating model that allowed no formal room for the Minister to influence the matters that should be looked at by the Council. The Senate Committee recommended, and s51 was amended to provide, that the Council is to consider, and report to the Minister on, matters referred to the Council by the Minister. This position had been achieved in practice by agreement between the President of the Council and the Attorney-General. However, subject to two provisos, it is a worthwhile amendment to recognise formally the capacity of the Minister to request that the Council look at

particular matters referred to it. First, the Council should not become dependent upon Ministerial references, but should be able to pursue issues that fall within its stated functions without having to seek a reference from the Minister. Secondly, there is a danger that, unless adequate resources are provided, the Minister could overwhelm the Council with references which, if not attended to, could lead to criticism and indeed a case being made out to terminate the existence of the Council. The exercise of this power will require goodwill on the part of the Minister and will make it more necessary than ever for the President to establish a good working relationship with the Attorney-General.

Work of the Council

The Council's activities broadly fall into three categories:

- the preparation of reports;
- advice to government on specific issues and general liaison with government agencies on matters relating to administrative law;
- educational activities through seminars and publications.

(i) Reports

The 44 reports made by the Council since its establishment are listed in the Appendix. It is interesting to note the subject matter of the reports. The major categories are as follows:

5 : *Administrative Decisions (Judicial Review) Act 1977* (the "ADJR Act")
Administrative Appeals Tribunal
Welfare and income support

4 : Customs and Exercise
Immigration and citizenship

3 : Access to administrative review

The number of reports devoted to the ADJR Act and to the AAT reflect the major role that these play in the administrative review system. The groups of reports relating to customs and to immigration reflect the fact these were two major areas of government decision-making that, until the adoption of the administrative review system, had largely gone unquestioned. One of the major contributions of the Administrative Appeals Tribunal has been in the development of customs law. Immigration has, of course, been a significant area of contention as to the nature of review processes that should be applied to it

It is interesting to note that the reports on access to administrative review, starting with Report No. 27 in 1986 relating to notification of decisions and rights of review, did not appear until some time after the establishment of the Council. That report was also significant in marking the first of a change of emphasis in the reports of the Council. Up until then all the reports related to specific review bodies or the review mechanisms that should be put in place in relation to particular types of decisions. From Report No. 27 onwards, 10 of the 17 reports relate to broader matters raising issues of principle relevant to review of administrative decisions. Indeed, of the last 6 reports of the Council, only one, relating to review of patent decisions, has been concerned with a specific area of decision-making. This reflects the maturation of the administrative review system whereby there are now few decisions that do not have some

review component relating to them. The issues that are now of concern are those which apply across the system or which reflect changes in government policy such as the increase in contracting out of government decision-making.

These types of issues raise much more difficulty for the Council in the approach that it should take to the content of its reports. The Council has been, and will continue to be, presented with a choice in many cases between principle and pragmatism. With the general decline in government support for external review of decisions exemplified by the adoption of the contracting out of decision-making and the limitation of review of immigration decisions, the Council has difficult choices to make as to whether it endeavours to maintain the purity of a once much praised review process or whether it goes along with the change in government attitude and tries to preserve the best system that this change of attitude will permit. Report No. 39: "Better Decisions: review of Commonwealth Merits Review Tribunals" and Report No. 42: "The Contracting Out of Government Services" reflect this dilemma. "Better Decisions" ran with the tide of government pressure to amalgamate all the tribunals into the one mega-tribunal while trying to preserve the features that were regarded as valuable in the various existing bodies. The Government seized on the model but ignored a number of the provisos relating to best practice that the Council tried to build into its approval of the amalgamation process. The result was the Administrative Review Tribunal proposal which was defeated in the Senate, largely because the Government had not followed the ARC proposal. With hindsight it may have been wiser for the Council to have stood on the issue of principle. It should have foreseen that the Government would draw from its report support for what it wanted to achieve without implementing the Council's qualifications.
By way of contrast, the Contracting Out report is an entirely principled report. It endeavours to bring within the scope of administrative review the range of decisions that formerly were subject to such review but which have been moved outside the ambit of the system as a result of the contracting out of the function. The principle is clear and the Council properly endorsed it. Without mechanisms being available for review of decisions made by non-governmental bodies, citizens are placed in a position that is worse than that which led to the establishment of the Kerr Committee. Unfortunately ideology has so far carried the day and the recommendations of the Council have been ignored.

The Council is placed in the difficult position of having to suggest mechanisms that will preserve the protection of persons affected by adverse decisions whether made by governmental or non-governmental agencies while recognising that governments nowadays wish to place limitations on external review.

This dilemma for the Council is reflected in the extent to which recommendations contained in the Council's reports have been accepted and implemented by government. The Council sets out the results of its more recent reports in its Annual Report. Its submission to the Senate Committee included a detailed statement on the implementation of its first 40 reports. Despite prompting from a number of the witnesses to the Committee, the Committee reached no general conclusion on the extent of implementation of the Council's reports by the government but suggested some changes in approach that might increase the opportunity for implementation. These are returned to below.

It is noteworthy that, in more recent years, the government has simply not responded to some of the major reports of the Council. For example, Report Nos 32 and 33 relating to the ADJR Act made in 1989 and 1991, respectively, have not prompted any response at all. Nor have the substantial reports on Government Business Enterprises (No. 38, 1995); Open Government: review of the federal *Freedom of Information Act 1982* (No. 40, 1995); and The Contracting Out of Government Services (No. 42, 1998). A number of years have elapsed since these reports

were made and to have simply no response from the government at all raises questions as to the significance that is placed on the work of the Council. These were carefully thought through and detailed reports dealing with significant questions. The failure of the government to respond has been disappointing, not only from the viewpoint of the Council but also from the community at large.

The Senate Committee recommended "that the Government give an undertaking to respond to all Administrative Review Council project reports within twelve months of their delivery".[15] This was the one recommendation of the Committee that was rejected by the Government. Its response to the Report said that it recognised the importance of responding in a timely manner but did not accept that it was necessary to bind itself to a response within 12 months.[16]

This approach reflects badly on the commitment of the Government to the maintenance of the system of review for citizens affected by executive decisions. It makes hollow the prediction expressed by Attorney-General Ellicott at the first meeting of the Council that a legislative obligation to respond to Council reports was unnecessary because future Attorneys-General would ignore such reports at their peril.

(ii) Advice and Submissions to Government and Parliament

To the end of June 2001, the Council had provided around 245 letters of advice and submissions to Ministers, parliamentary committees and government agencies of various kinds. Until recently they ran at the rate of 10-15 each year. These advices have, since the Council's Tenth Annual Report for the year 1985-86, been set out in the Annual Report. They primarily deal with individual matters rather than the broad policy issues with which the reports are concerned but they provide useful guidance to public administrators and administrative law practitioners on a diversity of issues. They are a very significant collection of wisdom. Any assessment of the value of the ARC cannot ignore this contribution. The Council itself has said that it should like the opportunity to comment more fully and at an earlier stage of the formulation of proposals than it is often given the chance.[17] Certainly this would be a wise step for prudent administrators to take. It would often avoid later tangles with the Senate Committees on Scrutiny of Bills and Regulations and Ordinances.

Whether the Council would be capable with its limited resources of providing greater assistance to agencies is a separate question. This may be some explanation for the fact that the number of advices and submissions has dropped markedly in recent years – 6 in 1998-99; 9 in 1999-2000; 4 in 2000-2001. But the greater concern is that it appears that the advice of the Council is no longer being sought by agencies and other bodies. If this be so, it is a commentary on its perceived relevance.

(iii) Education and Training

The Council has published a number of significant papers aimed at improving decision-making. In recent years this has formed a significant part of its activities. Noteworthy among these guides have been the recent publications:

- What Decisions Should be Subject to Merits Review, 1999
- Practical Guidelines for Preparing Statements of Reasons, 2000
- Guide to Standards of Conduct for Tribunal Members, 2001

These are necessary aids to decision-making for government officers. They are also valuable guides to persons affected by government decisions in setting out the standards with which the public can expect government officers to comply.

The Council has also initiated a regular Tribunals Conference attended by members and staff of Commonwealth, State and Territory tribunals. The Conference provides a forum for the exchange of views and experiences between tribunals. The Conference will, it seems, lead to the establishment of a Council of Tribunals which will involve tribunals across Australia. It is not yet clear whether this will lead to the end of the Council's role in the annual Conference. It may well be that the Council should involve itself still in bringing Commonwealth tribunals together. The demise of the ART proposal has left the way open for greater informal cooperation between those tribunals.

The Council has, since 1984, published a journal called *Admin Review* which provides information about recent developments in administrative review as well as the work of the ARC. In more recent times *Admin Review* has published articles on matters pertinent to the Commonwealth administrative law system. When *Admin Review* first appeared there was no journal devoted to administrative law in general or to the Commonwealth administrative review system in particular. *Admin Review* filled a very valuable gap. It is questionable, however, whether it needs to be maintained in view of the fact that there is now the *Australian Administrative Law Journal* and the Australian Institute of Administrative Law quarterly publication called *AIAL Forum*. These two publications obviate the need for *Admin Review* to publish articles as there are other appropriate outlets for such writings. The broader information that is contained in *Admin Review* and which is very useful could well be published on a cooperative basis with *AIAL Forum* which would provide a useful avenue of mutual distribution of such information and relieve the Council of its publishing obligation.

Members of the Council, particularly the various Presidents, have participated in administrative law and public administration conferences frequently. The Council itself has seldom run a conference of its own volition. In 2001 the Council was a joint sponsor of the AIAL Annual Conference. This seems to be a role that it could well undertake routinely with the benefit of making itself better known in the administrative law community. It would also provide a means of input into matters that it has under consideration. Workshopping discussion papers or advancing through a major paper possible proposals for change in the active forum that assembles each year for the AIAL Conference would be advantageous to the Council.

Future activities

The Council has indicated that it intends to continue with the following projects:

- Council of Australian Tribunals:
  - the ARC will continue with its support for the establishment of a Council of Australian Tribunals. This body would not be limited to Commonwealth tribunals but would encompass also the major State and Territory tribunals. It would provide a national forum for tribunal heads to develop policies, secure research and promote education on matters of common interest.
- The use of technology in government decision-making:

- an examination of the processes by which administrative action is delivered. This will focus on the use of technology in decision-making including the use of expert decision-making systems.

- The scope of judicial review:

  - a consideration of the principles supporting judicial review and the circumstances in which limitation or exclusion of review might be appropriate.

These are all significant and timely projects and suitable for the ARC action. How they might be carried through is returned to below.

Assessing the ARC

The Senate Committee was required to inquire into "the effectiveness of the ARC in performing its functions". It said that it found that objective assessment of the ARC's effectiveness was not easy because of the wide range of activities that the Council undertakes and the inherent difficulties in assessing such things as the quality of its advice, the value of policy recommendations, and the success of its efforts to promote administrative law values. The ARC itself suggested to the Committee that assessment of its effectiveness should be based on the extent to which:

- its advice was accepted and its recommendations implemented, or, if not implemented in full, acted as catalysts for change;

- its reports and advices served as useful summaries and analyses of the law, thereby making an important contribution to debate and discussion;

- its other forms of policy input, such as its comments on proposals being submitted to Cabinet and its submissions to parliamentary and other inquiries, were successful;
- its reputation was high in the eyes of those outside government; and

- its contribution as a facilitator led to worthwhile exchanges of ideas, cross-pollination of best-practices, and experiments and innovations.

These, together with a suggestion from the Attorney-General's Department that regard should be had to the Council's record in completing references and agreed projects, were used by the Committee in reaching its conclusion that the Council was indeed an effective body. The factors used by the Senate Committee have been broadly adopted by the Council for the purpose of reporting on its performance in its Annual Reports.

The Senate Committee's summary of submissions to it based against the performance criteria that it adopted revealed that the ARC was held in high regard, it had a very good record of completing references and agreed projects, its reports were regarded as useful summaries of the law and made a good contribution to debate subject only to one qualification to which I return below; and it had performed its facilitation role at a high level. There seems no basis for differing from these conclusions. Some criticism was made of the way in which the Council went about the preparation of its reports and advice. The Attorney-General's Department thought that there should be greater use of the issues/discussion paper technique and there should be more early and ongoing consultation with relevant agencies. These are somewhat curious suggestions because in fact the Council does consult widely before making a report. It is usual

for it to distribute issues papers as draft proposals and to invite comment from interested parties.[18]

The Attorney-General's Department also suggested that the Council should develop a "Financial Impact Statement" to accompany all advices presented to the Attorney-General and this view was also reflected in the Department of Immigration and Multicultural Affairs' submission that there should be greater emphasis on cost effectiveness. The Council noted that it did take these matters into account but, with the greater emphasis governments now place on expenditure control and measurable return for money spent, the Council will have to highlight the impact of its proposals in resource terms more clearly for its recommendations to have optimum effect.

Finally, a suggestion was made that there had been a lack of empirical research underpinning some of the ARC's work. This seems to me to be a valid criticism. The Council has on two occasions at least started work on a general review of the impact of the administrative review system on government decision-making with a view to demonstrating the overall value of the system. It has abandoned both projects because of the difficulties of obtaining material that would provide an answer to the issues to which the study gave rise. Stated broadly, the project contemplated was probably too large and too difficult. However, it could have been broken up into components and research undertaken of the effect of particular components of the review system on government decision-making. This has been done effectively by researchers at the ANU Law School supported by a modest grant from the Australian Research Council.

A review has been undertaken of the effect of judicial review on decisions when these have been referred back by the Federal Court to the decision maker for reconsideration.[19] The review involved approaching the lawyers for successful applicants and also tracing the outcome of reconsiderations by contacting the agencies concerned. Similar work has also been undertaken in relation to decisions referred back by the Court to the AAT. A third project involved obtaining the views of government officials who have been required by their work to take decisions subject to review as to the impact upon them of the review system. This last research revealed a remarkably supportive view of the value of the review system by those at the coalface contrasted with the scepticism of officers in policy positions who are not subjected to administrative review in their decision-making processes. It would seem that the review system presents more dangers theoretically than it does in practice.[20]

The fact that this work could be undertaken by academic researchers reflects somewhat unfavourably on the Council in that they are tasks that it could well have carried out and would have been better placed in terms of status and resources to have pursued. If the Council for some reason does not want to undertake this sort of study, it could profit by undertaking joint projects with, or funding projects by, academic researchers.

Conclusion

It is without doubt that over its 25 years existence the Council has performed much valuable work. The administrative review system established in the 1970s has developed as a result of the Council's contribution. However, the Council is now at a cross road, as indeed is the review system itself. In recent years the government has not encouraged continued expansion of the concept of review of government decisions. Financial and other limits have been placed on review bodies with the result that the effectiveness of the system to provide adequate means for review of government decisions has been markedly diminished. By way of diverse examples, the Ombudsman now exercises the discretion not to undertake an investigation in relation to 70% of the complaints received by the Office. In 1995-96 the AAT had 8 full-time and 2 part-

time Deputy Presidents and 10 full-time and 11 part-time Senior Members. It now has 4 full-time and 2 part-time Deputy Presidents and 8 full-time and 5 part-time Senior Members. It is difficult not to see this other than as a process of degrading the skill level of members.

The continuing debate on the scope of review of migration decisions has spilled over into other areas of government decision-making raising broad issues about the merits of external review. The Kerr Committee would be surprised to find many of the issues with which it was concerned being revisited.

The Council should be monitoring and publishing material relating to the state of the administrative review system. Indeed, if it does not pursue an active part in the debate about the role of the system, the forces that opposed administrative review 30 years ago are likely to turn the clock back to pre-Kerr days (with greater limitations on judicial review).

With this in mind, the Council should be looking to reinforce those connections that would at least preserve and perhaps even strengthen administrative review mechanisms. That support has come in the past from among lawyers and parliamentarians. The Council must establish links with these bodies and must educate them on the effect of limitations being imposed on the review system.

The Council has also now been given much extended powers to review agency decision-making. These powers should be used in cooperation with others – for example, academics to undertake empirical research; the Ombudsman to investigate systemic issues.

These are signs that the Council is becoming less relevant in the eyes of the government – the failure to respond to reports, the drop in the number of advices being sought, the absence of representatives of major agencies from Council membership, the failure to fill membership vacancies. These are signs that the executive is using time-honoured methods to undermine the Council – reducing resources, limiting its independence, ignoring its proposals.

If the Council does not recognise these signs and act to rebut them, it will not have a 50 year anniversary celebration. This would be a triumph for executive power but it would be a cost to the people of Australia. It would mean that the body established expressly to oversight the system put in place to provide the means to call the executive to account when it affects individuals would be lost. The demise of the system itself would not be far behind.

POSTSCRIPT

Sadly, since the preparation and delivery of this paper, the Council President, Ms Bettie McNee died. Mr Wayne Martin QC is now the President of the Council.

In the last 12 months, the Council produced an overview of the Council of Australasian Tribunals and the Council's work in securing the establishment of that body. It has also issued a revised version of its Practical Guidelines for Preparing Statements of Reasons. In the reporting year 2001-2002 the Council provided formal written advice to the Government on 7 occasions. The government has not responded to any previous Reports of the Council other than those mentioned in the paper. The Council's funding was reduced marginally in the 2001-2002 financial year.

Endnotes

1 *Commonwealth Administrative Review Committee Report*, 1971, Commonwealth Government Printing Office (Kerr Report), para 283.
2 Ibid, para 284.
3 Id.
4 Ibid, paras 287 – 288.
5 *Final Report of the Committee on Administrative Discretions*, 1973, AGPS.
6 Para 229 (xlviii).
7 Senate *Hansard*, 27 May 1975, p 1839.
8 *Report on the Role and Function of the Administrative Review Council*, June 1997.
9 *Review of the Office of Commonwealth Ombudsman*, AGPS, 1991.
10 The Directors of Research/Executive Officers of the Council have been:

NAME	YEARS
Graham Taylor	1 November 1977 – 1981
Geoffrey Flick	1981 – 1982
John Griffiths	1983 – 1985
Denis O'Brien	1986 – 1989
Bert Mowbray	1989 – 1992
Stephen Lloyd	1992 – 1993
Kathy Leigh	1993 – 1994
Phillipa Lynch	1994 – 1998
Philip Harrison	1998 – 1999
Gabrielle Lewis	1999 – 2000
Matt Minogue	2000 – 2002

11 AAT Act, s50.
12 Reports:
2, 20: repatriation
8, 21: social security
11: students assistance
27, 30, 34: access to the review system
37: community service support.
13 AAT Act s51(1)(d)(iii).
14 Julian Disney, "The Administrative Review Council: Progress and Prospects" (1991) 66 *CBPA* 103.
15 *Report on the Role and Function of the Administrative Review Council*, 1997.
16 Administrative Review Council, *Twenty-second Annual Report* 1997-1998, Appendix 4.
17 Para 6.33 of the *Legislation Handbook*, 2000 refers to the Council's role in the process of preparing drafting instructions.
18 Indeed one cannot but help compare the secrecy with which the policy leading to the attempt to enact the Administrative Review Tribunal was formulated with the open approach that has been adopted in relation to significant matters by the Council. The Attorney-General's Department would have been much better served if it had been prepared to consult with those affected before producing its abortive attempt to construct one single mega-tribunal.
19 Robin Creyke, John McMillan, Dennis Pearce, "Success at Court – Does the Client Win?" *Administrative Law under the Coalition Government,* 1997 National Administrative Law Forum, 239. The research indicates that, far from being a remaking of the decision to arrive at the same conclusion but with the correct procedures, the outcome on reconsiderations is likely to be favourable to the person affected.
20 Robin Creyke and John McMillan, "Executive Perceptions of Administrative Law – An Empirical Study" (2002) 9 *A J Admin L* 163.

APPENDIX

Reports of the Administrative Review Council

1 Administrative Decisions (Judicial Review) Act 1977 – Exclusions under Section 19 – 1978

2 Repatriation Appeals – 1979

3 Review of Import Control and Customs By-Law Decisions – 1979

4 Administrative Appeals Tribunal Act 1975 – Amendments – 1979

5 Defence Force Ombudsman – 1979

6 Entry to Cocos (Keeling) Islands and Christmas Island – 1979

7 Citizenship Review and Appeals System – 1980

8 Social Security Appeals – 1980

9 Administrative Decisions (Judicial Review) Amendment Bill 1980 – 1980

10 Shipping Registration Bill – 1980

11 Student Assistance Review Tribunals – 1981

12 Australian Broadcasting Tribunal Procedures – 1981

13 Commonwealth Employees' Compensation Tribunal – 1981

14 Land Use in the A.C.T. – 1981

15 Australian Federal Police Act 1979: Sections 38 & 39 – 1982

16 Review of Decisions under the Broadcasting and Television Act 1942 – 1982

17 Review of Taxation Decisions by Boards of Review – 1983

18 Compensation (Commonwealth Government Employees) Act 1971 Amendments – 1983

19 Rights of Review under the Migration Act 1958 and Related Legislation: Interim Report on the Constitution of the Administrative Appeals Tribunal – 1983

20 Review of Pension Decisions under Repatriation Legislation – 1983

21 The Structure and Form of Social Security Appeals – 1984

22 The Relationship between the Ombudsman and the Administrative Appeals Tribunal – 1985

23 Review of Customs and Excise Decisions: Stage Two – 1985

24 Review of Customs and Excise Decisions: Stage Four: Censorship – 1985

25 Review of Migration Decisions – 1985

26 Review of Administrative Decisions (Judicial Review) Act: Stage One – 1986

27 Access to Administrative Review: Stage One Notification of Decisions and Rights of Review – 1986

28 Review of Customs and Excise Decisions: Stage Three Anti-Dumping and Countervailing Duty Decisions – 1987

29 Constitution of the Administrative Appeals Tribunal – 1987

30 Access to Administrative Review: Provision of Legal and Financial Assistance in Administrative Law Matters – 1988

31 Review of Decisions under Industry Research and Development Legislation – 1988

32 Review of the Administrative Decisions (Judicial Review) Act: The Ambit of the Act – 1989

33 Review of the Administrative Decisions (Judicial Review) Act: Statements of Reasons for Decisions – 1991

34 Access to Administrative Review by Members of Australia's Ethnic Communities – 1991

35 Rule Making by Commonwealth Agencies – 1992

36 Environmental Decisions and the Administrative Appeals Tribunal – 1994

37 Administrative Review and Funding Decisions (A Case Study of Community Services Programs) – 1994

38 Government Business Enterprises and Commonwealth Administrative Law – 1995

39 Better Decisions: review of Commonwealth Merits Review Tribunals – 1995

40 Open Government: a review of the federal *Freedom of Information Act 1982* – 1995

41 Appeals from the Administrative Appeals Tribunal to the Federal Court – 1997

42 The Contracting Out of Government Services – 1998

43 Administrative Review of Patents Decisions – 1999

44 Internal Review of Agency Decision Making – 2000