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TABLE OF CONTENTS

JUDICIAL REVIEW OF STATUTORY AUTHORITIES

Michael Will*

Introduction

I will give you a brief excursion of the facts and the history of the case of *Griffith University v Tang*[1], take you through each of the three judgments, give you some of my thoughts as to whether I consider it to be a new test or not and then raise a couple of issues about the effect of the decision on the administration of universities.

Vivian Tang was a PhD student at Griffith University. In 2002, an Assessment Board which was a sub-committee of a research and post graduate committee established under the Council of Griffith University, found that she undertook research without regard to ethical or scientific standards on the basis that she presented falsified or improperly obtained data as if the result of laboratory work. In essence, it was found that she was involved in ongoing fabrication of experimental data. As a result of that finding, the decision was made to exclude her from her PhD candidature as her conduct amounted to a breach of the policy on academic misconduct at Griffith University. She applied internally for review of that decision to a University appeals committee and that appeal was dismissed in October 2002.

Ms Tang then went to the Supreme Court of Queensland on an application for judicial review of both decisions under the *Judicial Review Act 1991* (Qld). It is important to note that that Act is the same in all material respects as the Commonwealth *Administrative Decisions (Judicial Review) Act 1977.* (The two Acts are referred to collectively in this paper as the ADJR Act). Ms Tang claimed that there had been breaches of natural justice, that procedures required by law were not observed, that there were errors of law, that there was an improper exercise of power and that there was no evidence or other material to justify the decision to exclude her. It is also important to note that the Queensland ADJR Act, given that it repeats the words from the Commonwealth ADJR Act, applies to a decision of an 'administrative character made under an enactment'.

Within a month, Griffith University applied under s 48 of the Queensland ADJR Act to the Supreme Court for an application to dismiss or stay the application made by Ms Tang. For present purposes that application was on the basis that the decision was not one made under an enactment, but was a policy decision of the University. It is also important to note that it was an interlocutory application.

So how did the case end up in the High Court? Ms Tang succeeded at first instance, that is on the interlocutory application by the University: that application was dismissed by McKenzie J. The University appealed that decision to the Supreme Court of Queensland, Court of Appeal, and that appeal was dismissed by a unanimous decision. The Court found that it was a decision under an enactment applying *ABT v Bond*[2] and *Blizzard v O'Sullivan*[3]. The University then sought, and was granted special leave to appeal to the High Court. The

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High Court was composed of Gleeson CJ and Gummow, Kirby, Callinan and Heydon JJ. Gleeson CJ delivered a separate judgment, Gummow, Callinan and Heydon JJ delivered a joint judgment and, with the Chief Justice, allowed the appeal. Kirby J wrote a dissenting judgment.

Coming first to the Chief Justice's judgment, its starting point was that the Griffith University Act provided no specific power dealing with admittance, exclusions or academic misconduct. The powers exercised in establishing policies and procedures about these issues all flowed, first, from a general description in s 5 of the functions of the University, that is, to provide education, to confer higher education awards and to disseminate knowledge, second, from general powers in s 6 which gave the University all the powers of an individual to enter into contracts, deal with property, appoint agents and consultants, and fix charges, Associated with those two sources of power was the incidental power granted to the University to do anything necessary or convenient in connection with its functions.

The Chief Justice acknowledged the University's argument that it must be the statute that gives the decision in question legal force or effect for it to be reviewable under the ADJR Act. He noted the familiar form of the conferral of power in the Griffith University Act and commented that in all jurisdictions throughout Australia, there were similar Acts incorporating a range of institutions, including Universities. Such legislation incorporates those bodies, describes their functions, confers powers, and provides for governance. But all of that, he said, does not mean that all decisions made by those bodies are 'under' those enactments. He also commented that there was no finding in the courts below about what the legal relations were between the parties. In particular, there was no evidence of a contract between Ms Tang and the University. That is an important point to which the joint judgment returns.

The Chief Justice pointed out that it was important to note Justice Ellicott's approach in *Australian National University v Burns.*[4] That approach involved a professor being dismissed and a finding by the Full Federal Court that that was not a decision reviewable under the ADJR Act. That was a decision which arose under a contract of employment, but Ellicott J's approach at first instance in that case, that, for a matter to be reviewable, it had to be a matter at the heart of a university's existence and one of the fundamental decisions essential to the fulfilment of its basic functions, had been rejected by the Full Court and the High Court was not being asked to reconsider it.

Interestingly, given what I will be saying in a moment about the joint judgment, Gleeson CJ[5] refers to the exclusion of Ms Tang being in accordance with the terms and conditions as to academic behaviour which had previously been established. Further, Ms Tang was bound by those terms and conditions and the University could lawfully apply them to its relationship with Ms Tang.

That is interesting because it appeared that the Chief Justice was struggling with the issue of what precisely the legal relationship was between Ms Tang and the University. I think he was minded to find that there might be a contract and then deal with it on that basis. However, he did not go down that route.

Gleeson CJ noted in passing the decision of Justice Davies in *Scharer v State of New South Wales*[6] where His Honour had said that the touchstone for reviewability under the ADJR Act was whether statute had played a relevant part in affecting or effecting rights or obligations. He said that the legal effect in Ms Tang's case was to terminate the relationship and that was the position even if the statute conferred other benefits on Ms Tang. The relationship was voluntary and the Chief Justice acknowledged that Ms Tang would have had a legitimate expectation that certain procedures would be followed before termination of her candidature, but that that was not enough. On the other hand, he said, the decision to

terminate her did not take legal force or effect from the statute. It took place under general law, and under the terms and conditions on which Ms Tang and the University entered into a relationship. The power to formulate terms and conditions and to enter, and end, the relationship came from the Griffith University Act, but the decision to terminate the relationship was not given legal force or effect by that Act.

I turn now to the joint judgment of Gummow, Callinan and Heydon. Their Honours referred to the difference between the position under s 75(v) of the Constitution which fixes on the question of whether a decision is made by an officer of the Commonwealth as the touchstone of reviewability, and the ADJR Act test of a decision of an administrative character made under an enactment. They commented that this had caused resultant uncertainty 'over 25 years'. That comment raised an expectation that this case might resolve some of those uncertainties. Their Honours acknowledged the continuation of the prerogative writs or common law system of judicial review under Queensland law which is expressly maintained under its ADJR Act. They then went on to say that the University in question was wholly a creature of statute and that the *Higher Education (General Provisions) Act 1993* of Queensland prohibited non-universities from awarding degrees and therefore one could only obtain a degree from a university. They pointed out that it was an offence to say that you had such a degree if you did not have one.

Their Honours then turned to the question of standing. Their point here was that the question of the standing of an applicant for review only arises if there is something that is a decision by which the applicant is aggrieved. So they took the step of saying before you get to the question of standing you look at whether there is a decision and it is only when you decide that there is a decision that you turn back to the question of standing. Standing comes after the question of whether there is a decision under an enactment.

Their Honours then looked at the three elements provided for in the ADJR Act to determine reviewability: whether there is a decision, whether it is of an administrative character, and whether it is made under an enactment, and pointed out there were dangers in treating these elements separately. They said you must look at the elements together and at the interrelation between those elements: it is a question of characterisation depending upon the scope, subject and purpose of the ADJR Act. They also cautioned against using approximate or immediate source of power tests, again emphasising the subject, scope and purpose of the ADJR Act.

Their Honours then turned to what I consider to be a new test. They said that it was necessary, but not sufficient, to decide that a decision be required or authorised by the enactment, but you need something else. The additional factor required is that the decision must affect legal rights and obligations. 'Does the decision derive from the enactment the capacity to affect legal rights and obligations?' is the test. The rights and obligations their Honours referred to may be ones founded in the general or unwritten law as well as statutory rights and obligations, and they can be pre-existing or new. Again, coming to the precise tests that they enunciated[7], whether a decision is made under an enactment requires determination of two issues. The first issue is, is the decision expressly or impliedly authorised by the enactment? The second issue, is that a decision must itself confer, alter or otherwise affect legal rights or obligations. The decision must derive from the enactment. Here they concluded there were no legal rights capable of being affected. There was just a consensual relationship between Ms Tang and the University which depended for its continuation on mutuality. It had been brought to an end but not under the Act. The joint judgment[8] acknowledged that Ms Tang might have had an expectation that her exclusion would be dealt with fairly but their Honours said that was not enough. There were no substantive rights existing under the general law and no presently existing statutory rights which were affected by this decision. They also commented, interestingly, that it was not to the point that the University had carried out this exclusion by a process of delegation of its

power rather than by internal statutes which the University had the power to make. They said that use of one method rather than another concurrent power is insufficient to attract the ADJR Act.

I turn now to the strong dissenting judgment of Justice Kirby. His Honour said that the majority view was an unduly narrow approach to statutory judicial review of the deployment of public power. He said that, like the *NEAT* decision[9], it is an alarming decision. It extends the error made in the *NEAT* case and it involves the erosion of one of the most important legal reforms of the last century, namely the ADJR Act. He said that the Court should call a halt to such an erosion.

The main points of Kirby J's dissenting judgment are these. There is nothing in the ADJR Act to warrant a gloss that legal rights and obligations must be affected. The ADJR Act was reform legislation meant to encourage and make easier the process of judicial review. The new test of affecting legal rights and obligations was incompatible with standing requirements under the Act which involve a broader interest test. It was contrary to the text and purpose of the ADJR Act: nearly all Australian universities are public institutions, formed for public purposes, they are not private bodies able to enter into private arrangements as they please. Kirby J was also very critical of the method by which this decision had arrived before the High Court as a result of appeals from an interlocutory decision. As His Honour pointed out this meant the Court was faced with deciding on an important issue without all the evidentiary findings having been made below and teased out further on appeal.

The correct test for Kirby J would be this: Does the lawful source of power to make the decision lie in the enactment? That is the first point. Secondly, could a person, absent that source, derive the power outside the Act to make that decision? If yes, then it is not a decision under the enactment. If no, then it is. In this case the source of the power is the Act and the decision is made under it. That would be Kirby J's test. However, it is not the test that flows from this decision.

Finally Kirby J is quite critical of the new test imposed by the High Court because it goes against the broad connotation of 'decision' in the ADJR Act, the ambit of 'enactment' in the Act, and the wide scope of standing. In Kirby J's view, there were formerly three broad requirements and the Court had now imposed a narrow one. In his view, the interest test would be the broader and better test. Quite tellingly towards the end of his judgment, Kirby J makes the comment that if there was no contract between Ms Tang and the University, the only possible source of power to exclude her was the statute. There was no other competing source of power.

Does *Tang's* case establish a new test? In my view it does. I consider that this is the case for three reasons. The first is, as far as I can tell the High Court has not stated the test in these terms before. The second is, the Federal Court has made similar pronouncements but limited them, and the third is the comparison of the joint decision with that of the Chief Justice.

Coming to my second point about the Federal Court having used similar words before, I turn to *Scharer v State of New South Wales*.[10] In that case Davies J had said that the test was whether the Act played a relevant part in affecting rights or obligations. In my view the High Court has gone much further than that test in conclusively excluding an interest test and going back to a rights and obligations test. The Chief Justice did not go that far. He left it on the basis that the ADJR Act provided the legal force and effect for the decision. There is nothing new in that. In my view the joint judgment went further and put a High Court stamp on a new test which the Federal Court had tossed around but not really fixed upon. It is in my view a more restrictive test. However, we will need to wait to see how it is applied. It might produce some surprising results.

Some final comments on two issues about how this case might affect universities. University administrations may consider from this decision that they can avoid judicial review by avoiding reliance on internal statutes. Where they have the power to make internal delegated legislation, they may shy away from that, thinking that if they do so then the connection between their establishing legislation and the final decision will be harder to make. This would leave matters such as disciplinary provisions applying to academics more and more to policies. That in turn would lead to less judicial review of those sorts of decisions. That is a superficially attractive proposition. Evidentially it may present applicants with more problems if universities adopt the policy rather than the internal statute approach. But in principle there is no difference in the new test between a decision made under an internal statute and one made under a policy, which is in turn made under a delegated power. The route does not matter so long as rights and obligations are or are not affected. That is the test and the High Court says as much in the joint judgment[11].

The second point about universities is this. Would the view of Kirby J have opened the flood gates so that all academic decisions might have become reviewable? I think not. I think there is a difference between exclusion of a PhD candidate and, for example, marking of an undergraduate paper. It is a question of degree and that is important because there is always a discretion in a judge facing an application for judicial review not to allow the application on purely discretionary grounds.

Finally, there is the reluctance of courts, acknowledged again in this case, to interfere in academic as opposed to disciplinary decisions of universities.

Endnotes

1 (2005) 213 ALR 724; [2005] HCA 7.
2 (1990) 170 CLR 321.
3 [1994] 1QdR 112.
4 (1982) 43 ALR 25.
5 At [17].
6 (2001) 53 NSWLR 299 at 313.
7 At [89].
8 At [92].
9 *NEAT Domestic Trading Pty Ltd v AWB Ltd* (2003) 198 ALR 179.
10 Above note 6.
11 At [95].

GRIFFITH UNIVERSITY v TANG—COMPARISON WITH *NEAT DOMESTIC,* AND THE RELEVANCE OF CONSTITUTIONAL FACTORS

Graeme Hill*

Introduction

This paper considers two issues arising out of *Griffith University v Tang*:[1]

(1) whether the reasoning in *Tang* is consistent with the reasoning in *NEAT Domestic Pty Ltd v AWB Limited*;[2] and

(2) whether the constitutional factors relied on in the joint judgment of Gummow, Callinan and Heydon JJ in *Tang* support their Honours' interpretation of the phrase 'decision … made under an enactment'.

I suggest that the joint judgment in *Tang* does not engage sufficiently with all of the reasoning in *NEAT Domestic*, although there is certainly no conflict between the two cases. More significantly, I argue that constitutional factors referred to in *Tang* are of marginal relevance in construing the *Administrative Decisions (Judicial Review) Act 1977* (Cth) ('the AD(JR) Act'), and by extension the *Judicial Review Act 1991* (Qld) ('the Qld Judicial Review Act').

Comparing Tang and NEAT Domestic

In one sense, *Tang* and *NEAT Domestic* are the mirror images of each other. Simplifying greatly, *Tang* concerned an exercise of 'private' power by a 'public' body; conversely, *NEAT Domestic* concerned an exercise of 'public' power by a 'private' body. The High Court held in both cases that the relevant decision was not made 'under an enactment' and therefore was not subject to statutory judicial review. Despite this similarity in outcome, the two cases seem to contain quite different approaches to determining whether a decision is 'made under' an Act.

Different approaches to 'under an enactment'

NEAT Domestic – three related considerations

As is well known, *NEAT Domestic* considered whether judicial review was available for decisions by AWB (International) Ltd ('AWBI'). Under s 57(1) of the *Wheat Marketing Act 1989* (Cth) ('the Marketing Act'), a person cannot export wheat without the written consent of the Wheat Export Authority ('the Authority'), a Commonwealth statutory authority. Section 57(3B) provides further that the Authority cannot give a 'bulk-export' consent without the written approval of AWBI, a wholly-owned subsidiary of a company controlled by wheat growers. AWBI did not approve the bulk export of wheat by NEAT Domestic Trading Pty Ltd ('NEAT'), and NEAT sought judicial review of that decision. A majority of the High Court (McHugh, Hayne and Callinan JJ) held that any decision by AWBI was not made 'under' the Marketing Act and therefore was not reviewable under the AD(JR) Act.

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This paper is based on a talk given at the ANU on 10 May 2005. I am grateful to Professor Aronson for his helpful comments.

The joint judgment in *NEAT Domestic* relied on three 'related considerations'.[3]

- First, AWBI's power to give or refuse approval derived from its incorporation and the *Corporations Act 2001* (Cth), not the Marketing Act.[4]

- Secondly, AWBI was a 'private' company, in the sense that its directors owed duties under its corporate constitution and the corporations legislation to maximise returns to wheat growers who sold wheat through pool arrangements.[5] (I will call these duties 'corporations law duties'.)

- Thirdly, these corporations law duties could not be sensibly accommodated with any administrative law obligations imposed by the AD(JR) Act.[6]

Tang – two criteria

These three considerations can be contrasted with the two criteria relied on by the joint judgment in *Tang*. Gummow, Callinan and Heydon JJ held that a decision is not made 'under an enactment' unless:[7]

- the decision is expressly or impliedly required or authorised by the enactment; and

- the decision itself confers, alters or otherwise affects legal rights or obligations.

Their Honours concluded that Griffith University's decision was authorised by the *Griffith University Act 1998* (Qld) ('the University Act'), but the decision did not itself affect rights and obligations.[8] Therefore the decision was not made 'under' the University Act.

Discussion of NEAT Domestic in Tang

Although the joint judgment in *Tang* expressly relates its approach to the decision in *NEAT Domestic*, *Tang* seems to treat *NEAT Domestic* as turning entirely on the first consideration mentioned above (the source of AWBI's power to give or refuse an approval).[9] Gummow, Callinan and Heydon JJ state in *Tang* that any approval by AWBI was therefore made '*dehors* the federal statute, although, once made, it had a critical effect for the operation of the federal statute'.[10]

I would suggest, with respect, that this is an incomplete analysis of *NEAT Domestic*. It is difficult to conclude that AWBI's decision was '*dehors*' the Marketing Act, given that the only legal effect given to AWBI's decision was by the Marketing Act, and there was no reason for AWBI to make this decision other than the effect that the decision would attract under that Act.[11] In this sense, *NEAT Domestic* is quite different from *Glasson v Parkes Rural Distributions Pty Ltd*[12] (also referred to in *Tang*), because in *Glasson* the decision had legal effect under the State Act in the scheme.[13] The situation in *NEAT Domestic*, as described in *Tang*, seems to be exactly like an example given in *Australian Broadcasting Tribunal v Bond*[14] – the decision to issue or refuse an approval 'controls the coming into existence … of a statutory licence [in *NEAT Domestic*, the licence to export wheat] and is itself a decision under an enactment'.

Instead, in my view, the second and third considerations in *NEAT Domestic* explain why it was 'neither necessary nor appropriate'[15] to read s 57(3B) of the Marketing Act as impliedly authorising AWBI to issue an approval.[16] The fact that AWBI had power to issue approvals under the Corporations Act (the first consideration) did not preclude the possibility that the Marketing Act also authorised AWBI, impliedly, to issue an approval for the purposes of s 57(3B). For example, in *Minister for Immigration and Ethnic Affairs v Mayer*,[17] a

Commonwealth Act was held to authorise the Minister (by implication) to make a determination, even though the office of Minister presumably already carries with it a power to issue determinations.[18] What seems to distinguish the situation in *NEAT Domestic* from the situation in *Mayer* is the private nature of AWBI, and the existence of competing Corporations Law obligations. Therefore, the second and third considerations were in my view linked to the meaning of 'under an enactment', even though the joint judgment in *NEAT Domestic* did not make this link expressly.[19] To this extent, I would suggest that the joint judgment in *Tang* did not engage sufficiently with all of the reasoning in *NEAT Domestic*.

Applying the NEAT Domestic *approach to* Tang *facts*

Consistently with this analysis of *NEAT Domestic*, all of the considerations relied on in that case seem to be highly relevant to the situation considered in *Tang*. Applying those three related considerations:

- The source of power for Griffith University to make its decision necessarily derived from the University Act. As Kirby J noted,[20] there was no independent source of power for the University to make its decision.

- Griffith University is a 'public' decision-maker,[21] and

- There were no separate and potentially conflicting private law obligations imposed on the University. In particular, no-one in *Tang* contended that there was a contractual relationship between Ms Tang and the University.[22]

These considerations seem to favour judicial review being available. However, the situation in *Tang* invites closer attention to the second consideration.

Determining the 'public' character of a decision-maker

I have argued elsewhere that the second consideration referred to in *NEAT Domestic* (the 'private' nature of AWBI) should include consideration of the nature of the decision, as well as the character of the decision-maker.[23] In *Tang*, the majority judgments stress the voluntary (and therefore 'private') nature of the relationship between Ms Tang and Griffith University.[24] In my view, this approach is entirely consistent with *NEAT Domestic*. Although the actual decision in *NEAT Domestic* seems to downplay the nature of the particular decision made by AWBI, McHugh, Hayne and Callinan JJ emphasised that their conclusion was not to be understood as an answer to whether public law remedies were ever available against private bodies.[25] To that extent, their Honours accepted the possibility that an otherwise 'private' decision-maker could make decisions that are 'public' and thus amenable to judicial review.

The question then is how to determine which decisions are 'public' in nature and which are 'private'. Experience with other areas of the law suggests that any attempt to define 'governmental' functions is unlikely to be helpful.[26] The joint judgment in *Tang* asks whether legal rights and obligations owe, in an immediate sense, their existence to the decision, or depend on the presence of the decision for their enforcement.[27] As I will explain, I have some reservations about that test. An alternative test is that a 'public' decision is one that alters rights or creates obligations without consent.[28] That test should at least avoid the problems identified by Gleeson CJ with asking whether the decision was something anyone in the public could do.[29]

Nature of decision not determinative

Although *Tang* confirms that public decision-makers can sometimes make decisions that are 'private' in nature, there would have been merit in going on to consider the third consideration relied on in *NEAT Domestic* – whether the decision-maker was subject to existing legal obligations that could not be reconciled with administrative law obligations. It is one thing to say that a decision by a public body spending public money is not made 'under' an Act when the decision is subject to the constraints of contract law. It is another to say that this sort of decision is not made 'under' an Act when there are no other 'private' legal constraints.[30]

Taking that point further, I would suggest that the nature of the decision does not always provide a clear indication of whether the decision should be reviewable. It may be accepted that a decision is 'public' in nature if it alters rights and obligations without consent. However, it does not follow that every other decision should be regarded as 'private' and therefore outside the scope of statutory judicial review.[31] Instead, with these 'non-public' decisions, courts should give more weight to factors such as the nature of the decision-maker and whether the decision-maker is subject to other legal obligations that cannot be sensibly accommodated with administrative law obligations. That is because, if there is some connection between a decision and an Act, it is appropriate to have regard to the whole statutory context to determine whether Parliament intended the decision to be subject to statutory judicial review.[32]

Applying the Tang approach to NEAT Domestic facts

The approach of the joint judgment in *Tang* can also be tested by applying the two criteria from that case to the facts of *NEAT Domestic*.

Did the Marketing Act require or authorise AWBI's decision?

As noted earlier, the first criterion from *Tang* asks whether the decision is expressly or impliedly required or authorised by the enactment. This first criterion was not satisfied in *NEAT Domestic* – it was 'neither necessary nor appropriate' to read s 57(3B) of the Marketing Act as impliedly authorising AWBI to issue an approval. I suggested earlier that this conclusion relied on the private nature of AWBI, and the difficulty of accommodating administrative law obligations with corporations law duties (the second and third considerations).[33]

My interpretation of *NEAT Domestic* may be significant if it became necessary in a future case to determine whether a decision by a non-Commonwealth body was required or authorised by a Commonwealth Act. Although *Tang* seems to lay down a general test for determining whether a decision is 'made under' an enactment, that test does not provide any clear guidance on when a private decision-maker's decision will be '*dehors*' a Commonwealth Act. Similar uncertainty may arise when a State officer makes a decision that has significance for the operation of a Commonwealth Act. In a sense, *Glasson* was an easy case, because the Commonwealth Act neither provided for the appointment of the decision-maker, conferred power to make the decision, nor gave legal effect to the decision.[34] If, however, a Commonwealth Act provided for one of those things (say, the State officer held a dual appointment under Commonwealth law), the reasoning in *Glasson* would not be determinative and the test in *Tang* would not seem to provide clear guidance. In these situations, I would suggest, a court could legitimately have regard to each of the various considerations referred to in *NEAT Domestic* to determine whether the decision was required or authorised by the Commonwealth Act.[35]

Did AWBI's decision confer or alter legal rights and obligations?

The second criterion from *Tang* would ask whether AWBI's decision itself conferred, altered or otherwise affected legal rights or obligations. Of course, that question would not strictly arise in *NEAT Domestic*, because the situation there did not satisfy the first criterion. Even so, the facts in *NEAT Domestic* illustrate some tension in the reasoning of the joint judgment in *Tang* on this point.

On the one hand, the *Tang* joint judgment states that it is a mistake to search for the 'proximate' source of power to make a decision, because decisions can have a dual character.[36] On the other hand, the *Tang* joint judgment also states that the rights or duties must owe 'in an immediate sense' their existence to the decision.[37] However, rights and obligations do not derive from a decision 'itself', but rather from the legal effect given to a decision.[38] And the legal effect of a decision may derive from more than one source. The second criterion from *Tang* therefore seems to require a choice between these different sources that cumulatively, give legal effect to a decision, to determine which is the 'immediate' source of the rights and obligations.

Turning to *NEAT Domestic*, the Marketing Act attached consequences to an approval by AWBI, but the approval could not have had that effect unless the Corporations Law also conferred power to give the approval in the first place. Presumably it would be in error to ask whether the Corporations Act or the Marketing Act is the 'proximate' source of power to make AWBI's decision. However, the *Tang* test would ask which Act is the 'immediate' source of the decision's legal effect. These seem to be very similar questions. To take another example, if a statutory authority makes a decision under a contract, the legal effect of the decision depends on the contract, but also depends on the authority having power to enter into the contract. Asking whether rights and duties owe their existence 'in an immediate sense' to the contract, or the Act, seems to raise the same problem as asking which is the 'proximate source' of power to make the decision. Both tests run counter to the idea that a decision can have a dual character.[39] It may be therefore that the second criterion in the *Tang* joint judgment is not very different from the question posed by Gleeson CJ: that is, whether the Act is the source of the decision's legal force or effect.[40]

Tang and NEAT Domestic – conclusions

It is apparent from this comparison that there are some differences of approach between *NEAT Domestic* and *Tang*. I have suggested that the reasoning in *Tang* would have benefited from considering all of the considerations relied on in *NEAT Domestic*. However, there is no contradiction between the two cases. Indeed, these differences of approach may in fact shed light upon one another – *Tang* confirms that it is relevant to consider the nature of the decision, as well as the nature of the decision-maker, and *NEAT Domestic* provides guidance on when a decision by a non-Commonwealth body will be taken to be required or authorised by a Commonwealth Act.

Constitutional factors and 'under an enactment'

The second issue considered in this paper is whether the constitutional factors referred to by the joint judgment in *Tang* support their Honours' interpretation of 'under an enactment'. The reasoning in the joint judgment contains two steps:

(1) federal constitutional factors are said to require a particular interpretation of 'under an enactment' for the purposes of the AD(JR) Act, and

(2) the phrase 'under an enactment' is intended to have the same meaning in the Queensland Judicial Review Act as the AD(JR) Act, even though these federal constitutional factors do not apply to a State Act.[41]

Step (2) may well be correct, particularly in the light of s 16 of the Queensland Act.[42] However, I disagree with step (1) in the reasoning. As I will explain, the constitutional factors referred to in *Tang* are not in my view particularly relevant to the meaning of 'under an enactment' in the AD(JR) Act.

Two constitutional factors – dual characterisation, 'matter'

The joint judgment in *Tang* uses constitutional factors to make three points. Two of these points can be dealt with fairly quickly.

Analogies with dual characterisation and s 76(ii)

First, in rejecting any suggestion that a decision must have a single character, the joint judgment points out, by analogy, that a Commonwealth law will be valid if one of its descriptions is within a subject-matter of power.[43] In addition, their Honours observe that a matter may 'arise under' a Commonwealth Act within the meaning of s 76(ii) of the Constitution even though the cause of action itself derives from another source of law (such as an action for breach of contract where the subject-matter of the contract concerns an entitlement under federal law).[44]

The point being made here – that there is no sharp division between 'administrative' and, say, 'commercial' decisions – is supported by the well-known difficulty in distinguishing between 'governmental' and other functions in determining the scope of the privileges and immunities of the executive government.[45] The two analogies relied on by the joint judgment in *Tang* may not be the most obvious, but the point is a sound one.

Need for a 'matter'

Secondly, in concluding that a decision is not 'made under' an Act unless the decision affects legal rights or obligations, the joint judgment refers to the fact that federal judicial power is limited to resolving 'matters'. That is, an application under the AD(JR) Act must involve the court determining some immediate right, duty or liability.[46]

This second point seems to be something of a red herring. It is certainly true that federal judicial power is limited to resolving 'matters' and that a 'matter' requires there to be an immediate right, duty or liability to be determined by the court. However, this description of a 'matter' is to ensure that courts only rule on issues that can be properly resolved by an exercise of judicial power (thus ruling out, for example, advisory opinions[47]). Accordingly, the requirement for an 'immediate right duty or liability' need not exclude, say, the 'interests' that have traditionally been protected by natural justice.[48]

Consider, for example, the situation in *Ainsworth v Criminal Justice Commission*.[49] As is well known, a report of the Criminal Justice Commission was tabled in the Queensland Parliament, which made adverse recommendations about persons involved in the poker machine industry. Mason CJ, Dawson, Toohey and Gaudron JJ held that, although the report did not have any legal effect or consequence, it had the 'practical effect' of blackening the appellants' reputations.[50] Given that the 'interests' which attracted natural justice included a person's reputation,[51] their Honours were prepared to grant declaratory relief that the appellants had been denied natural justice.[52] Although *Ainsworth* was concerned with a State decision, the discussion of whether that case raised hypothetical issues suggests that a similar case in federal jurisdiction would involve a 'matter'.[53] Therefore, in my view, there

would be nothing to prevent Commonwealth judicial review legislation from validly applying to a similar situation (noting that AD(JR) Act review would require that there be a 'decision' or 'conduct').

Comparison between 'made under' and 'arising under'

The final constitutional point in *Tang* requires more detailed consideration. The joint judgment states that a decision will be made 'under' an enactment if legal rights or duties owe in an immediate sense their existence to the decision, or depend on the presence of the decision for their enforcement.[54] Subject to one important difference (discussed below), this test is derived from the test for determining when a matter 'arises under' a Commonwealth Act within s 76(ii) of the Constitution. That is confirmed by the fact that the joint judgment cites a case concerning s 76(ii) to support its test.[55]

Link between s 76(ii) test and second criterion in Tang

This statement of the joint judgment in *Tang* appears in the following context. Gummow, Callinan and Heydon JJ observe (undoubtedly correctly) that the meaning of 'under an enactment' must take account of the fact that AD(JR) Act review is limited to decisions 'of an administrative character', which is brought by 'persons aggrieved'.[56] According to their Honours, what warrants the conferral of a right of judicial review on persons aggrieved is 'in general terms the affecting of legal rights and obligations'.[57] Stated at that level of generality, the conclusion is unobjectionable – as a practical matter, it is unlikely that Parliament would confer judicial review rights on a person who is not affected by a decision.[58] However, it does not necessarily follow from this general conclusion that it must be legal rights and obligations that are affected (and not 'interests'), or that the rights affected must owe their existence to the decision 'in an immediate sense'.

Accordingly, it seems that the second criterion in *Tang* for determining when a decision is 'made under' an Act[59] is influenced by an analogy with the meaning of 'arising under' a Commonwealth Act in s 76(ii) of the Constitution.[60] Three short comments can be made.

Comments on s 76(ii) analogy

First, the joint judgment does not expressly acknowledge, or explain, this comparison between the meaning of 'made under' an Act and 'arising under' an Act in s 76(ii) of the Constitution. However, the comparison is not at all obvious. For one thing, the language is different ('made' under, as against 'arising' under).[61] Moreover, there is an important difference in context – s 76(ii) is of course a grant of jurisdiction, but the definition of 'decision to which this Act applies' in the AD(JR) Act sets the limits of statutory rights to judicial review.[62]

Secondly, in any event, a comparison with s 76(ii) of the Constitution does not support the requirement in *Tang* that legal rights or duties owe *in an immediate sense* their existence to the decision. A matter need not arise *directly* under a Commonwealth Act to come within s 76(ii). For example, as the joint judgment in *Tang* itself notes, an action for breach of contract will 'arise under' a Commonwealth Act if the subject-matter of the contract concerns an entitlement under federal law.[63]

Thirdly, the constitutional authority of the Federal Court to hear AD(JR) Act matters does not depend on the matter 'arising under' the Commonwealth Act under which the decision is made.[64] Thus, there is no functional link between the meaning of 'arising under' and 'made under' an Act.

- As a matter of *statutory construction*, the AD(JR) Act applies to some decisions that are made under State and Territory legislation.[65] Clearly, a State or Territory Act cannot provide the link with s 76(ii)-type jurisdiction.

- As a matter of *constitutional jurisdiction*, all AD(JR) Act applications 'arise under' the AD(JR) Act itself (although many applications also arise under the Commonwealth Act under which the decision is made). A matter 'arises under' a Commonwealth Act if, relevantly, 'the right or duty in question owes its existence to a federal law or depends upon federal law for its enforcement'.[66] To the extent that the AD(JR) Act creates new administrative law rights and obligations (such as the s 13 statement of reasons), those obligations owe their existence to the AD(JR) Act. To the extent that the AD(JR) Act provides remedies for the breach of administrative law obligations derived from elsewhere, these obligations depend on the AD(JR) Act for their enforcement. Of course, it is necessary to explain the Commonwealth's power to create these rights and obligations, and remedies.[67] But the jurisdiction of the Federal Court to determine AD(JR) Act applications does not depend on the application 'arising under' the Act under which the decision is made.

It remains to be seen whether this comparison between the meaning of 'arising under' an Act and 'made under an enactment' will be picked up and developed in future cases.

Conclusion

The situation raised in *Tang* (a 'public' body exercising 'private' power) has been described as a significant fissure in Australian jurisprudence.[68] In this comment, I have suggested that the joint judgment in *Tang* did not engage sufficiently with the reasoning in *NEAT Domestic*, which raised a comparable 'fissure' in public law (a 'private' body exercising 'public' power).[69] In particular, there would have been merit in discussing all of the considerations raised in *NEAT Domestic*, such as the public nature of the decision-maker and whether the decision-maker was subject to other legal obligations that could not sensibly be accommodated with administrative law obligations. These additional considerations would not necessarily require a different result in *Tang*, but they would give some content to the rather general test of asking whether a decision is required or authorised by an Act.

I have also suggested that the constitutional factors referred to by the joint judgment in *Tang* do not greatly assist in interpreting the phrase 'made under an enactment'. In particular, there is no obvious reason to draw on s 76(ii) of the Constitution to interpret the phrase 'made under' an Act, as the *Tang* joint judgment seems to do. The *Tang* joint judgment also seems to suggest that the need for a 'matter' restricts AD(JR) Act review to decisions that confer or affect legal rights and obligations. If that suggestion in *Tang* were accepted in future cases (and I have argued that it should not be), it would seem to limit all judicial review of Commonwealth decisions, including common law review in the High Court under s 75(v) of the Constitution or in the Federal Court under s 39B(1) of the Judiciary Act. That is because the need for a 'matter' applies to *all* federal jurisdictions, including s 75(v) jurisdiction and statutory equivalents.[70]

Finally, *Tang* is similar in some respects to the decision in *Bond* – both decisions choose a relatively narrow interpretation of threshold requirements for obtaining review under the AD(JR) Act ('made under an enactment' and 'decision', respectively). I have argued elsewhere with Professor Creyke that one of the difficulties with *Bond* is that lower courts have applied the 'final and operative' test as a rigid and inflexible requirement, and that a preferable approach would have been to ask whether the decision or conduct that was sought to be reviewed had a real impact on rights or interests at the stage that review was sought.[71] Similarly, important as the High Court's decision in *Tang* is, its real effect may emerge from the manner in which it is applied by lower courts.

Endnotes

1 (2005) 213 ALR 724.
2 (2003) 216 CLR 277.
3 Ibid at 297 [51].
4 Ibid at 298 [54].
5 Ibid at 297 [51], 299 [61].
6 Ibid at 300 [63].
7 *Tang* (2005) 213 ALR 724 at 745 [89].
8 Ibid at 747 [96].
9 Ibid at 743 [77] (n 72), citing *NEAT Domestic* (2003) 216 CLR 277 at 298 [55].
10 *Tang* (2005) 213 ALR 724 at 745 [87]. '*Dehors*' means '[o]utside the scope of; irrelevant': Leslie Rutherford and Sheila Bone, *Osborn's Concise Law Dictionary* (8th ed, 1993) at 111.
11 In this sense, AWBI's decision could not be regarded as a mere 'factum' on which the Marketing Act operated: see Graeme Hill, 'The Administrative Decisions (Judicial Review) Act and 'under an enactment': Can NEAT Domestic be reconciled with Glasson?' (2004) 11 *Aust Jo of Admin Law* 135 at 142-143.
12 (1984) 155 CLR 234, cited in *Tang* (2005) 213 ALR 724 at 745 [87] (n 89).
13 A decision to issue an overpayment certificate created a debt payable to the State: see *Petroleum Products Subsidy Act 1965* (NSW), s 10.
14 (1990) 170 CLR 321 at 377 (Toohey and Gaudron JJ), cited in *Tang* (2005) 213 ALR 724 at 745 [86] (Gummow, Callinan and Heydon JJ).
15 *NEAT Domestic* (2003) 216 CLR 277 at 298 [54] (McHugh, Hayne and Callinan JJ).
16 Hill, above n 11, at 139-140. However, it could also be argued that these considerations (1) only affect whether a breach of a ground of review could ever be established: cf *NEAT Domestic* (2003) 216 CLR 277 at 287-289 [19]-[22] (Gleeson CJ); or (2) only determine whether AWBI's decision was of 'an administrative character': Neil Arora, 'Not so Neat: Non-statutory Corporations and the Reach of the *Administrative Decisions (Judicial Review) Act 1977*' (2004) 32 *Fed L Rev* 141 at 146.
17 (1985) 157 CLR 290 at 301 (Mason, Deane and Dawson JJ), cited in *NEAT Domestic* (2003) 216 CLR 277 at 298 [54] (n 51).
18 For example, the Attorney-General's power to make an extradition request derives from the executive power, not statute: see *Oates v Attorney-General (Cth)* (2003) 214 CLR 496 at 511 [39] (the Court).
19 After referring to the second and third considerations, the joint judgment in *NEAT Domestic* simply concludes '[f]or these reasons, neither a decision of AWBI not to give an approval to a consent to export, nor a failure to consider whether to give that approval, *was open to judicial review under the AD(JR) Act or to the grant of relief in the nature of prohibition, certiorari or mandamus*': (2003) 216 CLR 277 at 300 [64] (emphasis added).
20 *Tang* (2005) 213 ALR 724 at 766 [159]-[160].
21 See particularly the factors mentioned by Kirby J (dissenting): ibid at 750-751 [108]-[110].
22 Ibid at 727 [12] (Gleeson CJ), 738 [57] (Gummow, Callinan and Heydon JJ), 755 [130] (Kirby J).
23 Hill, above n 11, at 140-142.
24 *Tang* (2005) 213 ALR 724 at 730 [20] (Gleeson CJ), 746 [91] (Gummow, Callinan and Heydon JJ). In dissent, Kirby J suggested that these issues could not be determined at this interlocutory stage, and required evidence: at 753-754 [120]-[123].
25 (2003) 216 CLR 277 at 297 [50].
26 See below, n 45.
27 *Tang* (2005) 213 ALR 724 at 744 [80].
28 See Mark Aronson, Bruce Dyer and Matthew Groves, *Judicial Review of Administrative Action* (3rd ed 2004) at 151: at common law '[i]t is said that the essence of public power is its non-consensual quality'. See generally Mark Aronson, 'A Public Lawyer's Responses to Privatisation and Outsourcing' in Michael Taggart (ed), *The Province of Administrative Law* (1997) 40 at 51-56.
29 Gleeson CJ stated that the difficulty with using this criterion as a free-standing test is that much would depend on the level of abstraction at which the decision, or the legal effect, was described: *Tang* (2005) 213 ALR 724 at 730 [22]. For example, was the decision in *Tang* a decision to terminate a voluntary relationship, or to terminate a Ph D program at Griffith University?
30 See ibid at 752-753 [116]-[119] (Kirby J, dissenting). The majority judgments in *Tang* were careful to avoid discussing whether review was available at common law: ibid at 725 [3] (Gleeson CJ), 732 [32] (Gummow, Callinan and Heydon JJ). And of course there may be other forms of scrutiny, such as making a complaint to the Queensland Ombudsman (noting that the *Ombudsman Act 2001* (Qld) is not limited to decisions made 'under' an Act: see the definition of 'administrative action' in s 7(1)). I am grateful to Professor Aronson for this point.
31 For example, it has been suggested that the Panel on Takeovers and Mergers (considered by the English Court of Appeal in *R v Panel on Takeovers and Mergers; Ex parte Datafin Plc* [1987] 1 QB 815) was

exercising mixed powers, which bore both public and private aspects: Aronson, Dyer and Groves, above n 28, 119. It may also be noted, by analogy, that Selway J suggested that the categories of 'legislative' and 'administrative' decisions are not mutually exclusive, and that some decisions could be both: *McWilliam v Civil Aviation Safety Authority* (2004) 214 ALR 251 at 259-260 [39]-[42].

32 See Hill, above n 11, at 143-144: arguing that the third consideration from *NEAT Domestic* asks whether Parliament intended the decision to be subject to AD(JR) Act review.

33 See above, nn 10-19.

34 *Glasson* (1984) 155 CLR 234 at 241 (the Court).

35 See Graeme Hill, 'Will the High Court '*Wakim*' Chapter II of the Constitution?' (2003) 31 *Fed L Rev* 445 at 480-490.

36 *Tang* (2005) 213 ALR 724 at 741 [68]-[69].

37 Ibid at 744 [80].

38 The joint judgment seems to acknowledge as much, referring to '[t]he legal rights and obligations which are affected by the authority of the decision *derived from the enactment in question*': ibid at 745 [85] (emphasis added).

39 In a related point, it has been suggested that the test of whether an Act 'requires or authorises' the decision (which became criterion (1) in *Tang*) 'does not appear to exclude any more or any fewer decisions than the previous ['proximate source'] test': Damien O'Donovan, 'Statutory Authorities, *General Newspapers* and Decisions under an Enactment' (1998) 5 *Aust Jo of Admin Law* 69 at 74.

40 *Tang* (2005) 213 ALR 724 at 730 [23].

41 See ibid 731 [26]-[27], 746 [90].

42 Section 16 provides, broadly, that a provision in the Queensland Judicial Review Act should not be taken to have a different meaning from the corresponding provision in the AD(JR) Act merely because different words are used.

43 *Tang* (2005) 213 ALR 724 at 740 [66].

44 Ibid at 740 [67], citing *LNC Industries Ltd v BMW (Australia) Ltd* (1983) 151 CLR 575.

45 See eg *Townsville Hospital Board v Townsville City Council* (1982) 149 CLR 282 at 288-289 (Gibbs CJ, with Murphy, Wilson and Brennan JJ agreeing). The High Court has also rejected any distinction between governmental functions, and commercial and trading functions, in determining whether a statutory body or company is 'the State' or 'the Commonwealth' for constitutional purposes: see *Deputy Commissioner of Taxation v State Bank (NSW)* (1992) 174 CLR 219 at 231-232 (the Court).

46 *Tang* (2005) 213 ALR 724 at 746 [90], citing (among other things) *In re Judiciary and Navigation Acts* (1929) 21 CLR 257 at 265 (Knox CJ, Gavan Duffy, Powers, Rich and Starke JJ).

47 My preferred analysis is that advisory opinions do not involve an exercise of judicial power at all: see *R v Kirby; Ex parte Boilermakers' Society of Australia (The Boilermakers Case)* (1956) 94 CLR 254 at 273-275 (Dixon CJ, McTiernan, Fullagar and Kitto JJ). However, an alternative analysis is that advisory opinions are judicial, but do not come within the narrower concept of judicial power 'of the Commonwealth': *In re Judiciary and Navigation Acts* (1929) 21 CLR 257 at 264 (Knox CJ, Gavan Duffy, Powers, Rich and Starke JJ).

48 Note that *In re Judiciary and Navigation Acts* also states that 'a matter under the judicature provisions of the Constitution must involve some right *or privilege or protection given by law* …': (1921) 29 CLR 257 at 266 (Knox CJ, Gavan Duffy, Powers, Rich and Starke JJ) (emphasis added).

49 (1992) 175 CLR 564.

50 Ibid at 581.

51 Ibid at 577-578.

52 Ibid at 582.

53 See ibid at 582.

54 *Tang* (2005) 213 ALR 724 at 744 [80].

55 Ibid (n 77), citing *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Barrett* (1945) 70 CLR 141 at 154 (Latham CJ).

56 *Tang* (2005) 213 ALR 724 at 743 [79].

57 Ibid at 744 [80].

58 As a matter of constitutional power, however, it would be possible to alter the standing requirements for seeking judicial review: see generally *Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd* (2000) 200 CLR 591.

59 That is, whether the decision itself confers, alters or otherwise affects legal rights or obligations: see above, n 7.

60 In the course of argument, Gummow J asked whether in previous Federal Court cases there had been any mention of an analogy with s 76(ii) of the Constitution, and stated that '[p]erhaps there should have been': *Griffith University v Tang* [2004] HCATrans 227 (21 June 2004) at 15. Neil Arora has argued explicitly in favour of this analogy: Arora, above n 16, at 157-159.

61 By contrast, s 76(ii) may be relevant when a Commonwealth Act uses the phrase 'arising under'. For example, the s 76(ii) test is applied to s 347(1) of the *Workplace Relations Act 1996* (Cth), which deals with liability to pay costs for proceedings 'arising under' that Act: see eg *Re McJannet; Ex parte Australian Workers' Union of Employees (Qld) (No 2)* (1997) 189 CLR 654 at 656-657 (the Court).

62 Significantly, when 'arising under' is used to define the *exclusive* jurisdiction of a specialist court, that phrase may be interpreted more narrowly than in s 76(ii) of the Constitution: see eg *Carricks Ltd v Pizzarro*

(1995) 38 NSWLR 271 at 277 (Priestley JA, with Sheller JA agreeing), considering s 107 of the *Workers Compensation Act 1987* (NSW).

63 See above, n 44 (discussing *LNC Industries*).

64 Contrary to the suggestion in Arora, above n 16, at 158. The Federal Court can of course only be given jurisdiction over matters of the types set out in ss 75 and 76 of the Constitution.

65 See para (ca) of the definition of 'enactment' in s 3(1) of the AD(JR) Act, and Sch 3. Regulations made under s 19A can specify additional State and Territory legislation that is treated as an 'enactment'. However, only a decision by a Commonwealth authority or an officer of the Commonwealth under these State and Territory Acts is a 'decision to which this Act applies': see para (b) of the definition in s 3(1) of the AD(JR) Act.

66 See eg *LNC Industries* (1983) 151 CLR 575 at 581 (Gibbs CJ, Mason, Wilson, Brennan, Deane and Dawson JJ).

67 Briefly, if the decision is made under a Commonwealth Act, then the application of the AD(JR) Act will be supported by whatever head of power supports that Commonwealth Act. If the decision is made under a *State* Act, then the application of the AD(JR) Act will be supported by whatever head of power supports the Commonwealth law authorising the Commonwealth body to perform the State function, and possibly by the Commonwealth's inherent executive power to regulate the conduct of its own officers and bodies.

68 *Hughes Aircraft Systems International v Airservices Australia* (1997) 76 FCR 151 at 179 (Finn J).

69 This comparison between *Hughes Aircraft* and *NEAT Domestic* is made in Arora, above n 16, at 152.

70 Indeed, McHugh and Gummow JJ have expressed doubts whether s 75(v) of the Constitution would permit courts to review a denial of a 'legitimate expectation', because the constitutional separation of power is said to limit s 75(v) to review on the grounds of jurisdictional error: *Re Minister for Immigration and Multicultural and Ethnic Affairs; Ex parte Lam* (2003) 214 CLR 1 at 24-25 [76]-[77]. A similar argument might apply also to a decision which affected only 'interests'. I am grateful to Professor Creyke for this point.

71 Robin Creyke and Graeme Hill, 'A Wavy Line in the Sand: *Bond* and Jurisdictional Issues in Judicial and Administrative Review' (1998) 26 *Fed L Rev* 15 at 41.

NON-STATUTORY REVIEW OF PRIVATE DECISIONS BY PUBLIC BODIES

Daniel Stewart*

The decision in *Griffith University v Tang*[1] is primarily a question of statutory interpretation: what does it mean for a decision to be 'made under an enactment' for the purposes of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (the 'ADJR Act') and its State and Territory equivalents. The majority[2] held that requirement involved two elements: 'first, the decision must be expressly or impliedly required or authorised by the enactment; and, secondly, the decision must itself confer, alter or otherwise affect legal rights or obligations, and in that sense the decision must derive from the enactment.'[3] Legal rights and obligations can be derived from general law or statute, or arise from decisions authorised by the enactment in question. On the basis of this interpretation, the majority held that the exclusion of a student, Ms Tang, from the PhD Program by Griffith University, a statutory authority, was not 'made under' any relevant enactment and hence not reviewable under the Queensland equivalent of the ADJR Act. The decision was based on 'a consensual relationship, the continuation of which was dependent upon the presence of mutuality.'[4] As this was the only basis for review relied on by the student in seeking judicial review the application was summarily dismissed.[5]

The impact of the decision on the operation of statutory schemes such as the ADJR Act, however, reveals an underlying concern over the scope of judicial review. In *Enfield City v Development Assessment Commission,*[6] Gaudron J suggests there are three factors informing comprehensive statutory schemes such as the ADJR Act[7]: the potential for executive and administrative decisions to affect adversely individual rights, interests and legitimate expectations; accountability and the need to ensure executive government and administrative bodies observe relevant limitations on the exercise of their powers; and the inadequacy of the prerogative writs as general remedies to compel that observance.[8] The scope of the ADJR Act and other statutory schemes therefore reflects the operation of other mechanisms in setting and enforcing limits placed on the exercise of power by public bodies.

This paper considers the extent to which classifying a decision as public, and hence subject to judicial review, depends upon both the nature of the decision-maker (whether they are a public or private body) and the nature of the function under examination (whether they are performing a public or private function). It begins with the role of the threshold requirement for review under the ADJR Act that there be a decision of an administrative character made under an enactment and its application to the distinctions between public and private decisions. It then looks at the availability of the prerogative writs and equitable remedies and

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whether the distinction between public and private decisions is also reflected in other avenues for judicial review. The impact of UK decisions on decisions with a public function and the impact of consensual relationships is then examined before considering the role natural justice plays in these contexts. The paper concludes that the decision to exclude review under statutory schemes such as the ADJR Act in circumstances judged to be a consensual relationship is made in the context of considerable uncertainty over the applicability of other forms of judicial review. The operation and assessment of the approach taken in *Tang* is similarly uncertain.

Role of threshold requirements

One of the concerns arising out of *Tang* is that it is intended to return us to a consideration of whether the decision affects rights or obligations in a legally enforceable sense and not merely interests or perhaps legitimate expectations. It could be argued that the majority included decisions which are a condition precedent to the valid exercise of authority conferred by an enactment regardless of the characterisation of the decision as affecting rights, interests, or expectations per se.[9] However, the reference to rights and obligations clearly indicates that it is not sufficient for a decision to merely be authorised by an enactment. Having a statutory source is not sufficient in itself to give rise to the availability of the statutory schemes for review.

Restricting the ADJR Act to 'decisions of an administrative character made under an enactment' has perhaps proven more complex than the drafters may have anticipated.[10] As Mason J emphasised in *Australian Broadcasting Tribunal v Bond,*[11] the threshold requirements go beyond the separation of powers implications in 'administrative decisions' or the limits of federal jurisdiction in restricting the ambit to Commonwealth and not State Acts. There is also what may be termed an 'efficiency' aspect, balancing the need to provide access to redress for persons aggrieved or affected by decisions against undue impairment to the administrative process.[12] In *Salerno v National Crime Authority*[13] the court described the need to limit access to ADJR Act review in this way:

> If a general authorisation in a statute for a decision by an organisation set up under that legislation is sufficient to make it a decision under the statute, and thus open to judicial review, every intra vires action of that organisation that has decisional effect and every kind of conduct engaged in for the purpose of making a decision will be examinable by the Court. The potential for massive disruption of the organisation's activities that would be the consequence of such a conclusion is manifest.[14]

As applied in cases like *Bond* and *Salerno*, this rationale operates as a temporal limit on access to ADJR Act review, depending when in the decision-making process, review was appropriate. However, as applied in *Tang* the threshold requirements may also have a fundamental role in distinguishing public from private decisions. The threshold requirements do not admit review of all decisions that may be classified as public, particularly decisions under prerogative powers,[15] but the restriction of the ADJR Act to decisions outside of a consensual relationship provides one form of delineation between decisions whose affects should be redressed through private law remedies, including contract, property, tort, and those for whom the public law remedies of judicial review may be appropriate. In this context the threshold requirements serve not to prevent undue review of intra vires decisions but to determine the appropriate basis on which limitations on the decision can be assessed and enforced. The question therefore arises whether this restriction is also inherent in the availability of judicial review under non-statutory review.

Alternative avenues of jurisdiction

Under Part 5 of the *Judicial Review Act 1991* (Qld) (the 'JR Act') the Supreme Court of Queensland retains the jurisdiction to provide remedies in the nature of the prerogative writs of certiorari, prohibition and mandamus and equitable remedies of declaration and injunction. The rights conferred by the JR Act, under which Ms Tang brought her application for review and which in relevant respects are respectively similar to those provided at the Commonwealth level by the ADJR Act,[16] are in addition to any other right to seek judicial review. The ADJR Act similarly does not displace the right to seek judicial review through any other means.[17] This suggests that statutory schemes such as these may be intended to provide recourse to judicial review through different, albeit overlapping, means to that provided by non-statutory review.

The jurisdictional requirements of other forms of judicial review go beyond reference to a statutory source of power to make the decision. Section 4 of the JR Act expands review under the Queensland statutory scheme to include executive decisions involving the expenditure of public funds[18] which would seem to incorporate many prerogative decisions. The limit on the ADJR Act's applicability to prerogative decisions reflects the uncertainty over the availability of the prerogative writs to exercises of prerogative power at the time of its introduction.[19] The reference to 'matters arising under' a Commonwealth enactment in s 39B(1A)(c) of the *Judiciary Act* 1903 (Cth) is more closely aligned to the ADJR Act's reference to the source of the power to make the decision, but the full extent of any distinction is perhaps uncertain.[20]

Access to judicial review at the Federal level is also available under s 75(v) of the Constitution and s 39B(1) of the *Judiciary Act* when the remedies of the writs of prohibition or mandamus or an equitable injunction are available against an 'officer of the Commonwealth'. This institutional focus does not include statutory or government owned or controlled corporations,[21] although they may still be classified as 'the Commonwealth' for the purposes of s 75(iii) of the Constitution. Such bodies allow for jurisdiction on the basis of private law as well as public law remedies provided the Corporation representing the Commonwealth is appropriately a party to the relevant matter. The nature of the action being brought, and the remedy sought, is therefore the basis of any distinction based on the public or private character of the decision.

Availability of alternative remedies

Developments in the availability of certiorari have largely involved the ability to review exercises of prerogative or executive power.[22] Recent acceptance of the proposition that certiorari could issue against a tribunal lawfully established under prerogative power has generally been traced[23] to *R v Criminal Injuries Compensation Board; Ex parte Lain*[24], where Lord Parker CJ stated:

> We have as it seems to me reached the position when the ambit of certiorari can be said to cover every case in which a body of persons of a public as opposed to a purely private or domestic character has to determine matters affecting subjects provided always that it has a duty to act judicially.[25]

The need for a body to have a duty to act judicially was deleted in *O'Reilly v Mackman.*[26] Lord Diplock put the test for amenability to certiorari to quash a decision as whether the decision-maker was a 'statutory tribunal or other body of persons having legal authority to determine questions affecting the common law or statutory rights or obligations of other persons as individuals'[27]

The requirement of a determination of 'rights or obligations' was applied by the High Court in *Ainsworth v Criminal Justice Commission.*[28] There the Queensland Criminal Justice Commission monitored, investigated and reported on the administration of the criminal justice system in Queensland. Its reports were published in Parliament. The Ainsworth group of companies was heavily criticised in a report considering the introduction of poker machines, with the Commission recommending that they not be allowed to participate in the introduction. However, the recommendation had no legal effect. Ainsworth was not prevented from obtaining a gaming licence by the recommendation, nor was it subject to prosecution because of the recommendation. Certiorari was not available for a breach of natural justice in making the recommendation because it did not have 'a discernible or apparent legal effect upon rights.'[29]

The principles in *Ainsworth* were developed in *Hot Holdings v Creasy,*[30] a decision that held that certiorari could issue to quash a recommendation from the Mining Warden about the priority of applications for a mining licence issued by the Minister. It was held that a 'preliminary decision or recommendation, if it is one to which regard must be paid by the final decision-maker, will have the requisite legal effect upon rights to attract certiorari.'[31] The judgement seemed to approve of the decision in *Lain* and its scheme to provide a benefit,[32] suggesting that certiorari is concerned with the legal effect of the decision in question rather than the categorisation of the ultimate decision as going to rights, interests or expectations.[33] The decision in *Hot Holdings* is therefore relevantly analogous to the situation described in *Australian Broadcasting Tribunal v Bond*[34] which was referred to by the majority in *Tang* as an example of a decision going to statutory rights and duties. [35]

Even in the absence of a decision which had any legal effect, the court in *Ainsworth* was prepared to order a declaration. Issuing a declaration does not depend on an effect on legal rights. There must only be a justiciable controversy. A declaration is available to answer real, rather than abstract or hypothetical, questions where it will produce foreseeable consequences for the parties.[36] In *Ainsworth* this consequence was merely the ameliorating effect on the reputation of Ainsworth of a declaration that there had been a breach of natural justice in making the report. There was no obligation to reconsider the report or issue a corrected version.

Where the decision in question acts as a precondition to a subsequent action then a declaration of the invalidity of the decision can be coupled with an injunction preventing the subsequent action from being taken.[37] Even though it is based in equity rather than statute[38] an injunction is not restricted to any classification of the legal effect on rights or interests. Even though regard must still be had to the 'existence of a legal or equitable right which the injunction protects against invasion or threatened invasion, or other unconscientious conduct or exercise of legal or equitable rights'[39] this may not be determinative.

As Gaudron, Gummow and Kirby JJ stated in *Bateman's Bay Local Aboriginal Land Council v The Aboriginal Community Benefit Fund Pty Limited,*[40] '[i]t would be an error to proceed on any basis which assumed, as a governing principle, that in its auxiliary jurisdiction equity intervenes solely to protect a proprietary or other legal right advanced by a plaintiff.'[41] Instead their Honours pointed to 'the public interest in the observance by such statutory authorities, particularly those with recourse to public revenues, of the limitations upon their activities which the legislature has imposed.'[42] Any reference to the classification of rights and interests that can be protected by an injunction may therefore only be relevant to considerations of standing, and even then only for the purposes of identifying the special character of the interest affected.[43]

It is not clear how far an injunction may be available to protect public, as opposed to private, rights and interests beyond those established and limited by statute. It has been suggested that for an interest, duty, wrong or obligation to be 'public', it must directly affect or benefit a

large number of people.[44] The discussion in *Bateman's Bay* extends injunctions to establishing and enforcing the limitations imposed by statute. The ability to injunct action being taken on the decision to exclude an individual PhD student would therefore depend on relevant limitations imposed on the decision by statute, such as through the enactment of a University statute, or a private action based on contract or other private law remedy. It remains to be seen whether an injunction to enforce public rights and duties can be extended to statutory authorities based on the effect of their decisions rather than limitations implied through the statutory source.

The majority in *Ainsworth* also referred to the possibility of prohibition being available had relief been sought prior to publication of the report, regardless of the report's lack of legal effect. The availability of prohibition requires that there has been a jurisdictional error, which is always involved with a breach of natural justice, but is only available while there is something still remaining to prohibit.[45] Prohibition may therefore act in similar circumstances as an injunction, acting to restrain the taking of further action based on limitations imposed by statute. Whilst an injunction may not involve classification of a decision as going to jurisdiction,[46] it similarly avoids classification of the decision as a relevant right or obligation. Both go to bodies that have a limited capacity to affect others, regardless of how that effect is classified. The classification of a decision as being based on a consensual relationship, however, would seem to preclude the establishment of any such limits.

As the decision in *Tang* concerned the ability to review a decision, the power for which was granted under the relevant statute, but for which it was not contended there was any relevant duty involved, the writ of mandamus will not be considered in detail here. It is hopefully sufficient to note that the focus of mandamus is on the nature of the duty rather than the body upon whom the duty is imposed, but classifying a duty as public involves similar concerns as the other remedies. A non-statutory source of a duty to consider eligibility for a grant may lead to a refusal to grant mandamus,[47] and duties imposed by contract may generally be classified as private.[48]

'Public' functions

Recent decisions in the UK have provided for public law remedies where the body in question performs a 'public function' regardless of the nature of the body. Contractual decisions, however, remain private. Recent Australian cases have applied these decisions, but to varying extents.

The Datafin decision

The reference in *Lain* to bodies being susceptible to certiorari that have a public, rather than a private or domestic, character was expanded upon in *Council of Civil Service Unions v Minister for the Civil Service.*[49] Lord Scarman suggested that 'the controlling factor in determining whether the exercise of prerogative power is subject to judicial review is not its source but its subject matter.'[50] This focus on the nature of the power and the effect of the decision, rather than its source in legislation or prerogative power, was adopted by the Court of Appeal in *R v Panel on Take-overs and Mergers; Ex parte Datafin Plc*.[51]

Datafin concerned a decision made by the Panel on Takeovers and Mergers, an unincorporated association without legal personality or statutory, prerogative or common law powers. The Panel devised, administered and enforced the Code on Takeovers and Mergers. The members of the Panel included representatives of the major participants in the UK securities markets. Breach of the Code could be enforced through private reprimand, public censure, or in a more flagrant case, through further action designed to deprive the offender of the ability to enjoy the facilities of the securities market. The Panel could refer certain aspects of the case to the Department of Trade and Industry, the London Stock

Exchange or other appropriate body. The Stock Exchange, for example, included breaches of the Code as found by the Panel as an act of misconduct leading to expulsion from the Official List of securities traded on the Exchange. Importantly, the listing of securities is a statutory function provided for under government regulations.

The decision by the Panel that there had been a breach of the Code was held to be susceptible to judicial review, including to the grant of certiorari where there was a breach of natural justice, because it was carrying out a 'public' function. As suggested by Lloyd LJ:

> The source of the power will often, perhaps usually, be decisive. If the source of the power is a statute, or subordinate legislation under a statute, then clearly the body in question will be subject to judicial review. If, at the other end of the scale, the source of the power is contractual, as in the case of private arbitration, then clearly the arbitrator is not subject to judicial review: … but in between these extremes there is an area in which it is helpful to look not just at the source of the power but at the nature of the power …[52]

Donaldson MR suggested that 'it is possible to find [in the cases] enumeration of factors giving rise to the jurisdiction, but it is a fatal error to regard the presence of all those factors as essential or as being exclusive of other factors.'[53] The factors included: whether the body was government owned, controlled or funded; is subject to generally applicable state regulation; carries out functions also carried out by public authorities; and whether it can only be restrained effectively through public law remedies. He concluded:

> Possibly the only essential elements are what can be described as a public element, which can take many different forms, and the exclusion from the jurisdiction [of the courts to provide judicial review] of bodies whose sole source of power is a consensual submission to its jurisdiction.[54]

Here, because the 'panel regulates not only itself, but all others who have no alternative but to come to the market in a case to which the code applies'[55] and the public nature of the interests affected by the decision, namely listing on the stock exchange and its importance to commerce, the Panel was sufficiently public to provide jurisdiction for judicial review.

Consensual submission to jurisdiction

The exclusion of 'bodies whose sole source of power is consensual submission to its jurisdiction' is derived from the decision of Parker LJ in *Lain*[56] where he stated that '[p]rivate or domestic tribunals have always been outside the scope of certiorari since their authority is derived solely from contract, that is from the agreement of the parties concerned.'[57] This aspect of *Datafin* was considered in *R v Disciplinary Committee of the Jockey Club, ex parte Aga Khan.*[58] There the disciplinary committee of the Jockey Club, a body incorporated by Royal Charter, disqualified a horse for failing a blood test. The owner claimed that this damaged his reputation. However, although the Jockey Club regulated a significant national activity which affected the public, there was a consensual element to its power. Although the acceptance of the Jockey Club's regulation was so widespread that anyone who wished to race their horse in England had 'no choice but to submit to the Jockey Club's jurisdiction'[59] it was still based on consent rather than through the action of any legislative scheme. The rules of the Jockey Club were incorporated into contracts required between racecourses and owners, and it was held that remedies in private law available to the owner were an adequate form of redress.

Reference to the consensual element of a decision-maker's power is therefore one factor that goes to establishing whether a body is subject to judicial review. As Scott Baker LJ suggested in *R v Director General of the National Crime Squad; Ex parte Tucker*[60]:

Whether a decision has a sufficient public law element to justify the intervention of the administrative court by judicial review is often as much a matter of feel, as deciding whether any particular criteria are met.[61]

Although many cases rely on *Datafin* where a private body is involved in carrying out a public function, 'the logic of *Datafin's* "public function"' test cuts both ways'[62] and has been used to exclude judicial review of public bodies, including statutory authorities, exercising private power. Even commercial decisions on entering or terminating commercial contracts can, however, be sufficiently 'public'.[63] The circumstances giving rise to the public element in cases involving consensual decisions, such as an obligation to have regard to the public interest, rarely, however, involve the imposition of limitations leading to a breach of a ground of review.[64]

The distinction between public and private functions discussed in *Datafin* and *Aga Khan* was required by the procedures for initiating review under what was then Order 53 of the Rules of the Supreme Court[65] which provided for judicial review of the lawfulness of an enactment or 'a decision, action or failure to act in relation to the exercise of a public function'. As Lord Diplock sets out in *O'Reilly v Mackman,*[66]*,* the introduction of O53 'drastically ameliorated' the differences under the previous procedural requirements between seeking the prerogative writs and remedies in private law.[67] The new rules provided a procedure 'by which every type of remedy for infringement of the rights of individuals that are entitled to protection in public law can be obtained in one and the same proceeding'[68] including injunctions and declarations, and, in appropriate circumstances, damages. However, the purpose of O53 remained to provide additional forms of protection for public decision-makers to prevent the undue disruption of administrative decision-making. Order 53 provided for leave to apply for the order, discovery of documents and cross-examination of witnesses. Affidavits sworn on oath setting out the material facts relied upon are required before leave can be given. Additionally there was a requirement that proceedings be instigated within 3 months of the decision instead of the lengthy limitation periods in private law actions so as to protect 'the interests of good administration and of third parties who may be indirectly affected by the decision, for speedy certainty as to whether it has the effect of a decision that is valid in public law.'[69]

The distinction drawn in UK cases between public and private functions is therefore required to prevent abuse of the judicial process through inappropriate choice of initiating procedure. In *Cocks v Thanet District Council*,[70] handed down on the same day as *O'Reilly,* it was held that private law rights which depended on prior public law decisions would also ordinarily have to be litigated through the procedure for judicial review, highlighting the need to select the correct procedure or risk being out of time.[71]

However, recent cases have suggested a relaxation of the distinction at least in cases involving a statutory body.[72] In *Clark v University of Lincolnshire and Humberside*[73] the court considered the case of a student being awarded only a third class degree , due to accusations of plagiarism. The proceeding was brought for breach of contract even though the Court seemed to accept that the University was a statutory body with public functions in conferring degrees and hence may have been judicially reviewed. However, the court emphasised that there was no need to rigidly apply a demarcation between public and private functions. Lord Woolf MR said:

> If it is not possible to resolve the dispute internally, and there is no visitor, then the courts may have no alternative but to become involved. If they do so, the preferable procedure would usually be by way of judicial review. If, on the other hand, the proceedings are based on the contract between the student and the university then

> they do not have to be brought by way of judicial review. The courts today will be flexible in their approach.[74]

The court held that it was possible to review the decision on the basis of the contractual agreement between the University and the student. The court cautioned that there may be decisions involving 'issues of academic or pastoral judgement which the university is equipped to consider in breadth and in depth, but on which any judgement of the courts would be jejune and inappropriate.'[75] This included such question as what mark or class a student ought to be awarded. However, where the dispute lies, as in this case, with whether the dispute resolution procedures set out in the contract have been followed, the courts were well able to adjudicate, whether through judicial review or through enforcing the contract. Review of the decisions by a body established by statute, even when based on contractual agreement, was dependent on the nature of the decision in question rather than any categorisation of the nature of the decision-maker or the effect of the decision as going to legal rights or obligations.

Procedure v substance

As the decision in *Clark* indicates, the distinction between public and private functions discussed in *Datafin* may now go more to the procedural form the application takes rather than the substance of the review provided. In Australia, it is not clear whether this same flexibility will be available.

In *Typing Centre of New South Wales v Toose*[76] Mathews J held that decisions of the Advertising Standards Council (ASC) that there had been a breach of the Advertising Code of Ethics (the code) was susceptible to judicial review. The ASC was established by private charter by representatives of the advertising and media industries. Television stations, as members of a representative body, were contractually bound to comply with the terms of the code as interpreted by the ASC. Mathews J considered that the ASC was acting in interpreting the code, which in many respects merely restated the existing law, in the same way as courts in interpreting and moulding Acts of parliament. Someone attempting to place an advertisement who was not party to the contract should be able to have the decision of the ASC reviewed. However, the jurisdictional basis of the decision is unclear.

In *Dorf Industries Pty Ltd v Toose*[77] Ryan J discussed *Typing Centre* in refusing to grant a declaration that various television advertisements did not contravene clause 6 of the code. He held that to do so would leave two contrary decisions, one by the court and the other by the ASC. Whilst the declaration would prevent any disciplinary action being taken against any television channel that played the advertisements, it would not result in the invalidity of the ASC's decision. 'It is only when the supervisory as distinct from the original determinative or appellate jurisdiction of the court is invoked that different discretionary considerations apply.'[78]

Therefore, one of the matters going to the discretion of the court as to whether to make a declaration was whether an appropriate action had been brought to quash the decision through the writ of certiorari. If there continues to be a distinction drawn between decisions that are susceptible to judicial review on the basis of carrying on a public function then selecting the appropriate remedy may be required.

An example of the possible importance of the distinctions relied on in *Dorf Industries v Toose* may be found in the recent decision of *D'Souza v RANZCP*.[79] This case concerned the refusal to accept D'Souza as a Fellow of The Royal Australian and New Zealand College of Psychiatrists (the College). The College was an incorporated body limited by guarantee. D'Souza was an Associate of the College, involving a contractual relationship between him and the College, subject to which he could sit examinations to be considered for election as

a Fellow. The Articles of the College provided for the governing body of the College, the Council, to establish by-laws made binding on Associates for the qualifications needed for election as a Fellow. D'Souza claimed judicial review on the basis that the decision not to award him a pass grade for his examinations involved apprehended bias, otherwise breached procedural fairness, or was not reasonably open.

Ashley J briefly reviewed *Datafin* and various decisions that have referred to *Datafin* in Australia and concluded that 'on the present state of Australian authority certiorari is not available in respect of a decision of a body whose powers derive only from private contract.'[80] Ashley J goes on to consider, if that conclusion was wrong, whether the College's decision, if not made in the exercise of a public function, at least had public consequences.[81] Fellows of the College were recognised under the *Health Insurance Act 1973* (Cth) and given de facto recognition as a 'qualified psychiatrist' under the *Mental Health Act 1986* (Cth) which affected their ability to occupy certain positions within hospitals and participate in the Medicare system. The refusal to pass the examination acted as a condition precedent to election as a Fellow, giving rise to the principle in *Hot Holdings*.[82] Therefore, had the decision not been 'the working out of a contractual relationship between the parties', the decision would have been subject to judicial review'.[83]

Ashley J goes on to establish that there may have been a breach of procedural fairness.[84] The only other basis argued was an action for restraint of trade, which was ultimately rejected by the Court as the rules relating to the examination procedure were a reasonable restraint not exercised unreasonably. The form of relief sought, namely certiorari on the basis that the decision was a public one, led to the denial of relief.

Exercising a private power

The difficulties faced by applicants seeking certiorari against decisions made by public bodies such as Griffith University is demonstrated by *Whitehead v Griffith University*,[85] a case concerning the censure of a senior lecturer and refusal to convene a misconduct panel after allegations of soft marking for international students. Chesterman J declined certiorari on the basis that the University was exercising powers under a contract of employment between the parties. The case appeared to be 'entirely in the domestic or private' realm rather than the public, in the sense of governmental.[86] A declaration was also refused, but as an exercise of discretion because of the availability of 'ample alternative means of relief open to the applicant pursuant to the agreement' governing the employment contract.[87]

McClellan J took a similar approach to decisions by universities in *Hall v University of NSW*.[88] There an independent external inquiry was set up by the University to investigate allegations made against Hall of scientific misconduct and scientific fraud, not unlike the allegations against Ms Tang in *Tang*. The report may have been made public, and was to be used by the university to consider whether disciplinary action could be taken under the relevant enterprise agreement that formed part of the contract of employment.

McClellan J, after referring to cases including *Datafin,* held that

> Judicial review is not available in respect of a public body [here one established by statute] exercising a private power, such as that derived from property or contract, even where the consequences of such a decision may be thought of as 'public' [given the severe impact on Hall's reputation]. However, public bodies exercising private powers are amenable to declaratory and injunctive relief for a breach of procedural fairness in the same way that private organisations and associations are amenable to such relief.

He then went on to consider whether there had been a breach of the obligation of procedural fairness, having decided that the obligation to accord procedural fairness could give rise to declaratory relief regardless of the characterisation of the decision under review as public or private.

The suggestion that judicial review is not available against a public body exercising a private power was also accepted in *Victoria v Master Builders Association of Victoria.*[89] Each of the judges considered the need to establish the public nature of the decision of a non-statutory taskforce established by the Victorian Government under executive power to 'blacklist' potential contractors and thus deny them the opportunity of being awarded contracts by government departments. The 'blacklist' was part of a regulatory scheme established as part of a 'scheme designed to induce former contractors and tenderers … to atone for their presumed past misconduct'[90] including being involved in collusive practices in relation to the awarding of Government contracts.

Eames J held that determining a public element in the decision of the task force involved 'a comprehensive analysis of the power being exercised, the characteristics of the body making the decision, and the effect of determining that the exercise of the power is not amenable to review.'[91] In completing this analysis, his Honour concluded that the integrity and efficiency of the building industry was plainly a matter of public importance, the Government was intending to address this through the establishment of the taskforce and that the Government's dominance of the building and construction industry in question meant that 'the task force is applying the coercive force of the state'[92] and hence should be susceptible to judicial review.[93]

The factors discussed by Eames J are based on those adopted by Lord Diplock in the *CCSU* case and by the judgements in *Datafin*. They are also similar to those adopted in *NEAT Domestic Pty Ltd v AWB Limited*.[94] There the court was considering whether the refusal of AWBI, a private corporation, to grant approval, which was a condition precedent to the grant of a licence to export wheat, could be invalidated. The majority concluded that although AWBI had an effective veto under the legislation over the export of wheat it was acting in its own capacity as a corporation based on its own self-interest to consider the interests of its shareholders. This self-interest was an integral part of the legislative scheme and it would not be possible to impose public law obligations on AWBI while accommodating pursuit of its private interest. The majority decision does not refer to *Datafin* or the analysis of the cases under it.[95] A full analysis of whether the decision in *NEAT* is contrary to the approach taken in *Datafin* is beyond the scope of this paper. However, the approach of the majority in *NEAT* illustrates the range of considerations that may go towards establishing whether a body is carrying out public functions and the difficulty of predicting the outcome of any such analysis.[96]

The obligation of natural justice

On the limited facts presented, it is likely that the primary ground relied on by Ms Tang in her application to review the University's decision to exclude her from the PhD program was likely to relate to a breach of natural justice. Her application referred to various breaches of natural justice including the bias of the decision-maker as prosecutor and judge and the denial of representation where that was permitted under the University policy.[97] As the decision in *Clark v University of Lincolnshire and Humberside*[98] demonstrates, contractual obligations may also give rise to obligations of natural justice akin to those arising under judicial review. If the ability to enforce those obligations does not depend on the form of action taken, then there is an issue about the purpose of drawing distinctions based on the public or private nature of the decision.

It has long been accepted that the obligation of natural justice can be imposed on private organisations in Australia. Generally, the obligation of natural justice arises from the implication that fair procedures are intended by the parties to a contract, often incorporating the rules of the organisation.[99] However, this approach recognises 'the possibility that express words or necessary implication in the rules could exclude natural justice in whole or part.'[100] Therefore, it may be possible for a detailed procedure for the hearing of disputes adopted as part of the contract to imply no further procedures are necessary.[101]

Courts have declined to intervene by way of an declaration of the invalidity of a decision in breach of the rules of voluntary unincorporated organisations and an injunction to prevent giving effect to the decision.[102] Thus in *Cameron v Hogan*[103] it was stated that:

> [R]ules made by a political or like organisation for the regulation of its affairs and the conduct of its activities have never been understood as imposing contractual duties upon its officers or member. Such matters are naturally regarded as of domestic concern. The rules are intended to be enforced by the authorities appointed under them. In adopting them, the members ought not to be presumed to contemplate the creation of enforceable legal rights and duties so that every departure exposes the officer or member concerned to a civil sanction.[104]

However, in *Edgar v Meade*[105] it was suggested that membership of non-contractual organisations may be enforced by declaration and injunction where membership was a matter of public policy. The court was able to intervene to enforce rules of membership, even though non-contractual, where the organisation had been registered as part of a legislative scheme on the basis of those rules. Echoes of this approach may be seen in the way the issue of whether the organisation was carrying out a public function under *Datafin*.

The question of whether a private body was carrying out a public function was also used in *Forbes v New South Wales Trotting Club Ltd.*[106] Although the applicability of the rules of natural justice had been conceded, Gibbs J offered the comment that the concession seemed to be correctly made:

> The [Trotting Club], although not granted statutory powers, was in fact the body whose function was to control trotting in New South Wales, and trotting is a public activity in which quite large numbers of people take part, whether as spectators or otherwise. Members of the public have the legitimate expectation that they will be given permission to go on to courses when trotting meetings are being held provided that they pay the stipulated charge and provided of course that they are not drunk, disorderly, or otherwise unfitted by their condition of behaviour to be admitted. The [Trotting Club] had power to defeat this expectation …and was accordingly required to observe the rules of natural justice.[107]

Therefore, there is authority for the proposition that even decisions made on the basis of consensual non-contractual relationships may be subject to the obligations of natural justice, especially where the decision involves a public function. However, there are a number of aspects of the application of natural justice to private decisions that should be noted.

The first is that the doctrine of legitimate expectations is currently uncertain. The majority in *Tang* refer to several statements which suggest that a legitimate expectation based on the conduct of the decision-maker does not give rise to the obligation of natural justice but merely to its content once the obligation arises.[108] A legitimate expectation may arise only in circumstances where it suggests that, in the absence of some special or unusual circumstance, the person concerned will obtain or continue to enjoy a benefit or privilege.[109] It may be difficult to satisfy this criterion in circumstances where the discretion whether to make the decision is relatively unconfined, as is common in situations involving private or

consensual decisions. A legitimate expectation may not, of itself, be sufficient to give rise to any entitlement to judicial review.

The second aspect of the application of natural justice to private decisions is that the content of the obligation may depend on the nature of the body in question. In *D'Souza*[110] it was held that 'the trend of authorities seems to be that an allegation of apprehended bias is not in point in a case involving a domestic, consensual or private tribunal – by contrast with a Court, or a tribunal founded in statute.'[111] The nature of the body may imply, for example, that it was intended or necessary for decision-makers to have been involved in the events leading to the decision, even if this suggests they are acting as both prosecutor and judge.[112] The fact one of the parties to a contract is the government may mean an obligation of fairness will be readily implied in the contract, or indeed lead to the conclusion that contractual relations are formed at an earlier stage of the negotiations.[113]

It is interesting to compare the approach taken in *D'Souza,*[114] with that in *Chiropractors Association of Australia (South Australia) Ltd v Workcover Corporation of South Australia*.[115] That case also involved the recognition of qualifications, namely whether chiropractors were 'legally qualified medical practitioners' for the purposes of being able to make assessments of incapacity for the purposes of the Workers' Compensation scheme in operation in South Australia at the time. The assessment was made by the Workcover Corporation, a statutory authority, however the relevant legislation was 'silent as to the process of recognition by the Corporation and as to any other express criteria necessary to be met in order to obtain recognition.' The application for a declaration for breach of natural justice was dismissed, primarily because there was no legitimate expectation involved in the recognition process and the lack of any considerations personal to the particular applicants for natural justice involved in that recognition. However, the issue of whether the decision to grant recognition gave rise to the obligation of natural justice, or was properly the subject of judicial review, was not discussed.

The final aspect of the implication of natural justice is the role of reputation. In *Ainsworth*[116] a declaration that there had been a breach of the obligations of natural justice was made on the basis that the decision had affected the applicant's reputation. Clearly a mere finding that might affect someone's reputation if it became public would not be sufficient to attract the obligation. There must be something inherent in the way the finding is used or disclosed before an effect on reputation will be present.[117] Public bodies or those carrying out statutory functions may be liable for defamation, subject to the common law doctrine of absolute or qualified privilege.[118] However, the presence of an alternative remedy is not sufficient to disqualify judicial review. In *Ainsworth* Brennan J contrasted the position of a person who, 'without purporting to perform any function or exercise power conferred upon him by statute',[119] may publish a report subject only to the general law limitations on free speech. However:

> conduct in which a person or body of persons engages in purported exercise of statutory authority must be amenable to judicial review if effect is to be given to the limits of the authority and the manner of its performance as prescribed by the statute. It is immaterial that the statute defines a mere function that requires no grant of power to enable its performance: what is material to jurisdiction in judicial review is that the function is conferred by statute.[120]

Brennan J acknowledged[121] that authority derived from the prerogative[122] may also be sufficient to give rise to judicial review on the basis of the effect on reputation.[123] In the case of a statutory authority, Brennan J therefore suggested that the purported exercise of authority conferred by statute depends on identifying the limits of the authority and the manner of its performance. Not all actions of a statutory authority, including those that have an effect on reputation, are carried out in purported exercise of its statutory functions. Thus

there remains a need to distinguish between which activities of a statutory authority can give rise to judicial review for breach of natural justice.

Conclusion

The majority in *Tang*, required by the statutory scheme of review to establish that legislation was the source of any relevant limitations on the making of the decision, focused on the source of the legal effect of the decision in question. The need to ensure efficiency in the administration of regulatory schemes was perhaps reflected in the unwillingness of the court to imply limits based on the effect of the decision. Outside of statutory schemes such as the ADJR Act, it is unclear whether the public law remedies available would encourage a similar unwillingness.

The prerogative writs are clearly predicated on the public nature of the decision in question, but that does not mean that they are available against any decision by a statutory authority such as Griffith University. The decision in *Datafin* and the cases that have followed it have attempted to unravel the complex factors that go into establishing the 'publicness' of a decision, albeit encouraged by procedural requirements that protect the need for certainty and speed in relation to government decisions that is now a general goal for litigation reaching the courts. The introduction of the *Human Rights Act 1998* (UK) and the expansion of the grounds of review has extended this analysis.

In Australia, however, the basis for restricting an examination of the grounds of review is less clear. The suggestion that review under statutory schemes balance protection of the interests of individuals against the needs of efficient and effective administration does not provide a means to establish which interests are protected, and, given the range of possible approaches the government may take in regulating, or not regulating, what means of interference in individual interests are subject to judicial scrutiny. It remains uncertain whether it is more effective to approach these issues on a case by case basis, accepting judicial review is available, in the expectation that the cases will reveal the difficulty of establishing breach of a ground of review in all but the most serious of cases. Alternatively, if threshold requirements are imposed generally, protecting conduct from judicial scrutiny on the basis of the nature of the function being carried out, then the elements that go into the balance need to be sufficiently clear to prevent the very undue interference a threshold seeks to avoid.

Restricting review to decisions that are not based on a consensual relationship requires identification of those relationships that can be accepted as consensual. The decision in *Tang* indicates that the availability of private law remedies may not be determinative, leaving the possibility that the assessment of consent may be imposed at the interim stages of a dispute without evidence of the ways in which the basis of that consent was established and arguably been breached. The variety of elements that go to establishing coercion and the distinctions between legal and practical effect of a decision that are discussed in the cases described above suggest that even reliance on mutual consent may be a difficult distinction to make.

Endnotes

1 (2005) 213 ALR 724; [2005] HCA 7 ('*Tang*').
2 Gummow, Callinan and Heydon JJ (Gleeson CJ agreeing with the order made but through a separate judgement, Kirby J dissenting).
3 *Tang* at [89] per Gummow, Callinan and Heydon JJ.
4 Id at [91]. Gleeson CJ suggests that the relationship was 'voluntary'. Note that the absence of a contract had been conceded by the parties, see Kirby J's critique at [161]-[164].

5 For a discussion of the judgments in *Tang* see the discussion by Michael Will in this volume, and Daniel Stewart '*Griffith University v Tang*, 'under an enactment' and limiting access to judicial review.' (2005) 33(3) *Fed L Rev* (Forthcoming).
6 (2000) 1999 CLR 135.
7 Gaudron J also includes the *Administrative Law Act 1978* (Vic), *Judicial Review Act 1991* (Q), and the *Administrative Decisions (Judicial Review) Act 1989* (ACT): Ibid at fn 87.
8 Id at 156-7.
9 See Stewart, D above n 5.
10 See generally Mark Aronson, 'Is the ADJR Act hampering the development of Australian Administrative Law?' (2004) 15 *Pub L Rev* 202.
11 (1990) 170 CLR 321.
12 Ibid at 336-7.
13 (1997) 75 FCR 133 per Von Doussa, Drummond and Mansfield JJ.
14 Ibid at 143.
15 For a discussion of the availability of judicial review of decisions relying on prerogative power see the discussion below under 'Availability of alternative remedies'.
16 Section 16(1) of the *Judicial Review Act 1991* (Qld) explicitly states that ideas expressed in the ADJR Act are not taken to be different in the *Judicial Review Act 1991* (Qld) merely because different words are used. It was accepted that where the same words are used then the meaning was also relevantly the same.
17 ADJR Act s 10.
18 Under s 4(b) the JR Act also applies to:

> A decision of an administrative character made … by an officer or employee of the State or a State authority or local government authority under a non-statutory scheme or program involving funds that are provided or obtained …
> (i) out of amounts appropriated by Parliament; or
> (ii) from a tax, charge, fee or levy authorised by or under an enactment.

This suggests that, unlike the ADJR Act, the JR Act has application to at least some exercises of executive power by a public body, enhancing the implication that it is meant to augment the availability of judicial review provided by prerogative remedies.
19 See *Minister for the Arts, Heritage and Environment v Peko-Wallsend Ltd* (1987) 15 FCR 274.
20 Margaret Allars, 'Public Administration in Private Hands' (2005) 12 *Aust J Admin L* 126 at 129. As Professor Allars suggests, there may not be any temporal restriction implied in s 39B(1A)(c) (Ibid at 130). For a discussion of the extent to which the requirement for a 'matter' may imply restrictions similar to those implied by the majority in *Tang* into the scope of 'decision … of an administrative character made under an enactment' see Graeme Hill, '*Griffith University v Tang* – Comparison with *NEAT Domestic*, and the Relevance of Constitutional Factors', inthis volume, and Stewart, above n 5.
21 Eg *Post Office Agents Association Ltd v Australian Postal Commission* (1988) 84 ALR 563 at 575. See Nicholas Seddon *Government Contracts: Federal, State and Local,* (3rd ed, 2004) at 342. Note that it has been accepted by the High Court that institutions such as the Refugee Review Tribunal are also Officers of the Commonwealth for this purpose, see eg. *SAAP v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] HCA 24 at [43].
22 Prerogative power is used to refer to those rights, powers and privileges which are peculiar to the Sovereign and which are over and above those enjoyed by citizens. Executive power, however, includes the capacity of any juristic person to determine with whom and on what conditions it will enter into contracts. See *Victoria v Master Builders Association of Victoria* [1995] 2 VR 121 at 136 per Tadgell J, 147 per Ormiston J and 157-8 per Eames J.
23 *Hot Holdings v Creasy* (1996) 185 CLR 149 at 162-3: See Allars, above n 20 at 128-9.
24 (1967) 2 QB 864.
25 Ibid at 882.
26 [1983] 2 AC 237: See *Victoria v Master Builders Association of Victoria* [1995] 2 VR 121 at 134.
27 Ibid at 279.
28 (1992) 175 CLR 564.
29 See *Hot Holdings v Creasy*, above n.23 at 159 per Brennan CJ, Gaudron and Gummow JJ.
30 Ibid.
31 Ibid at 165. The minority of Dawson and Toohey JJ held that it was only the existence of the recommendation and not the content of the recommendation that was a precondition to the discretion of the Minister, and hence how priority was determined had no legal effect on the ultimate legal rights of the parties. Thus dissent based on a difference in statutory interpretation as to the status of the recommendation and the extent of its content has to be considered by the Minister.
32 This may even extend to circumstances where the benefit could lawfully have been provided through some other source of authority, such as executive or prerogative power. See Mark Aronson, Bruce Dyer and Matthew Groves, *Judicial Review of Administrative Action* (3rd ed 2004) at 712 discussing the criticisms of *Lain* made by Professor Wade in, for eg, HWR Wade and CF Forsyth, *Administrative Law* (8th ed, 2000) at 222-3 and 628-9.
33 See Aronson, et al, ibid at 709-712.
34 (1990) 170 CLR 321 ('*Bond*').
35 *Tang* at [86].

36 Eg NJ Young, 'Declarations and other remedies in administrative law' (2004) 12 *Aust Jo Admin Law* 35 at 36-7.
37 Eg *McClelland v Burning Palms Surf Life Saving Club* (2002) 191 ALR 759 at 782ff.
38 *Mayfair Trading Pty Ltd v Dreyer* [1958] 101 CLR 428 at 454 per Dixon CJ. See also Young, above n 36 at 37.
39 *Cardile v LED Builders Pty Ltd* (1999) 198 CLR 380 at [31].
40 (1998) 194 CLR 247.
41 Ibid at [27]. See also *Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd* (2000) 200 CLR 591 at 628 per Gummow J; *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 at 232 (at fn 153) where Gaudron J stated, 'it may be that, in the case of some public wrongs, an injunction will not issue notwithstanding that no equitable or legal right is infringed'; Young, above n 36 at 39.
42 *Bateman's Bay*, ibid at [50].
43 Aronson, et al, above n 32 at 813.
44 Ibid at 813-4.
45 Ibid at 691.
46 The distinction between statutory limitations going to jurisdiction and those enforceable by injunction may not be significant given the expansion of the grounds of review that may give rise to jurisdictional error evident in cases such as *Craig v South Australia* (1995) 184 CLR 163 and those following *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476. See generally Caron Beaton-Wells, 'Judicial Review of Migration Decisions: Life After *S157*' (2005) 33 *Fed L Rev* 141.
47 *Barnett v Minister for Housing and Aged Care* (1991) 31 FCR 400.
48 Eg *Belcaro Pty Ltd v Brisbane City Council* (1963) 110 CLR 253 at 264. See generally Aronson, et al, above n 32 at 732.
49 [1985] AC 374.
50 Ibid at 407.
51 [1987] 1 QB 815. Cases that have cited *Datafin* also include *Victoria v Master Builders Association of Victoria* [1995] 2 VR 121; *Minister for Local Government v South Sydney Council* (2002) 55 NSWLR at 381 at [7]; *Typing Centre of New South Wales v Toose*, Mathews J, Supreme Court of NSW, judgement 15 December 1988, unreported; *Dorf Industries Pty Ltd v Toose* (1994) 54 FCR 350; *Masu Financial Management Pty Ltd v Financial Industry Complaints Service,* Shaw J, Supreme Court of NSW, judgement 15 September 2004, unreported; *Adamson v NSW Rugby League* (1991) 31 FCR 242 per Gummow J at 292; *Australian Stock Exchange Ltd v Hudson Securities Pty Ltd* (1999) 33 ACSR 416 at [83].
52 *Datafin,* ibid at 847
53 Ibid at 838
54 *Datafin*, ibid at 838.
55 Ibid at 846 per Lloyd LJ.
56 Above n 24.
57 Ibid at 882.
58 [1993] 2 All ER 853.
59 per Farquharson LJ.
60 [2003] ICR 599.
61 Ibid at [13] as cited in *D'Souza v RANZCP* [2005] VSC 161.
62 Aronson, et al, above n 32 at 125.
63 Eg *Mercury Energy Ltd v Electricity Corporation of New Zealand Ltd* [1994] 1 WLR 521. See also Aronson, et al, above n 32 at 126.
64 Aronson, et al, above n 32 at 126: cf the suggestion by Gleeson CJ in *NEAT Domestic Pty Ltd v AWB Limited* (2003) 216 CLR 277 at 288 that personal animosity or a desire to confer a personal benefit upon a particular person may invalidate through judicial review a decision of even a private company acting within a regulatory scheme premised on the company acting for the interests of its shareholders.
65 See now Pt 54 of the Civil Procedure Rules (SI 1998/3132).
66 [1983] 2 AC 237.
67 Ibid at 285.
68 Ibid at 283.
69 Ibid at 284.
70 [1983] 2 AC 287.
71 See *Clark v University of Lincolnshire and Humberside* [2000] 1 WLR 1988 at [16].
72 Professor Oliver has recently suggested that there is a distinction to be drawn between the classification of functions performed by statutory bodies and those performed by private bodies, at least when discussing the distinctions between the 'public function' test for judicial review under Pt 54 and 'a function of a public nature' which is required for private bodies to be susceptible to the Human Rights Act 1998 (UK): Oliver, D. 'Functions of a public nature under the Human Rights Act' [2004] *PL* 329 at 348. For a recent discussion of the continuing importance of the distinction before judicial review actions can be brought against private bodies see *R v Lloyd's of London; Ex parte West* [2004] EWCA Civ 506 where it was held that Lloyd's was not amenable to review under Pt 54 and the applicant would have to pursue Lloyd's for breach of contract or other private law action.
73 Above n 71.

74 Ibid at [32]-[33].
75 Ibid at [12]. This was cited in *Tang* at [58].
76 Above n 51.
77 (1994) 53 FCR 350, above n 51.
78 Ibid at 367. The lack of any challenge to the validity of a decision also went against the grant of a declaration in *Chiropractors Association of Australia (South Australia) Ltd v Workcover Corporation of South Australia* [1999] SASC 120, approved on appeal at [1999] SASC 470 at [20].
79 [2005] VSC 161.
80 Ibid at [112].
81 The basis for this distinction is not clear.
82 Above n 29. See the discussion of *Hot Holdings* above around n.30.
83 Ibid at [118].
84 But goes on to suggest that certiorari would have been refused on discretionary grounds anyway given the application for review was brought when internal review was still possible, ibid at [211]-[218].
85 [2003] Qd R 220.
86 Ibid at 225.
87 Ibid at 227.
88 [2003] NSWSC 669.
89 Above n 26 at 134.
90 Ibid at 137 per Tadgell J.
91 Ibid at 163 per Eames J.
92 Ibid at 164.
93 See also *MBA Land Holdings Pty Ltd v Gungahlin Development Authority* [2000] ACTSC 89 where a decision of awarding a tender to was held to be a public function that could give rise to a declaration of breach of natural justice. The statutory authority in question was subject to ministerial direction, it was directed under the relevant legislation to provide for the social and economic needs of the community, and it operated on other than prudent commercial principles.
94 Above n 64. For a fuller discussion of the relationship between *NEAT* and *Griffith* see Daniel Stewart, '*Griffith University v Tang*, 'under an enactment' and limiting access to judicial review' (2005) *Federal Law Review* forthcoming and Graeme Hill, above n.20.
95 Unlike Kirby J who seems to implicitly accept the *Datafin* decision at [113].
96 See also '*Sydney' Training Depot Snapper Island v Brown* (1987) 14 ALD 464 where it was held that a decision to issue a notice to quit under the terms of a lease was held to not give rise to public law remedies.
97 See *Tang*, at [53] per Gummow, Callinan and Heydon JJ, [116] per Kirby J.
98 Above n 71.
99 In *McClelland v Burning Palms Surf Life Saving Club* (2002) 191 ALR 759 Campbell J states that there 'is a long line of judicial statements, explaining that the basis on which a court can prevent excess of power by a domestic tribunal is by enforcing the contract under which the tribunal operates', at 780-81.
100 Ibid at 785, [97].
101 But cf the approach adopted in *Re Minister for Immigration, Multicultural and Indigenous Affairs v Miah* (2001) 206 CLR 57.
102 Ibid at 783.
103 (1934) 51 CLR 358.
104 Ibid at 376 per Dixon, Evatt and McTiernan JJ.
105 (1916) 23 CLR 29.
106 (1979) 143 CLR 242.
107 Ibid at 264, citing *Heatley v Tasmanian Racing & Gaming Commission* (1977) 137 CLR 487 where the Commission was a statutory authority.
108 *Tang* at [92].
109 See *Haoucher v Minister for Immigration and Ethnic Affairs* (1990) 169 CLR 648 at 681-2 per McHugh J.
110 Above at n 79.
111 Ibid at [123].
112 See *Australian Workers Union v Bowen (No 2)* (1948) 77 CLR 601 at 628 per Dixon J, as quoted in McClelland, above n.37 at 794-95.
113 See *Hughes Aircraft Systems International v Airservices Australia* (1997) 146 ALR 1.
114 Discussed above at n 79ff.
115 Above n 78.
116 Above n 28.
117 See *Victoria v MBA*, above n.22 at 140.
118 See *National Companies and Securities Commission v News Corporation Ltd* (1984) 156 CLR 296.
119 *Ainsworth*, above n.28 at 584.
120 Ibid at 585.
121 Ibid at fn 48.
122 Citing *CCSU,* above n.49..
123 Exercise of executive power did not prevent damage to reputation implying an obligation of natural justice in *Victoria v MBA*, above n 22.

FEDERAL DIMENSIONS TO THE ACT *HUMAN RIGHTS ACT*

James Stellios*

1 Introduction

The enactment of the *Human Rights Act 2004* (ACT) has significant implications for policy-making in the ACT government and the ACT Legislative Assembly. It also has significant implications for the way in which the ACT Supreme Court is to interpret Territory law, and locates that Court in a broader legislative and executive scheme for the protection of rights. The intention that rights be taken into account in the development and interpretation of Territory law will have implications for the way in which Territory policy and legislation is designed and enforced, and for the exercise of power by ACT officers and agencies.

Less apparent is the federal context in which the legislation operates. The policy design and implementation of the *Human Rights Act* largely proceeded on the basis that the legislation would have a discrete operation within the ACT, and apply only to the ACT legislative, executive and judicial arms of government. However, the ACT government has very close constitutional and statutory links with the Commonwealth government, and two overlapping dimensions of these connections will be explored in this paper: first, the exercise of Commonwealth judicial power and federal jurisdiction by the ACT Supreme Court and, secondly, the existence of co-operative arrangements for the exercise of ACT powers by Commonwealth officers and agencies. The paper will explain that there are at least two important consequences of these constitutional and statutory connections. First, the judicial provisions of the *Human Rights Act* (particularly the declaratory provision) might be largely ineffective in a significant number of cases. Secondly, the *Human Rights Act* may potentially affect Commonwealth officers and agencies in important ways. These observations are relevant not only for the ACT *Human Rights Act*, but also for proposals for similar State rights-protective legislative initiatives.[1]

2 Overview of the Human Rights Act

Part 3 of the *Human Rights Act*[2] sets out a range of civil and political rights: right to recognition and equality before the law; right to life; right to protection from torture and cruel, inhuman or degrading treatment; protection of the family and children; right to privacy and reputation; freedom of movement; freedom of thought, conscience, religion and belief, peaceful assembly and freedom of association; freedom of expression; right to take part in public life; right to liberty and security of person; right to humane treatment when deprived of liberty; various rights of children in the criminal process; right to a fair trial; various rights in criminal proceedings; right to compensation for wrongful conviction; right not to be tried or punished more than once; freedom from retrospective criminal laws; freedom from forced work; and rights of minorities. These rights, the Act says, are not absolute, but may be subject only to 'reasonable limits set by Territory laws that can be demonstrably justified in a free and democratic society' (s 28). It is also said that only individuals possess human rights (s 6) and that the Act is not exhaustive of the rights an individual may have under domestic or international law (s 7).

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Part 3 of the Act does not purport to have a free-standing substantive operation.[3] Instead, the Act goes on to set out two ways in which the human rights impact of Territory laws is to be considered: first, the scrutiny of bills prior to enactment (Part 5) and, secondly, in the course of proceedings before the Supreme Court (Part 4). The scrutiny of bills stage involves two mechanisms. The Attorney-General is required to present to the Legislative Assembly a compatibility statement indicating whether a bill is consistent with human rights and, if not, 'how it is not consistent' (s 37). Additionally, a standing committee must report to the Legislative Assembly 'about human rights issues raised by bills presented to the Assembly' (s 38). A failure to comply with either requirement 'does not affect the validity, operation or enforcement of any Territory law' (s 39).

The judicial proceedings stage also involves two mechanisms. First, an interpretive rule requires the Supreme Court, '[i]n working out the meaning of a Territory law',[4] to prefer as far as possible 'an interpretation that is consistent with human rights' (s 30).[5] Secondly, where an issue arises in a proceeding being heard by the Supreme Court 'about whether a Territory law is consistent with a human right', the Supreme Court has the power to declare that it 'is not consistent with the human right' (a declaration of incompatibility – s 32). Importantly, a declaration does not affect 'the validity, operation or enforcement of the law, or the rights or obligations of anyone' (s 32(2)). Instead, the Attorney-General must present a copy of the declaration and a response to the Legislative Assembly (s 33).

3 The exercise of federal jurisdiction by the ACT Supreme Court and its consequence for the effectiveness of the ACT Human Rights Act

In its report on the Human Rights Bill 2003, the Legislative Assembly Standing Committee on Legal Affairs identified a number of constitutional problems with the proposed legislation. First, that the conferral of the declaratory power on the ACT Supreme Court might be invalid as either contrary to the *Kable* doctrine[6] or outside the scope of authority conferred by the *Australian Capital Territory (Self-Government) Act 1988* (Cth).[7] Secondly, that it may not be possible to appeal an exercise of power under the declaration provision to a federal court.[8] Thirdly, that following the High Court decision in *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs*,[9] Federal Court judges could not sit as judges of the ACT Supreme Court when called upon to exercise the power in s 32.[10]

Central to all three constitutional problems is the proposition that an exercise of power under s 32 does not involve the exercise of Commonwealth judicial power.[11] Whatever may be the merits of the constitutional problems raised by the Committee, the central proposition identified in the Committee's Report has much broader implications for the effectiveness of the *Human Rights Act* when the Court is exercising federal jurisdiction. Whether the judicial provisions of the *Human Rights Act* will be effective to any extent depends upon the unresolved and difficult constitutional question of what jurisdiction is exercised by the ACT Supreme Court.

(i) All Supreme Court jurisdiction in relation to matters is federal jurisdiction

It has been argued that all the jurisdiction of the ACT Supreme Court *in relation to matters* is federal jurisdiction.[12] Although the ACT Supreme Court is not a federal court for the purposes of Ch III of the *Constitution*,[13] it seems reasonably clear following the decision of the High Court in *Northern Territory v GPAO*[14] that the Supreme Court would be exercising federal jurisdiction in relation to matters arising under a Commonwealth law enacted under s 122 of the *Constitution* and falling within s 76(ii) of the *Constitution*.[15] The position, however, is 'uncertain' in relation to matters arising under Territory laws or under the common law in the ACT.[16] Both Professor Leslie Zines and Stephen McDonald have argued that in both cases, the Supreme Court should be seen as exercising federal jurisdiction, as those matters can be sourced ultimately to Commonwealth legislation and, therefore, fall within s 76(ii) of the *Constitution*.[17]

If these contentions were accepted by the High Court, the declaratory provision of the *Human Rights Act* might be entirely ineffective for two related reasons. First, when exercising federal jurisdiction in relation to matters, the Supreme Court could not be empowered by the ACT Legislative Assembly to exercise non-judicial power. However, as the ACT Standing Committee on Legal Affairs foreshadowed,[18] the power to grant a declaration which does not affect the validity, operation or enforcement of the law or the rights or obligations of anyone may well involve the exercise of power which is not Commonwealth judicial power.[19] The resolution of a controversy is central to the exercise of Commonwealth judicial power.[20] The fact that the declaratory power only arises when a proceeding is before the Supreme Court is no answer to this difficulty. Although the Supreme Court may purport to exercise the declaratory power in the course of hearing a controversy, it could not be said that the controversy extends to include a declaration about compatibility with rights. Nor could it be said that the power is an administrative function incidental to the exercise of Commonwealth judicial power.

The second difficulty is really another way in which the High Court has explained the first. If it is assumed that all the jurisdiction of the ACT Supreme Court in relation to matters is federal jurisdiction derived from ss 75 or 76 of the *Constitution*, such jurisdiction can only be conferred and exercised in relation to 'matters'. It is settled constitutional doctrine that a 'matter' requires there to be a justiciable controversy between the parties. In other words, there needs to be an 'immediate right, duty or liability to be established' by the determination of the court exercising federal jurisdiction.[21] Although a claim under the *Human Rights Act* for a declaration of incompatibility might arise in the context of a 'matter', there would be no right, duty or liability determined by the declaration which would comprise part of the matter before the Court.[22]

The question then would be whether the interpretive rule set out in s 30 could be severed from the declaratory provision in s 32 and applied separately. It may be argued that the interpretive rule and the declaratory provision are integral parts of the legislative scheme for the protection of rights in the *Human Rights Act*, and, thus, were intended to operate together. In the ACT Bill of Rights Consultative Committee Report, much was made of the model of institutional 'dialogue', to be created by the *Human Rights Act*, on human rights issues 'between the three arms of government and the community'.[23] The interpretive rule was identified as one of the major features of the legislation giving effect to that model. Arguably, to apply s 30, but not s 32, would alter the policy or operation of the Act.

However, in this respect I think there is significant room for debate. There is an equally strong claim that s 30 is a separate dimension of the scheme which is capable of operating in the same way as it would have if not for the severance. In other words, s 30 could fully and completely operate as originally intended without the presence of the declaratory provision in the legislation. The fact that the provisions are in separate parts of the Act may support such a contention.

In summary, if it were accepted that all the jurisdiction of the ACT Supreme Court *in relation to matters* is federal jurisdiction, there is a strong argument that the declaratory provision is entirely ineffective to the extent of federal jurisdiction. It is possible that the interpretive rule could be applied separately from the declaratory provision. It also probably leaves the scrutiny of bills provisions fully effective. But, if the High Court were to hold that the Supreme Court exercises federal jurisdiction in relation to all matters, a significant component of the human rights scheme may well be wholly ineffective.

Despite the position *in relation to matters* before the ACT Supreme Court, it is clear that the Supreme Court is not a federal court and, consequently, it may be possible for the Court to exercise jurisdiction that does not derive from Ch III of the Constitution where 'matters' are

not involved.[24] On that basis, it may have been possible for the legislative scheme in the *Human Rights Act* to have been designed to confer the declaratory power in the Court's non-federal jurisdiction. However, as the legislation currently operates, the application for declaration can only be made where a proceeding is being heard by the Court and, therefore, is likely to involve the resolution of a 'matter' in most cases.

(ii) Not all Supreme Court jurisdiction in relation to matters is federal jurisdiction

If the argument above is incorrect, and the Supreme Court exercises Territory jurisdiction in most cases, it is important to appreciate that there will remain a significant number of cases in which the Court will exercise federal jurisdiction. And, as the recent High Court decision in *Aftrack* highlights, a court may often proceed without realising that federal jurisdiction has been engaged.[25] Again, on the analysis outlined above, in the cases where federal jurisdiction is being exercised, at least the declaratory provision may well be ineffective.

The clearest conferral of federal jurisdiction on the ACT Supreme Court is by s 68(2) of the *Judiciary Act*, which confers criminal jurisdiction in relation to federal offences. When exercising that jurisdiction, a range of Territory procedural and substantive laws respecting matters such as arrest, custody, bail, examination, commitment, conviction, sentencing, imprisonment and appeal, will be picked up as surrogate federal laws by a combination of ss 68(1) and 79 of the *Judiciary Act*.[26]

In addition to federal criminal jurisdiction, it has been accepted that the Supreme Court can exercise federal jurisdiction in other cases, although it is not entirely clear how this jurisdiction has been conferred.[27] For example, the Supreme Court will be exercising federal jurisdiction in matters where a question arises under the Constitution,[28] or where the Commonwealth is named as a party.[29] Wherever the jurisdiction is federal, Territory laws are picked up and applied by s 79 of the *Judiciary Act* as surrogate federal laws.[30] To emphasise the potential consequences of this point, it would be sufficient to attract federal jurisdiction in the context of Territory criminal proceedings if a constitutional claim were made.[31] Similarly, if a Territory offence were to be prosecuted together with a related federal offence,[32] the Territory offence may well fall within the accrued federal jurisdiction of the ACT Supreme Court.

In all of these cases, the ACT Supreme Court would be applying Territory legislation which potentially impacts upon a range of human rights set out in the *Human Rights Act.* Because the Court would be exercising federal jurisdiction, for the reasons explained above, there would be difficulties with the Court picking up and applying the declaratory provision in s 32 of the *Human Rights Act*. Whether the Court could pick up the interpretive rule in s 30 would, again, depend upon its severability.[33]

4 Application of the Human Rights Act to Commonwealth officers exercising Territory powers and functions

(i) Cooperative governmental arrangements for the exercise of Territory powers and functions

It appears that the enactment of the *Human Rights Act* proceeded largely on the basis that the legislation would have a discrete operation within the ACT. On the question of whether the ACT should 'go it alone', the ACT Bill of Rights Consultative Committee said:

An ACT bill of rights could not, of course, directly affect Commonwealth or State agencies or action and would have direct impact only on areas of ACT law.[34]

Certainly, that appears to be the case on the face of the legislation. The scrutiny of bills provisions apply to bills presented to the ACT Legislative Assembly (s 37), and the judicial

provisions apply to Territory laws (s 29). However, there is a significant degree of legislative and executive coordination and cooperation between the ACT and Commonwealth governments. Some of this intergovernmental activity is specific to the ACT government and the Commonwealth government, while other activity is part of broader Commonwealth/State/Territory cooperative schemes.

The clearest example of the former type of arrangement is the 'unique'[35] arrangement whereby Commonwealth officers are used for policing services in the ACT. The Australian Federal Police (AFP) is authorised to undertake police services in the ACT,[36] and AFP members have the powers and duties conferred or imposed by Territory legislation.[37] As the ACT Bill of Rights Consultative Committee highlighted, the exercise of these powers by AFP officers has clear potential to affect the human rights in the *Human Rights Act*.[38] For example, Part 10 of the *Crimes Act 1900* (ACT) sets out a range of AFP powers in relation to criminal investigation. Statutory powers of entry, search and seizure, detention and arrest are all capable of affecting the human rights set out in the *Human Rights Act*, in particular those relating to the right to liberty and security of person (s 18) and to privacy (s 12).

A good example of wider Commonwealth/State/Territory cooperative arrangements with the potential to impact upon human rights is the Australian Crimes Commission legislation.[39] The *Australian Crime Commission Act 2003* (ACT) confers investigative and intelligence gathering functions on the Australian Crime Commission, a body established by the *Australian Crime Commission Act 2002* (Cth). The ACT Act also empowers an examiner – a person appointed under the federal Act – to conduct an examination for the purposes of certain ACC operations/investigations. The examiner may regulate the conduct of examination proceedings as she/he considers appropriate, and has the power to summon witnesses, take evidence and obtain documents (Part 3). Provision is also made for the issuing of arrest warrants (s 27) and search warrants (Part 4). Various offences are created for non-compliance with statutory requirements (ss 25 and 26). The conferral of these powers and functions on the ACC and federal examiners is made possible by the *Australian Crime Commissions Act 2002* (Cth) (s 55A). As with the exercise of power by AFP officers, there are human rights implications for ACT ACC Act provisions: right to liberty and security of person, to privacy and to a fair trial.

(ii) Disputes in the ACT Supreme Court arising from cooperative arrangements

These cooperative governmental arrangements - whether specific to the Commonwealth and the ACT or part of a broader Commonwealth/State/Territory cooperative arrangement - can give rise to a range of judicial disputes which will require the application of the relevant Territory legislation. In some circumstances, proceedings may be instituted in the ACT Supreme Court. For example, in relation to the AFP, litigation in the ACT Supreme Court can raise the interpretation of provisions of the ACT *Crimes Act* in the context of prosecutions under that Act or tort claims for trespass, unlawful detention, detinue or conversion. Similar proceedings may be instituted following an exercise of power conferred by the ACT ACC Act. In all these circumstances, the *Human Rights Act* purports to require the ACT provisions to be interpreted consistently with the human rights set out in the ACT *Human Rights Act* and, if they cannot be, for a declaration of incompatibility to follow.

Two important consequences follow from the creation of intergovernmental arrangements for the exercise of Territory powers. First, the identification of an officer or agency of the Commonwealth, or the Commonwealth itself, as a party to the suit may attract federal jurisdiction. As explained above, the circumstances in which the ACT Supreme Court would be exercising federal jurisdiction are unclear, and the point would be much clearer for a State purporting to adopt a similar scheme to that in the ACT *Human Rights Act*, as s 39 of the *Judiciary Act* expressly vests that head of federal jurisdiction (ie, s 75(iii)) in State courts. To the extent that the ACT Supreme Court would be exercising federal jurisdiction, the

difficulties identified above would frustrate the intended operation of s 32 of the *Human Rights Act* (and perhaps the interpretive rule in s 30). Secondly, if it is possible for the interpretive rule to be picked up and applied in federal jurisdiction separately from the declaration power, the exercise of the power in s 30 will affect the scope of power exercised by the relevant Commonwealth officer or agency.

(iii) Disputes in federal courts arising from cooperative arrangements

There are also circumstances in which proceedings may be instituted in a federal court which might raise a question about the applicability of the *Human Rights Act*. The most obvious case is where judicial review proceedings are instituted in the High Court under s 75(v) of the *Constitution* or the Federal Court under s 39B of the *Judiciary Act* against an officer of the Commonwealth exercising powers conferred by Territory legislation.[40] The question then is whether the *Human Rights Act* could be picked up and applied by a federal court in a judicial review proceeding under s 79 of the *Judiciary Act*. On the one hand, it is quite clear that the textual reference to the 'ACT Supreme Court' in s 32 of the *Human Rights Act* does not prevent the application of the *Human Rights Act* by a federal court.[41] However, on the other hand, s 32 may impose a function beyond the reach of s 79.[42] The declaration provision is the central component of an ACT legislative scheme for informing the Legislative Assembly about the human rights implications of ACT law. The Registrar of the ACT Supreme Court is required by s 32(4) to give a copy of the declaration to the Attorney-General who, in turn, is required to present a copy to the Legislative Assembly (s 33). There is strength in an argument that s 79 would not operate to substitute a federal court into that scheme for institutional 'dialogue'. In any event, as explained earlier, s 79 would not operate to pick up s 32 (and possibly s 30) if it were characterised as a non-judicial power.

(iv) Consequences for the effectiveness of the Human Rights Act in the context of cooperative schemes

The consequences of these conclusions are significant for the effectiveness of the *Human Rights Act* in the context of cooperative governmental arrangements involving the Commonwealth government. If Territory powers had been conferred upon Territory officers, proceedings arising from an exercise of that Territory power would be more likely to be heard by a Territory court and, in hearing such proceedings, it is less likely that federal jurisdiction would be triggered (on the assumption that some jurisdiction is capable of being non-federal). Leaving aside other arguments about the constitutional validity of the *Human Rights Act*, the ACT Supreme Court would be required by that Act to give a rights sensitive interpretation to Territory provisions and, if it could not do so, to make a declaration of incompatibility. Instead, by entering into a cooperative arrangement and conferring those powers on federal officers, the application of s 32 (and possibly s 30) of the *Human Rights Act* would be frustrated in a range of cases.

There are four further points that should be emphasised. First, if some or all of the arguments in section 3 were not accepted, the *Human Rights Act* might be applied in full or in part, by either or both the ACT Supreme Court or a federal court, when federal officers or agencies exercise Territory powers. The relevant court would have to give those Territory provisions a human rights sensitive interpretation and, if unable to do so and if the declaratory provisions could be picked up, would issue a declaration of incompatibility. If that were the case, it is clear that the *Human Rights Act* would have significant implications for Commonwealth officers and agencies exercising Territory powers, and for Commonwealth policy makers when designing cooperative schemes.

Secondly, there are other ways in which the *Human Rights Act* may impact directly upon Commonwealth officers and agencies. ACT laws of general application which seek to apply,

and are capable of applying, to Commonwealth officers and agencies would be within the scope of the *Human Rights Act.* This is particularly important in the ACT given the significant presence of the Commonwealth government. Although perhaps rare, it is possible that, in its application to Commonwealth officers and agencies, such legislation could have human rights implications. Additionally, there are other cooperative arrangements which use ACT governmental mechanisms for the administration of federal law. For example, Territory remand centres are used for the detention of federal prisoners and unlawful non-citizens.[43] Again, the *Human Rights Act* would require rights sensitive interpretations of these Territory provisions where proceedings are instituted in the ACT Supreme Court.

Thirdly, because of the power of the Commonwealth Parliament to enact laws for the ACT under s 122 of the *Constitution*, there are ways in which the *Human Rights Act* can be side-stepped by the enactment of federal legislation. As indicated, the *Human Rights Act* only applies to Territory laws, not Commonwealth laws. Thus, for example, the AFP Act sets out powers for AFP officers to use surveillance devices in relation to ACT offences.[44] If those powers were conferred by Territory legislation, those provisions would be subject to the *Human Rights Act*. However, because they are conferred by federal legislation, the provisions of the *Human Rights Act* are avoided. Another example is the Commonwealth *Evidence Act 1995* (Cth) which applies to proceedings in an ACT Court until a proclamation is made displacing the operation of that Act.[45] Again, if the ACT Legislative Assembly were to enact its own evidence legislation mirroring the federal provisions, the provisions of the *Human Rights Act* would be triggered.

Fourthly, despite any potential invalidity or inapplicability of the *Human Rights Act* in judicial proceedings, the scrutiny of bills provisions are likely to be valid. Consequently, the human rights implications of new cooperative schemes requiring ACT legislation, or changes to existing cooperative arrangements requiring amendments to ACT legislation, would need to be evaluated by the Attorney-General and the relevant Standing Committee. The political significance at the federal level of adverse human rights findings during that process is apparent.

4 Conclusion

For the Consultative Committee, federalism in Australia was seen as allowing regional diversity and providing an opportunity for experimentation:

> … the ACT has often been in the forefront of legislative reform for Australia. Apart from better protecting human rights in the ACT, a possible outcome of the ACT adoption of a bill of rights would be to encourage other jurisdictions to investigate this initiative.[46]

However, Australian federalism is a multi-faceted structure which also imposes constraints, particularly for a Commonwealth Territory. Section 3 of this paper has explained how the constitutional scheme for the exercise of Commonwealth judicial power and federal jurisdiction by the ACT Supreme Court may deprive the *Human Rights Act* of one if its central pillars in all or at least a significant number of cases. Section 4 of this paper has explained how cooperative federalism in Australia, whereby Territory powers are conferred on Commonwealth officers or agencies, may be affected by the *Human Rights Act*. The *Human Rights Act* will affect the way that Territory statutory powers are shaped, even if exercised by Commonwealth officers and agencies. This will be the case even if the judicial provisions of the Act are held to be wholly or partly invalid or inapplicable. These federal dimensions have the potential to significantly impede, respectively, the effective operation of the *Human Rights Act* and the uniform operation of cooperative federal arrangements. They are dimensions which should be taken into account by State policy makers considering

similar schemes for the protection of rights and by federal policy makers contemplating cooperative arrangements.

Endnotes

1 The Victorian government released a *Statement of Intent* in May 2005, and set up a committee to consult with the Victorian community about human rights.
2 For a more detailed account of the provisions of the *Human Rights Act* and the report of the ACT Bill of Rights Consultative Committee, *Towards an ACT Human Rights Act* (2003), see Carolyn Evans, 'Responsibility for Rights: The ACT Human Rights Act' (2004) 32 *Federal Law Review* 291; and Leighton McDonald [2004] *Public Law* 22. See also the collection of papers marking the first anniversary of the *Human Rights Act* in (2005) 197 *Ethos.*
3 Although it seems to have been viewed as having a free-standing operation in some cases: see *R v YL* [2004] ACTSC 115, [90] (Crispin J).
4 Subsection 30(3) provides that 'working out the meaning of a Territory law' means resolving an ambiguous or obscure provision of the law, confirming or displacing the apparent meaning of the law, finding the meaning of the law when its apparent meaning leads to a result that is manifestly absurd or is unreasonable, or finding the meaning of the law in any other case.
5 This provision is complicated by s 30(2) which subjects the interpretive rule in s 30(1) to s 139 of the *Legislation Act 2001* (ACT) which, in turn, requires a purposive interpretation.
6 *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51.
7 ACT Legislative Assembly Standing Committee on Legal Affairs, Scrutiny Report No 42 (15 January 2004) 11.
8 Ibid, 12.
9 (1996) 189 CLR 1.
10 Above n 7, 12.
11 Ibid 11.
12 Leslie Zines, *Federal Jurisdiction in Australia* (3rd ed, 2002) 182, 186; Stephen McDonald, 'Territory Courts and Federal Jurisdiction' (2005) 33 *Federal Law Review* 57, 78-88.
13 *Re Governor, Goulburn Correctional Centre; ex parte Eastman* (1999) 200 CLR 322.
14 (1999) 196 CLR 553. The decision in *GPAO* established 'that a *federal* court, when deciding a matter arising under a law created pursuant to s 122, exercises "federal jurisdiction"': McDonald, ibid 82.
15 See Zines, above n 12, 179.
16 Ibid.
17 See Zines, above n 12; 179-86; McDonald, above n 12, 78-88.
18 Above n 7, 12.
19 See, by analogy, the discussion of the operation of s 79 of the *Judiciary Act 1903* (Cth) in *Solomons v District Court of NSW* (2002) 211 CLR 119, [28] (Gleeson CJ, Gaudron, Gummow, Hayne, Callinan JJ).
20 *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334, 335-7 [45]-[49] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).
21 *In re Judiciary and Navigation Acts* (1921) 29 CLR 257, 265.
22 *Agtrack (NT) Pty Limited v Hatfield* [2005] HCA 38, [29] (Gleeson CJ, McHugh, Gummow, Hayne, Heydon JJ). That there would be no 'matter' which could then be appealed to a federal court was a point made by the Standing Committee on Legal Affairs when it considered the Human Rights Bill: see above n 7, 12.
23 Above n 2, 61.
24 Contrast the position of a federal court: *Re Wakim;ex parte McNally* (1999) 198 CLR 511.
25 *Agtrack (NT) Pty Limited v Hatfield* [2005] HCA 38, [32] (Gleeson CJ, McHugh, Gummow, Hayne, Heydon JJ).
26 See *Putland v The Queen* (2004) 204 ALR 455. Other federal provisions, like Part 1B of the *Crimes Act 1914* (Cth), operate in a similar way. For a detailed discussion of federal criminal jurisdiction in Australia, see Australian Law Reform Commission, *Sentencing of Federal Offenders*, Issues Paper 29.
27 The position is much clearer for State courts which have been expressly vested with federal jurisdiction in relation to a range of matters by s 39 of the *Judiciary Act*.
28 *John Pfeiffer Pty Ltd v Rogerson* [19] (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ).
29 *Blunden v Commonwealth of Australia* [9] (Gleeson CJ, Gummow, Hayne and Heydon JJ).
30 See *Solomons v District Court of NSW* (2002) 211 CLR 119, [21] (Gleeson CJ, Gaudron, Gummow, Hayne, Callinan JJ). In relation to State offences committed in Commonwealth places within States, the same analysis applies. Section 4 of the *Commonwealth Places (Application of Laws) Act 1970* (Cth) picks up applicable State legislation, and s 7 of that Act invests the relevant State court with federal jurisdiction: see *Cameron v The Queen* (2002) 209 CLR 339; *Pinkstone v The Queen* (2004) 206 CLR 84.
31 *Agtrack Pty Ltd v Hatfield* [2005] HCA 38, [30] (Gleeson CJ, McHugh, Gummow, Hayne, Heydon JJ).
32 There appear to be arrangements in place for the prosecution in one trial of sufficiently related federal and Territory offences: see ALRC, *Sentencing of Federal Offenders*, above n 27, 58.

33 See *Solomons v District Court of NSW* (2002) 211 CLR 119, [24] (Gleeson CJ, Gaudron, Gummow, Hayne and Callinan JJ).
34 Above n 2, 38. However, as will be discussed further below, even the Committee recognised the potential impact on the Australian Federal Police, an agency established under Commonwealth legislation.
35 *Lissner v Commonwealth* [2002] ACTSC 53, [7] (Connolly M).
36 *Australian Federal Police Act 1979* (Cth) ('the AFP Act'), s 8(1)(a) and (1A).
37 AFP Act, s 9(1)(b).
38 Above n 2, 77. The Consultative Committee pointed the potential difficulty for the ACT Legislative Assembly seeking to require federal officers to act consistently with human rights: 77.
39 The observations in this section are not limited to co-operative schemes for law enforcement. Other examples of co-operative schemes include the *Human Cloning and Embryo Research Act 2004* (ACT); the *Gene Technology Act 2003* (ACT) and the *Drugs in Sport Act 1999* (ACT). All of these legislative schemes confer powers and functions on federal officers and agencies and have potential human rights implications.
40 *Re Cram; ex parte NSW Colliery Proprietors' Association Ltd* (1987) 163 CLR 117. It may also be that the exercise by a Commonwealth officer of power conferred by a Territory law to make a decision is a decision 'under an enactment' for the purposes of the *Administrative Decisions (Judicial Review) Act 1977* (Cth), and judicially reviewable by the Federal Court. Although there is some support for that proposition in the decision of von Doussa J in *Pancontinental v Burns* (1994) 124 ALR 471, 480), the conclusions in that decision may be contrary to the way in which the High Court in *Griffith University v Tang* (2005) 213 ALR 724, [89] (Gummow, Callinan and Heydon JJ) addressed the question of when a decision will be 'under an enactment'. I am very grateful to Graeme Hill for this point.
41 *ASIC v Edensor Niminees Pty Ltd* (2001) 204 CLR 559, 593-4 [72]-[74] (Gleeson CJ, Gaudron and Gummow JJ).
42 Ibid.
43 *Remand Centre Act 1976* (ACT), s 15.
44 See *Surveillance Devices Act 2004* (Cth), Schedule 1, Item 3, saving s 12L of the AFP Act in relation to the use of listening devices in respect of ACT offences.
45 *Evidence Act 1995* (Cth), s 4(6).
46 Above n 12, 38.

DEVELOPMENTS IN ADMINISTRATIVE LAW

Ron Fraser*

Government initiatives, inquiries, legislative and parliamentary developments

Anti–terrorism legislation agreed to by Council of Australian Governments

Following the actual and attempted terrorist bombings in London on 7 and 21 July 2005, and the UK Government's steps to strengthen anti–terrorism legislation, the State Premiers called on the Prime Minister to convene a national summit on the question of anti-terrorism laws, and a number announced measures they proposed to take. On 8 Sept 2005 the Australian Prime Minister, Mr John Howard, announced twelve new 'regimes' to counter attempted terrorist attacks. The most controversial of these were control orders for up to 12 months in relation to people who 'pose a terrorist threat' and preventative detention for up to 14 days, with the assistance of State and Territory laws to overcome constitutional constraints on the Commonwealth. In addition it was proposed to replace the existing offence of sedition with an offence of inciting violence against the community, consistent with the recommendations of the Gibbs committee in 1991 for updating and simplifying that offence, and increasing its penalty.

These measures have parallels in existing or proposed UK legislation. Major changes were also signalled to airport security following the Wheeler report. At a special meeting of the Council of Australian Governments (COAG), most State Premiers expressed support for the Commonwealth's proposals, subject to certain safeguards. The ACT Chief Minister, Mr Jon Stanhope sought an opinion from the ACT Human Rights and Discrimination Commissioner, Dr Helen Watchirs, concerning the potential human rights implications of the proposals: the advice stated that ACT legislation to implement the proposals would probably require extensive amendments to make it human rights compliant. Earlier, on 23 Aug 2005 the Prime Minister held consultations with leading figures from the Australian Islamic community which developed a statement of principles.

The COAG meeting unanimously agreed to a large number of measures designed to combat terrorist attack, and the Prime Minister announced additional funding of $40 million for a range of security-related measures. Legislative amendments to the Commonwealth Criminal Code and options for 'harmonising State and Commonwealth legislation' will also be produced. Consultations will also take place between the Commonwealth and the States and Territories concerning legislative amendments 'to enhance and clarify' arrangements for calling out the Australian Defence Force to assist civil authorities[1].

The details concerning control orders and preventative detention orders include the following:

- *Control orders*: The AFP (acting with the Attorney–General's approval) must have reasonable grounds for claiming that issue of an order would substantially assist in preventing a terrorist act, or that a person has trained with a listed terrorist organisation. A control order will be issued by a court which must be satisfied on the balance of probabilities that each of the controls is reasonably necessary, appropriate and adapted

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to the purpose of protecting the public from a terrorist act. A control order may last up to 12 months; it is not stated whether it can then be renewed. The person concerned will not be given notice of an application to the court to issue an order, but after receiving official notice of an order may immediately apply for its revocation by the same court.

- *Preventative detention orders*: The AFP must have reasonable grounds for claiming that making an order would substantially assist in preventing a terrorist attack or preserve evidence of one that has occurred. Orders can be issued by an AFP officer for an initial 24 hours, which can be extended by a further 24 hours by a Magistrate or Judge acting as an issuing authority in a personal capacity. Persons detained can only be questioned in order to confirm their identity. Because of the Commonwealth's constitutional constraints, the States and Territories have agreed to enact measures designed to supplement Commonwealth legislation by providing for preventative detention for a total of up to 14 days, and stop, question and search powers in areas 'such as transport hubs and places of mass gatherings'.

Limitations and safeguard measures:

- Judicial review of the issue of both kinds of orders, and of the treatment of detainees.

- Access to a lawyer, with potential limitations on security grounds for a lawyer acting in relation to preventative detention.

- Power for the Commonwealth Ombudsman to investigate in relation to preventative detention orders (presumably the Ombudsman's normal investigatory powers would be applicable also to some aspects of control orders, though subject to limitations in relation to Commonwealth judges).

- Application in Queensland only of its existing mechanism of a Public Interest Monitor to be involved in monitoring orders on a continuing basis.

- Orders not applicable to people under 16, and modified for those between 16 and 18.

- Annual reporting to Parliament by Commonwealth Attorney–General.

- Observance of human rights obligations in relation to detainees with a penalty of up to two years' imprisonment for breach by an officer of such obligations.

- Review after five years, sunset clause after 10 years.

Debate continues concerning whether or not the control and preventative detention orders regimes in particular is necessary and proportional to Australia's situation. The Law Council of Australia states that it wants to see the details of the proposals, many of which it describes as 'foreign to our legal traditions'[2].

Note: Unfortunately it has not been possible to update this item in the light of developments following its preparation, but readers are referred to the Anti–Terrorism Bill 2005 and the Anti–Terrorism Bill (No 2) 2005. The latter purports to reflect the COAG agreement together with subsequently agreed changes which is available together with other materials from: http://parlinfoweb.aph.gov.au/; for the initial draft of the Bill sent to Premiers and Chief Ministers, and for a range of advice on the human rights and constitutional law issues relating to the Bill, see: www.chiefminister.act.gov.au/ 'what's new?'. The Senate Legal and Constitutional Affairs Legislation Committee is to report on the main Bill (No 2) by 28

November after receiving submissions by 11 Nov 2005. *See also* www.aph.gov.au/senate/committee/legcon_ctte/inquiries.htm .

Military justice report and government response

Senate Committee report

A unanimous Senate Foreign Affairs, Defence and Trade References Committee has produced an extremely thorough and comprehensive report[3] on all aspects of the military justice system, which is made up of the two separate processes of (i) disciplinary proceedings, where military offences have been committed, and (ii) administrative proceedings relating to complaints, redress of grievance for administrative action taken and inquiries concerning untoward incidents.

The almost two-year inquiry took into account a number of previous reports on the system, as well as major changes made recently to the military justice systems in Canada and the United Kingdom, and received a substantial number of open and confidential submissions and oral evidence, much of it from members or ex-members of the Australian Defence Force (ADF) or their relatives, some of whom had died while serving in the ADF. In the words of committee chair, Labor Senator Steve Hutchins: 'The Committee has been compelled by the evidence of bereaved families. … [These incidents reflect] a systematic breakdown of both the administrative and disciplinary arms of the military justice system.'

The Committee found serious defects of competence in the investigation process in both disciplinary and administrative matters, found that Service police were not up to date with forensic methods and that a number of disciplinary investigations had gone badly wrong. It was also critical of the way the ADF handled decisions to initiate disciplinary prosecutions and the provision of legal services to members of the ADF. The Committee was highly critical of the effect on the administrative processes of the ADF of 'the culture of silence' within it, including fear of reprisals of various kinds, together with the failure to respond to complaints made by ADF members or their families. The lack of perceived independence and the apparent conflicts of interest built into the processes, the tendency for lengthy delays, and other defects in the redress of grievance process, required significant reforms.

Among the Committee's major recommendations to address the identified defects were the following:

- All ADF suspected criminal activity in Australia to be referred to State or Territory civilian police for investigation and prosecution in civilian courts, except where no equivalent civilian offence exists or where a matter is referred back to the ADF. In today's circumstances it made sense to 'outsource' rather than duplicate the existing civilian system.

- Investigation of criminal activity committed on operations outside Australia to be conducted by the Australian Federal Police (AFP).

- Prosecutions to be referred to civilian prosecuting authorities.

- Replacement of Courts Martial and Defence Force Magistrate trials by an Independent Permanent Court, composed of independently appointed judges possessing extensive civilian experience.

- Introduction of a new ADF Administrative Review Board (ADFARB), similar to the Canadian Forces Grievance Board, to:

- Monitor progress of military grievances at unit level.
- Deal with those grievances not resolved at that level within 60 days of lodgement.
- Oversee and continue the work of the Inspector General ADF (introduced in Sept 2003), which could not itself rectify a deeply flawed system.
- Through its chair, decide on the manner and system of means of inquiring into serious incidents such as suicide, accidental death or serious injury, subject to the Minister's power to appoint a Court of Inquiry where necessary.

- Replace ad hoc Boards of Inquiry by a military division of the Administrative Appeals Tribunal (AAT), which could include service members appointed for particular matters by the Chief of the Defence Force, to inquire into major incidents referred to ADFARB.

Government response to report

The Government responded to the report on 5 Oct 2005. While promising to implement significant changes to all aspects of the military justice system, and accepting in whole or in part 30 of the committee's 40 recommendations, the Government rejected or modified most of the more sweeping recommended changes summarised above on the principal basis that 'a military justice system, as a core function of command, cannot be administered solely by civilian authorities'. Among the most important features of the Government's response are the following:

- Disciplinary and criminal matters:

  - A tri–Service ADF Investigation Unit, independent of chains of command and headed by a new ADF Provost Marshal.

  - As recommended by the committee, a statutorily based independent Director of Military Prosecutions to be responsible for military prosecution decisions, including referral to other authorities, and investigation or prosecution of offences only where a service connection is clearly present.

  - An Australian military court with a statutorily appointed Chief Judge Advocate (an existing position), two permanent judge advocates and a part-time reserve panel, selected from available full or part-time legal officers with five year fixed terms and possible renewal for a further five years, to function outside the chain of command in relation to their judicial duties.

  - A summary authority scheme for more minor offences with simplified procedures and rules of evidence, and a right of appeal to a judge advocate on conviction and sentence, and a modified right of appeal to the Defence Force Discipline Tribunal. (The relationship between these appeals is not clear in the response.)

- Administrative proceedings**:**

  - The Government rejected the centrepieces of the Committee's recommendations on administrative proceedings (see above), i.e. the proposed ADFARB, and a military division of the AAT to replace Boards of Inquiry. Instead, the existing Complaints Resolution Agency within Defence will become the lead agency in the coordination of complaints and redress of grievances, with similar oversight and monitoring functions in this regard to those recommended for ADFARB. It will take over the management of all cases unresolved by commanders after 90 days. The recommendations of a Joint Review of the ADF Redress of Grievances Process, conducted by the Defence department and the Defence Force Ombudsman, will continue to be implemented. The functions of the Inspector General of the ADF will be put on a statutory basis,

the Defence Force Ombudsman, will remain, and Boards of Inquiry will continue to be appointed. Mandatory Commissions of Inquiry headed by an independent civilian president will be appointed to consider all suicides of ADF members and deaths in service.

- Implementation, report and review:

  - A high level team will oversee the two year implementation period and the Defence department will report on progress to the Senate Committee at six monthly intervals. Independent reviews of the military justice system will be carried out periodically by a qualified eminent Australian, the first to be held in two years to assess the effectiveness of the new reforms. The approximate cost of the change process will be $3.5 million per annum.

Major developments in immigration portfolio

Major changes to the detention regime for asylum seekers have been implemented and substantial changes are being introduced into the administration of the Department of Immigration and Multicultural and Indigenous Affairs (DIMIA), as a result of representations by Government backbenchers and the revelations and recommendations of the Palmer Report.. These changes are dealt with in roughly the chronological order of their announcement.

Removal pending bridging visas

The Minister for Immigration and Multicultural and Indigenous Affairs, Senator Amanda Vanstone[4], announced removal of some of the previously announced limitations on eligibility for this class of visa, designed for unsuccessful asylum seekers whose removal from Australia is not possible at least for the moment (see (2005) *AIAL Forum* 2), especially those limitations relating to litigation by detainees and their cooperation with removal from Australia. The existence of the new form of visa was an important consideration in the package of measures resulting from discussions by the Prime Minister with a group of government backbenchers (see below).

Government backbenchers' private members bills

As a result of dissatisfaction with existing legislation concerning detention of asylum seekers, Liberal MP Petro Georgiou, with the approval of a small number of other Liberal MPs, gave notice to the House of Representatives of two private members bills, the Migration Amendment (Mandatory Detention) Bill 2005 and the Migration Amendment (Act of Compassion) Bill 2005, which were subsequently withdrawn by him in view of concessions made by the Government . However, the bills were introduced into the Senate by Greens Senator Kerry Nettle on 16 June 2005; after Senator Nettle's second reading speech, debate was adjourned to a later date. The bills go much further in principle and practice than most of the government concessions, replacing mandatory detention by detention for specific purposes only and making it subject to time limits and court and other supervision, as well as providing for limitations on long term detention and the detention of children. Temporary protection visas for recognised refugees would be replaced by permanent protection visas.

Government changes to operation of the immigration detention regime

Following discussions between the Prime Minister and government backbenchers who supported the private members' bills , the Prime Minister announced a package of reforms to the operation of the immigration detention system which would result in the policy of mandatory detention being 'administered more fairly and flexibly', while the framework of the

Government's existing policies remained completely intact. Many of the changes are included in the *Migration Amendment (Detention Arrangements) Act 2005* (Cth), which amongst other things confers a number of non-compellable and non-reviewable discretions on the Minister, and in the Migration and Ombudsman Legislation Amendment Bill 2005.

The principal changes[5] include:

- Stating the principle in the *Migration Act 1958* (Cth) (Migration Act) that minors shall only be detained in a detention centre as a measure of last resort, that detention of families with children should take place in the community under residence determinations that will be subject to individual conditions. On 29 July 2005 it was announced that all families with children in detention centres had moved into the community under residence determination arrangements. However, detention of families in Residential Housing Projects will continue during primary assessment of refugee claims, where removal is imminent or where conditions have been breached.

- Widening the Minister's discretion to grant visas to those in detention, including the Removal Pending Bridging visas.

- Providing for non-enforceable time limits of 90 days for processing applications for protection visas and for their review by the Refugee Review Tribunal (dealt with in the Migration and Ombudsman Legislation Amendment Bill 2005).

- Giving the Ombudsman a specific function to review the cases of those detained for more than 2 years, and thereafter every 6 months (see under *Ombudsman* heading).

- The government undertook to complete the consideration of the remaining caseload of applications for permanent visas from temporary protection visa holders, understood to be about one-third of an initial figure of 9,000 TPV holders. It made no statement as to whether those already refused would be reconsidered.

- The government agreed to the appointment of an Interdepartmental Committee (IDC) (including Attorney– General's, DIMIA, Foreign Affairs and Trade, ASIO and Family and Community Services) chaired by the Secretary of the Department of the Prime Minister and Cabinet to oversee the implementation of all the changes agreed on. The Minister and the chair of the IDC will meet regularly with interested members of the government to discuss implementation progress.

The *Detention Arrangements Act 2005* was passed by the Senate on 23 June 2005 and assented to on 29 June 2005.

Reports of inquiries into Cornelia Rau and Vivian Alvarez/Solon affairs and administrative changes

The report of the inquiry by former AFP Commissioner Mick Palmer into the mistaken immigration detention of Australian permanent resident Ms Cornelia Rau (and permanent resident Ms Vivian Alvarez/Solon) was released by the government on 14 July 2005. In broad terms the findings by Mr Palmer included the following:

- There was no automatic process of review sufficient to provide confidence to the government that the power to detain a person on reasonable suspicion of being an unlawful non-citizen under s 189 of the Migration Act was being exercised 'lawfully, justifiably and with integrity'. Mr Palmer recommended review and assessment within 24 hours or as soon as possible afterward.

- There were serious problems with the handling of immigration detention cases stemming from 'deep-seated cultural and attitudinal problems within DIMIA and a failure of executive leadership in the immigration compliance and detention areas'. The culture was overly self-protective and defensive and unwilling to engage in self-criticism or analysis, and urgent reform coming from the top was necessary, assisted by external professional assistance.

- The mental health care Ms Rau received in Baxter Detention Centre was inadequate, and the detainee population generally required 'a much higher level of mental health care than the Australian community'. There was a need for accountability and review mechanisms.

- The services contract with Global Solutions Limited for provision of immigration detention was fundamentally flawed, and the inquiry recommended consultation with the Auditor–General and the establishment of a panel of external experts to advise on management of the detention services contract and report to the Minister quarterly. (Note also ANAO Audit Report No 1, 2005-2006, *Management of the Detention Centre Contracts: Part B*, 2005.)

- A nationwide missing persons database should be established as a national priority. The federal Minister for Justice and Customs, Senator Ellison is pursuing this issue with Commonwealth and State law enforcement agencies. Those detained are to be fingerprinted, without their consent if necessary.

Mr Palmer recommended a range of new groups and bodies to supervise, monitor and implement changes and made a number of specific recommendations for improving detention administration including better training for DIMIA officers and detention provider employees.

The Ombudsman's report on the removal of Ms Vivian Alvarez, reflecting the work of Mr Neil Comrie and his team initially appointed by the Government but later continued under the Ombudsman Act, was presented to the Government on 26 Sept 2005. Mr Comrie's team was able to make use of the Ombudsman's statutory powers to obtain evidence that had not been available to it in its previous role. The report found that the handling of Ms Alvarez/Solon's removal from Australia had been 'catastrophic' and, after considering legal authority including *Ruddock v Taylor*[6] in its opinion the removal had been unlawful. The report found that DIMIA officers at all levels had 'little understanding of their responsibilities under [s 189 of] the [Migration] Act – other than a mistaken belief that they *must* detain a person and that when the person is detained the detention is absolute' (original emphasis).

Like the Palmer Report, the Ombudsman's Report found there were numerous major systemic problems in the Department, but in this case dating back at least to 2001. The Ombudsman's recommendations complemented and endorsed those of the Palmer Report. One recommendation drew the attention of the Secretary of DIMIA to the opinion of the Ombudsman that the conduct of three officers might constitute a breach of one or more requirements of the Australian Public Service Code of Conduct. After a preliminary departmental investigation, an investigation into the conduct of the officers by the former Australian Government Solicitor, Mr Dale Boucher, was announced by the Secretary.

The government accepted the thrust of the findings and recommendations of Mr Palmer and the Ombudsman[7]. The Prime Minister has apologised to both Ms Rau and Ms Alvarez/Solon for the treatment they received; the current DIMIA Secretary, Mr Andrew Metcalfe, has also apologised to Ms Alvarez/Solon. Questions of compensation and other assistance are still under discussion between the government and the two women's legal representatives.

Major administrative and other systemic changes arising out of the two inquiries were announced before and during their conduct (on 7 February and 25 May 2005), as well as on the release of the Palmer report in July 2005 and in the implementation report provided in September 2005. These measures include a complete change of the leadership team in DIMIA, including the replacement of Secretary Bill Farmer (posted as Ambassador to Indonesia) by then Prime Minister and Cabinet Deputy Secretary, Andrew Metcalfe, and numerous other changes at executive level. The proposed changes are complex and extensive with an estimated cost of $231.1 million over five years. A specific Palmer Programme Office is part of a Change Management Task Force and will report directly to the Secretary on progress.

The three broad goals are for DIMIA to become a more open and accountable organization; that it deal more reasonably and fairly with 'clients', and that staff be well trained and supported. Other goals include:

- A high level Values and Standards Committee which will have external representation, including from the Ombudsman's office and the Australian Public Service Commission.

- Training will be delivered through the establishment by mid–2006 of a College of Immigration Border Security and Compliance at a cost of $50.3 million over five years.

- An independent review of the compliance and detention divisions, and a group of external experts is to advise the Minister on the management of the detention contract.

- The role of IT systems in supporting active case management and identification of clients is to be independently assessed.

- Major initiatives are proposed to address the mental and general health particularly of long term detainees. Quarterly implementation reports will be made to the Government and an implementation report will be tabled in Parliament in September 2006[8].

Senate Committees inquire into operation of the Migration Act and into Mental Health Care

The Senate Legal and Constitutional References Committee is conducting an inquiry into the administration and operation of the *Migration Act 1958*, with particular attention to the processing and assessment of visa applications, migration detention and the deportation of people from Australia, and the inquiry extends to the adequacy of healthcare, including mental healthcare, and other services and assistance to people in immigration detention, the outsourcing of management and service provision at immigration detention centres, and related matters. The committee is required to report by 8 November 2005. A Senate Select Committee on Mental Health is due to report by 6 October 2005, and has received a large number of submissions[9].

Legislative developments in the Autumn 2005 sittings

The following are among the legislative items dealt with in the Autumn sittings of the Commonwealth Parliament:

- *Australian Communications and Media Authority Act 2005* and companion legislation were passed by the Senate on 16 March 2005 and assented to on 1 April 2005 (see (2004) 43 *AIAL Forum* 3).

- *Migration Litigation Reform Bill 2005* was passed by the House of Representatives on 10 May and introduced into the Senate on 11 May 2005 and debate adjourned. The Senate

Legal and Constitutional Legislation Committee reported on the provisions of the bill on 11 May 2005. Coalition and Labor members of the committee recommended that the Senate pass the bill, subject to: repeal after 18 months of provisions conferring broadened powers of summary dismissal of proceedings; and presentation to Parliament after 12 months of a comprehensive report by the Attorney–General on the operation of the bill's provisions. The Australian Democrats opposed the bill as unnecessary, but if it were to be enacted supported the committee's recommendations together with a three year sunset clause[10].

- See *National Security Information Amendment Act 2005* was passed by the Senate on 16 June 2005 and assented to on 6 July 2005. In essence it extends the operation of the *National Security Information (Criminal Proceedings) Act 2004* (see (2005) 45 *AIAL Forum* 3 and (2004) 43 *AIAL* 3 and 14) to include federal civil proceedings, and makes specific provision for the conduct of such proceedings in relation to national security information, including the giving of conclusive certificates by the Attorney–General and the joining of the Attorney–General as a party to proceedings. A submission by the Australian Law Reform Commission to the relevant Senate Committee urged that the process should be extended to administrative proceedings in tribunals. The Human Rights and Equal Opportunity Commission submitted that the bill raised concerns in relation to the human rights to a fair and public hearing and to an effective remedy for violations of a person's human rights. Notices given and certificate decisions made by the Attorney–General or another Minister in relation to civil proceedings are excepted from review under the *Administrative Decisions (Judicial Review) Act 1977*, and the Federal Court is precluded from judicial review of a proceeding or appeal before another federal or state or territory court. The Act renames the original Act the *National Security Information (Criminal and Civil Proceedings) Act 2004*[11].

Legislative developments Spring sittings 2005

The Spring sittings are notable for the fact that the Howard Coalition Government controls the Senate for the first time with 39 seats out of 76. Following the Palmer report on Cornelia Rau, new provisions permit disclosure of identifying information to individuals or the public to assist with identifying or locating a person who is otherwise unable to be identified or located.

Controversial legislation that has been or will be introduced includes: a bill for the full sale of Telstra (passed), industrial relations legislation, legislation on counter-terrorism and legislation concerning voluntary student unionism.

The following bills of administrative law interest are among those proposed by the government for consideration in the Spring Sittings 2005: those marked with an asterisk are intended for passage in those sittings. Comments on bills not yet introduced are drawn from the Government release at www.pmc.gov.au/parliamentary/index.cfm, and, where the bill has already been introduced, from Parliamentary Bills lists; details of some bills dealt with in earlier issues are not repeated:

- *Law Enforcement Reform Bill**: To provide for the establishment, functions and powers of an independent Australian Commission for Law Enforcement Integrity, headed by a statutory Integrity Commissioner, with investigative powers to look into possible corruption in Australian government law enforcement agencies, with power to recommend prosecutions, and other remedial measures.

- *Migration Amendment (Migration Zone) Bill*: To amend the *Migration Act 1958* to provide greater certainty in the definition of 'migration zone', expand the definition of 'excised

offshore place' to include certain islands and territories in Northern Australia, and other purposes. *Note* that the Government has already made regulations to similar effect. A disallowance motion supported by the ALP, Greens and Democrats was rejected by the Senate on 18 August 2005[12].

- *Migration and Ombudsman Legislation Amendment Bill 2005*: To implement elements of the changes to detention discussed above and other matters (see *Immigration* above and below under *Ombudsman* heading). The bill was introduced into the Senate on 15 September 2005.

In addition the following relevant legislation has been enacted so far in the Spring sittings:

- *Human Services Legislation Amendment Act 2005* was passed by the Senate on 5 September and assented to on 6 September 2005. The bill abolishes the governance boards of Centrelink and the Health Insurance Commission (HIC) and establishes Medicare Australia, which will replace the HIC; the *Health Insurance Commission Act 1973* is renamed the *Medicare Australia Act 1973*. The bill creates the offices of CEO of Medicare Australia and Centrelink and makes them directly accountable to the Minister. (See under *Public Administration* for the background to these changes.)

ACT and Victorian human rights developments

The ACT Human Rights and Discrimination Commissioner, Dr Watchirs, delivered a report[13] to the ACT Chief Minister on 30 June 2005 concerning the effect of the *Children and Young Persons Act 1999* (ACT) in relation to human rights in Quamby Detention Centre. The report contained detailed recommendations on a wide range of practices within Quamby that the Commissioner found were inconsistent with the human rights of detainees, and included a recommendation for the urgent making of disallowable rules for the operation of Quamby compatible with the *Human Rights Act 2004* (ACT). While supporting the Government's intention to commit $40 million to build a new detention centre for young offenders by 2008, the Commissioner believed a review of policies now could improve the treatment of detainees before the new facility commences operation. The Minister for Children, Youth and Family Support, Ms Gallagher, indicated that her department's review of Quamby would be guided by the report.

The Victorian Government is currently carrying out a community consultation on Human Rights. The government has produced a statement of intent and set up an independent committee chaired by Professor George Williams of the University of NSW to consult with Victorians about the need for change. The committee has produced a community discussion paper available from the website of the Victorian Department of Justice: www.justice.vic.gov.au .

The courts

Appointment of Justice Susan Crennan to High Court

On 20 Sept 2005, the Commonwealth Attorney–General, Mr Ruddock, announced he would recommend to the Governor–General that Justice Susan Crennan of the Federal Court be appointed to the High Court from 1 November following the retirement of McHugh J on 31 Oct 2005. The appointment was widely welcomed by legal professional organisations and others. The appointment revived debate about whether a more open method of selection and appointment would be desirable[14].

Statutory procedural fairness provision for RRT review not confined to pre-hearing processes

By a majority of 3:2 (McHugh, Kirby and Hayne JJ; Gleeson CJ and Gummow J dissenting) the High Court held in *SAAP*[15] that the procedural fairness provisions in s 424A if the Migration Act are not restricted to matters preceding any hearing held by the Refugee Review Tribunal (RRT) but apply to all stages of the RRT review process. The appellants were an Iranian mother and daughter, whose applications for a refugee protection visa, based on fear of persecution as members of the Sabian–Mandean sect, were rejected by the Minister's delegate.

The RRT upheld the visa refusal, in part at least on the basis of evidence given by the first appellant's eldest daughter in the appellant's absence. The RRT member summarised some of that evidence and put three aspects of it to the first appellant, indicating that he was prepared to receive written submissions; however, he did not at any time issue a written invitation to the first appellant to comment on the eldest daughter's evidence. Section 424A requires the RRT to give an applicant particulars in writing of any information it considers would be the reason, or part of the reason, for affirming the decision under review, making clear their relevance to the review, and inviting the applicant's comments.

Chief Justice Gleeson and Gummow J held that the structure of the division of the Act in which s 424A is found was 'sequential' and that s 424A did not apply to information that emerged once a hearing by the RRT was under way. In the view of Gummow J, the purpose of the sections among which s 424A appears is 'to improve the efficiency of the RRT's procedures by compelling the RRT to obtain the maximum amount of documentary information that may be available before resorting to the [hearing] procedure in s 425'. The Chief Justice could see no purpose in applying s 424A when the RRT could invite oral comment at the hearing.

The majority rejected the sequential construction of the provisions. In the view of McHugh J, it was inconsistent with the inquisitorial nature of the RRT's review to require it to 'obtain all information relevant to the decision under review before invoking the s 425 [hearing] procedure', since further adverse information could emerge at the hearing. Similarly, Hayne J considered that the review process is primarily a documentary process in which the applicant's appearance at a hearing is not the culmination of the review, and further information may emerge at any time. The language of the Act did not dictate a sequential construction. Justice Kirby agreed with Hayne J's analysis, noting that a written communication, even to an illiterate person (as in this case), of a 'potentially important, even decisive, circumstance' permitted the review applicant to receive advice and give instructions. All majority judges held that the section was imperative, and that its breach therefore constituted a jurisdictional error rendering the RRT's decision invalid. The court found no grounds for exercising its discretion not to grant relief.

Assessment of future persecution on the ground of proselytising religion

In *NABD*[16], a similar issue arose to that determined in *Appellant S395/2002 v MIMA*[17] RRT and decided after the Federal Court decisions in this matter. By a majority of 3:2 (Gleeson CJ, and Hayne and Heydon JJ in joint reasons; McHugh and Kirby JJ dissenting) the High Court dismissed the appeal by an appellant who had claimed that he was entitled to protection as a refugee on the basis of a well-founded fear of persecution by reason of religion because of his conversion to Christianity (Uniting Church) in Indonesia after fleeing from Iran.

The RRT rejected claims of past persecution, ultimately finding on the basis of relevant 'country information' that his fear of future persecution was not well-founded because there was no real chance of his being persecuted in Iran if he practised his religion as he had in Indonesia and in a detention centre in Australia. The appellant claimed that the RRT had made a similar jurisdictional error to that identified in *S395/2002*, in that it had decided the question of whether his fear was well-founded by erroneously classifying converted Christians in Iran into 'proselytising Christians' and 'quietly evangelising Christians' (McHugh J), where only the former ran a real chance of persecution by reason of their religion.

Chief Justice Gleeson decided the appeal in the same way as he had in dissent in *S395/2002*, finding that the RRT's process of reasoning was legitimate. The joint judgment of Hayne and Heydon JJ distinguished *S395/2002* on the ground that here the RRT did not ask, as it had in the earlier case, 'whether it was possible for the appellant to live in Iran in such a way as to avoid adverse consequences', thereby failing to assess the appellant's individual case. The RRT was entitled to conclude on the information available to it that the appellant's actual practice of his religion would not raise a real chance of persecution in Iran on the basis of his religion.

Justice McHugh dissented on the principal grounds that the RRT's adoption of the classification of Iranian Christians into two categories was not justified by the evidence and that by doing so the RRT failed to answer the real question as to whether the appellant's fear was well-founded. In this case there was no evidence of recognition in Iran itself of the supposed two sub-groups, or that the Iranian authorities tolerated any form of faith sharing. In Kirby J's view, consistency with the approach adopted in *S395/2002* required the same outcome in this matter. It was time to erase the supposed dichotomy of those who might be able to avoid or diminish the risks of persecution by conducting themselves 'discreetly' in denial of their fundamental human rights, and those who were expected to assert those rights openly.

The objects of the Refugee Convention properly understood embodied principles for the protection of basic human rights, and fundamental human rights relating to religion included rights to manifest and practice the religion. The RRT had failed to consider whether, in Iran, the obligation to avoid proselytising would be the result of a denial of fundamental freedoms by its harsh laws and social practices, which would itself provide grounds for a well-founded fear of persecution.

Whether Army Sergeant's injury was attributable to defence service –AAT asked wrong question

The appellant in *Roncevich*[18], when serving as a Sergeant in the Australian Army, had attended a function in the Sergeants' Mess at Holsworthy Military Barracks to welcome the Regimental Sergeant Major of the Army; the function was scheduled at short notice. The appellant was present at the function for four and a half hours, becoming inebriated. He returned to his room in the barracks intending to change into civilian clothes, ironed his uniform for the next day and then returned to the Mess. He fell from a window when standing on a trunk to spit, with the result that his left knee was badly injured.

The appellant sought compensation under s 70(1) and (5) of the *Veterans' Entitlement Act 1986* (Cth) (the VE Act). He appealed to the High Court against the upholding by the trial judge and the Full Court of the Federal Court of a decision of the Administrative Appeals Tribunal (AAT) to affirm the respondent's decision to refuse compensation. In a unanimous decision, the High Court (in joint reasons, and separate reason of Kirby J) held that the AAT had asked the wrong question, namely whether the appellant's intoxication arose out of a task he had to do as a soldier, rather than the question posed by the VE Act as to whether

the injury arose out of, or was attributable to, any 'defence service' of the applicant. The court remitted the matter to the AAT for determination according to law; the court could not substitute a finding of facts in favour of the appellant as the AAT had made no findings on the real issue.

The evidence was capable of providing an affirmative answer to the correct question: the authors of the joint reasons had little doubt that there was a requirement short of military orders, or an expectation, of attendance at the Sergeants' Mess accompanied by the consumption of alcohol. The remaining question was whether the Sergeant's subsequent actions, including his fall, also arose out of or was attributable to his defence service. Justice Kirby's judgment raises interesting questions relating to appeals from the AAT (or other tribunals) to the Federal Court on a question of law, including issues relating to 'perverse' findings of fact. None of the judges accepted that the AAT's reasons were insufficient: in Kirby J's words, the AAT 'made its reasons plain enough'.

Application of Nauruan immigration laws to asylum seekers detained at Australia's request

A 4:1 majority of the High Court (Gleeson CJ, Gummow, Hayne and Heydon JJ in a joint judgment; Kirby J dissenting), sitting to review a decision of the Supreme Court of Nauru under the *Nauru (High Court Appeals) Act 1976*, upheld the application of the Nauruan Immigration Act and Regulations to the detention in Nauru of asylum seekers taken to Nauru by the Australian Government for detention pursuant to Memoranda of Understanding (MOUs) between Nauru and Australia. The appellant[19], an Afghan national of Hazara ethnicity, was brought to Nauru at the end of 2001 by Australian sea transport. His presence there was purportedly governed by successive special purpose visas issued on certain conditions. His application for habeas corpus had been dismissed by the Nauruan Supreme Court. Some time before the High Court's decision, the appellant had been granted an Australian visa and was reported to have come to Australia.

All judges dismissed the respondent's argument that the matter was therefore moot and should be dismissed: there were important issues to be determined including the question of costs. In the opinion of the majority the conditions attached to the special purpose visas were valid, and the visas themselves had been lawfully issued under the Nauruan legislation. They rejected the argument that the visas had been invalidly issued because the Australian Consulate–General in Nauru had applied for them without the request or consent of the appellant: the legislation did not provide that no valid visa could be issued except upon application. The majority identified a 'conundrum' to the effect that if the appellant's current visa were found to be invalid, under the Nauruan legislation he would be subject to arrest, punishment and removal from Nauru.

Justice Kirby interpreted the Nauruan laws in the context of a significant deprivation of the appellant's liberty (and that of others in a similar position). The High Court in exercising its jurisdiction in relation to decisions of the Nauruan Supreme Court should apply the principle applied by those courts of construing legislation as far as possible to conform with Nauru's international relations, even if that principle is not accepted in Australia (referring to *Al-Kateb v Godwin*[20]). The Nauruan Immigration Act and Regulations, which had a general application, were simply not applicable to justify prolonged indefinite detention of a person deliberately brought to Nauru by its Government pursuant to the MOU with Australia. The appellant would also not be subject to penalties under legislation that was inapplicable to him; in any case, he could not be said to have unlawfully entered Nauru or be unlawfully in it.

Whether procedural fairness or dismissal at pleasure applied to statutory power of removal of senior police officer

Six members of the High Court (Kirby J being absent) allowed an appeal by a former NSW Deputy Commissioner of Police[21] (the appellant) on the ground that his removal from that office was invalid for lack of procedural fairness. The court rejected the appellant's submission that legislation gave the Commissioner the power of 'dismissal at pleasure', as had historically been the case at common law in relation to constables. The existence of another power in the legislation providing all members of the Police Service with a right of hearing did not exclude procedural fairness under s 51 of the *Police Act 1990* (NSW), which provided for removal from office 'at any time' of certain senior police officers by the Governor on a recommendation of the Commissioner that had been approved by the Minister for Police.

The appellant had been reappointed to the position of Deputy Commissioner on a 5-year contract. The recommendation for the appellant's removal from office after 19 months' service was stated to be on the ground of 'performance'. The appellant did not receive prior notice of the recommendation or any particulars on which it was based, and had no opportunity to respond to the recommendation before it was made to the Governor. No performance appraisal process, as provided for in the employment contract, had occurred.

In overruling the decision of the NSW Court of Appeal, all members of the High Court accepted the principle stated in *Annetts v McCann*[22] (that unless excluded by plain words of necessary intendment, the conferral of a power to prejudice a person's rights and interests was subject to the rules of procedural fairness. The Police Act did not contain any provision that resulted in the exclusion of the rule of procedural fairness requiring an opportunity to be heard. In the Chief Justice's opinion, the breadth of the power to remove, and its manner of exercise, tended to the conclusion that it was intended to be exercised fairly. The views of the remaining judges were broadly similar, but Callinan and Heydon JJ differed on the effect of the decision's invalidity. The result of the orders made by the majority was to reinstate the orders of the trial judge in favour of the appellant, including substantial compensation. Following the decision of the primary judge in 2002, the Police Act was amended to provide that an 'executive officer may be removed from office at any time for any or no reason and without notice'.

Wrongful imprisonment and immigration detention

A majority of the High Court (Gleeson CJ; Gummow, Hayne and Heydon JJ in joint reasons, and Callinan J; McHugh and Kirby JJ dissenting) allowed an appeal against a decision of the NSW Court of Appeal upholding a decision to award damages to the respondent, Mr Taylor[23], on the basis of a finding that two periods of immigration detention totalling 316 days amounted to wrongful imprisonment. The respondent was born in England and emigrated to Australia with his family as a child in 1966; he did not ever take out citizenship and later was granted a permanent transitional visa.

In 1996 he pleaded guilty to eight sexual offences against children, and on his release from prison, the then Minister for Immigration and Multicultural Affairs cancelled his visa on character grounds in September 1999. That decision was quashed by consent by a single justice of the High Court in April 2000 on the basis of a jurisdictional error.

In June 2000 the then Parliamentary Secretary again cancelled the respondent's visa on the same grounds. That decision was also quashed by the Full Court of the High Court on constitutional grounds and on a separate ground of jurisdictional error[24], overturning a

previous authority on the constitutional ground. In turn, the constitutional ground for the decision in *Patterson* was overruled by a differently constituted court in *Shaw v MIMA*[25] .

The joint reasons distinguished between the issue of the lawfulness of a decision to detain a person under s 189 of the Migration Act and the lawfulness of a decision under s 501 of that Act to cancel a person's visa. Section 189(1) provided that if 'an officer knows or reasonably expects that a person in the migration zone is an unlawful non-citizen' he or she *must* detain that person. In their Honours' view, a belief or suspicion that a person is an unlawful non-citizen may be reasonable even if the basis for the detention turns out to have been legally inaccurate. What constitute reasonable grounds for suspecting a person to be an unlawful non-citizen is to be judged against what was known or reasonably capable of being known at the relevant time. There was no justification in the provision for making a distinction between mistakes of fact and law. Justice Callinan's reasons for decision are in similar terms.

Justices McHugh and Kirby dissented, the former on the technical meaning of the words in s 189, the latter agreeing that if the facts are legally incapable of making the person an unlawful non-citizen, the officer cannot be said to reasonably suspect the person has that status. Justice Kirby held that the Ministers' action could not be justified under s 189, which did not apply to them, or under the provisions for cancelling a visa in s 501. The law of tort governed the appeal unless displaced by statute: wrongful imprisonment is a tort of strict liability in which lack of fault is irrelevant to the existence of the wrong, because its focus is on the vindication of liberty and reparation to the victim. Both judges held that the decisions made by the Ministers were directly responsible for the detentions of the respondent.

Apprehended bias – ACT bushfire and Queensland Bundaberg hospital inquiries

Litigation in relation to two major public inquiries illustrates the significant role the procedural fairness rule of apprehended bias may play in adjudicative processes. In the ACT Coroner's inquiry into the 2003 bushfires, an application to the Supreme Court resulted in the proceedings of the inquiry being delayed from October 2004 to October 2005. Nine ACT government officials at the time of the destructive January 2003 bushfires, including the former bushfire chief and the head of the Emergency Services Bureau, joined by the ACT Government, made an application for prohibition against the coroner, Ms Doogan, based on claims of apprehended bias.

A full bench of the ACT Supreme Court (Higgins CJ, Crispin and Bennett JJ) rejected the application in a joint judgment[26] based on the test of whether 'a fairminded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the question the judge is required to decide'. The result was in part connected with the fact that the court took a narrower approach to the legislative scope of a coroner's inquiry in the ACT than had previously been widely understood by coroners and government. The coroner's powers extended only to inquiring into the 'cause and origin' of the fire, and not into all the circumstances surrounding it.

A large number of matters were claimed as the cumulative basis for apprehended bias, focusing principally on the relationship of the coroner and counsel assisting the inquiry with two investigators/expert witnesses appointed by the ACT Government to assist the inquiry, whom the coroner mistakenly thought had been appointed by her as independent experts. Other grounds of complaint included comments and interventions by the coroner during the hearings, actions and comments by counsel assisting the inquiry, and actions such as meetings and site inspections with the investigators. Despite some concerns, the Court held that no grounds for reasonable apprehension of bias had been established at the stage of

proceedings reached by the inquiry. The Court would in any case have exercised its discretion to refuse relief in relation to mere possibilities. No appeal has been lodged.

In the case of proceedings relating to a challenge to Mr Tony Morris, QC, the commissioner appointed by the Queensland Government to conduct an inquiry into events at Bundaberg Base Hospital involving Dr Jayant Patel, the discriminatory behaviour of the commissioner towards witnesses from the hospital administration compared to other witnesses from the hospital, and an unjustified and intemperate interjection by the commissioner during cross-examination of a witness by one applicant's counsel, led to the opposite result to that in the bushfire inquiry[27]. The inquiry will now continue with wider terms of reference under new commissioner, former judge Geoff Davies, who will discard tainted evidence from consideration entirely

Invalidity of suspension of ATSIC Chairperson on grounds of 'misbehaviour' under delegated legislation and general statutory power

The Full Court of the Federal Court (Black CJ and Weinberg J, Selway J having died after the court's decision was reserved) upheld the decision of Gray J that the decision of the Minister for Immigration and Multicultural and Indigenous Affairs to suspend Mr Clark from his position as a Commissioner of the Aboriginal and Torres Strait Islander Commission (ATSIC), which he chaired, was invalid.[28] If not disallowed in the Parliament, the suspension would have provided the basis for possible dismissal by the Minister.

In suspending Mr Clark because of his conviction and fine of $750 for obstructing police, the Minister purported to act under (i) a paragraph of a Determination made by the previous Minister in 2002. It provided that the behaviour of a person in circumstances where they were convicted of an offence for which there is a penalty of imprisonment was taken to be statutory misbehaviour, even where the person was discharged without a conviction being recorded, and (ii) the general meaning of 'misbehaviour' in the *Aboriginal and Torres Strait Islander Commission Act 1989* (Cth) (the Act). Although ATSIC had been effectively abolished by the time of the court's decision, the court considered that important questions of law, as well as the matter of costs, needed to be resolved.

Their Honours agreed that the relevant provision in the Determination was invalid, but differed in their reasons, Weinberg J holding that the provision was so wide that it was invalid on the ground of not being reasonably proportional to the purpose of the empowering Act, while Black CJ based the invalidity of the provision in the Determination on the ground that it failed to specify the misbehaviour with sufficient clarity, a ground rejected by the Weinberg J.

Although their Honours also differed on whether the provision should be read down or not, the Minister's decision based upon it was invalid on either reading. Moreover, the Minister's reliance on the general meaning of 'misbehaviour' in the Act had miscarried, because her reasons for decision gave no indication that she had considered the central question whether Mr Clark's conduct bore on his capacity to continue to hold office as an ATSIC Commissioner. However, the court rejected the trial judge's finding that the Minister's Determination of what constituted misbehaviour had to be read down to avoid discrimination on the grounds of race.

Brief items

- *Industrial relations*: The High Court's rejection of the challenge by the ALP and the ACTU, to proposed Government advertising promoting changes to industrial relations

laws, was handed down on 29 Sept 2005. At the time of writing, no reasons had been published for the court's decision that there were no grounds for relief[29].

- *Lawyers advertising*: By a majority of 5:2 (McHugh and Kirby JJ dissenting) the High Court has held that NSW legislation prohibiting lawyers from advertising personal injury services do not infringe the implied freedom of political communication in the Constitution[30].

- *Refugee protection*: The Minister for Immigration and Multicultural and Indigenous Affairs has sought special leave to appeal to the High Court in relation to a majority decision[31] of the Full Court of the Federal Court (Wilcox and Madgwick JJ; Lander J dissenting) holding that the correct test for granting a permanent protection visa to a person, who has already been recognised as a refugee by the grant of a temporary protection visa, is whether or not the cessation clause in Article 1C(5) of the Refugees Convention applies to the person, rather than treating the matter afresh under Article 1A(2) of the Convention, as Lander J held.

In the majority's view, the former provision required changes in the country of origin to be of a fundamental nature addressing the causes of displacement which led to the recognition of refugee status; UNHCR guidelines referred to the need for conditions to have changed 'in a profound and enduring manner before cessation can be applied'. Justice Lander agreed with Emmett J and other judges at first instance that the Migration Act was unambiguous in requiring a fresh application for a permanent protection visa 'even if that did not necessarily sit comfortably with the framework of the Refugees Convention'.

Administrative review and tribunals

United Kingdom tribunals reform developments

The UK Department for Constitutional Affairs (DCA) has announced that two major tribunals are to join the new Tribunals Service in April 2006, one to two years ahead of schedule. They are the Criminal Injuries Compensation Appeals Panel and the Appeals Service which resolves disputes on matters such as social security, child support cases and disability living allowance. Between them the two tribunals deal with 230,000 cases a year[32].

COAT report on tribunal remuneration

The Council of Australasian Tribunals (see (2002) 35 *AIAL Forum* 1) has published a comprehensive table concerning the remuneration of members of Australian tribunals: see 'Results of Remuneration Survey' at: www.coat.gov.au.

Ombudsman

Commonwealth Ombudsman's immigration jurisdiction, including actions of contractors

The following changes have recently occurred in relation to the Commonwealth Ombudsman jurisdiction in relation to immigration matters[33]:

- The Ombudsman has acquired a new function, under new Part 8C of the Migration Act of reviewing and reporting on the detention of immigration detainees who have been held for more than 2 years, and thereafter every 6 months. The Ombudsman has power to recommend the release of a person, the granting of a visa, the ongoing detention, or any other recommendation the Ombudsman considers appropriate. While his

recommendations are not binding on the Minister, the Ombudsman's de-identified statements on each such detainee will be tabled in Parliament. The Ombudsman may exercise all existing powers of investigation in carrying out this new function.

- There is to be a separate team within the Ombudsman's office to investigate the circumstances of long-term detainees. It will deal with cases in order of priority, beginning with those who have been in detention the longest, among whom precedence will be given to assessing cases involving the long-term detention of people with significant health problems, including those with current mental health issues such as those in Glenside Hospital in Adelaide. Visits have been made to Glenside and visits are planned to Baxter and Villawood detention centres. The Ombudsman's staff have met with a range of community organisations and advocacy groups.

- Following the publication of the report into the Vivian Alvarez matter (see *Immigration* heading), the Ombudsman's office continues to investigate the other more than 200 related matters originally referred to the Palmer inquiry and a number of further matters.

- The Migration and Ombudsman Legislation Amendment Bill 2005 provides that the Ombudsman, in performing his or her functions in relation to immigration, including immigration detention, may be called the Immigration Ombudsman if he or she chooses. The bill also makes explicit that the Ombudsman can perform functions and exercise powers under other Commonwealth and ACT legislation. There is also provision to enable an agency or person to provide information to the Ombudsman notwithstanding any law that would otherwise prevent them from doing so. Of wide significance is the general provision giving the Ombudsman jurisdiction in relation to the actions of contractors and subcontractors when they are exercising powers or performing functions for or on behalf of Australian Government agencies in providing goods or services to the public: these actions are deemed to be actions of the relevant agency, and can therefore be investigated by the Ombudsman. This change may have been prompted by the need for the Ombudsman to be able to investigate contractors providing immigration detention services, but it is not limited to those circumstances. Successive Ombudsmen have long sought clarification of this matter and it will be interesting to see if similar amendments are made to the FOI Act.

- The Ombudsman has sought and been assured by the Government of additional funding of $12.8 million over four years to fulfil his enhanced role of Immigration Ombudsman, in particular a broader detention review role including health complaints, a greater role in examining compliance activities and an expanded role in investigating immigration complaints and issues.

Freedom of information, privacy and other information issues

Limitation on AAT's powers where conclusive certificate issued in relation to deliberative process documents

In *McKinnon v Secretary, Department of Treasury*[34], a majority of the Full Court of the Federal Court (Jacobson and Tamberlin JJ; Conti J dissenting) rejected an appeal against a decision of the AAT to uphold a conclusive certificate supporting exemptions under s 36 of the *Freedom of Information Act 1982* (Cth) (FOI Act) for deliberative process documents relating to (a) taxation 'bracket creep' and (b) the First Home Owners Scheme[35] .

The appellant, Mr McKinnon, is the FOI Editor of The *Australian* newspaper. The central issue concerned the proper interpretation of the provisions in the Commonwealth FOI Act to the effect that, while the AAT does not have power to review a decision to issue a conclusive

certificate, it must in the case of deliberative process documents covered by a conclusive certificate 'determine the question whether there exist reasonable grounds for the claim that the disclosure of the document would be contrary to the public interest' (s 58(5)).

Justice Jacobson followed previous authority in holding that in carrying out such a determination the AAT was not required to balance different aspects of the public interest. Justice Tamberlin agreed with Jacobson J's reasons and orders, adding that answering the question posed in s 58(5) is different from the AAT's normal role in determining the balance of public interest factors, and in performing that task it is unnecessary 'to evaluate anything beyond the question whether the ground raised to support the particular facet of the public interest is irrational, absurd or patently untenable'.

Justice Conti dissented, holding that, when making a s 58(5) determination, the AAT is required to determine all the grounds that exist (at the time of its determination) in relation to a public interest claim, and to weigh and balance those grounds in order to determine whether reasonable grounds exist in favour of non-disclosure: the provision did not direct determination of whether there are 'any' reasonable grounds. Similarly, the AAT was obliged in principle to weigh and balance the testimonies of the appellant's witnesses as well as those for the respondent. Where there are conflicting views the AAT has to 'determine [a] question', not just one side. His Honour was alone in finding that the appellant's claims that the AAT had erred in its approach to the concept of public interest had force, and that it had misinterpreted the meaning of an exception allowing the release of reports of 'scientific and technical experts'. Mr McKinnon has sought special leave to appeal to the High Court.

Reports concerning privacy and the private sector

A report by the Commonwealth Privacy Commissioner[36] on the operation of the private sector provisions of the Privacy Act found that on balance the provisions worked well, noting, however, that at present her office did not have the power to conduct audits of the compliance of private sector business with the Privacy Act's requirements. The Commissioner noted that the provisions seemed to be working well for business, but that there was less satisfaction on behalf of those representing consumer and privacy advocacy groups. The Commissioner also recommended a wider review of privacy for the 21st century, which the Commissioner saw as relevant to a number of complex areas. Her recommendations included the following:

- Examination of the differing privacy principles applicable to the government and private sectors with a view to developing a single set of principles applicable to both..

- Examining exemptions from the Act.
- Retaining the small business exemption, but with a modified cut off point of 20 or fewer employees.

- A National Health Privacy Code as a schedule to the Privacy Act, and specific legislation for any national electronic health records system.

- Greater resources to carry out her responsibilities especially in the private sector.

- A right of review of the merits of the Commissioner's complaints decisions.

A later Senate Committee privacy report endorsed the Privacy Commissioner's recommendations as having high priority, recommending a review by the Australian Law Reform Commission of privacy regulation, including the Privacy Act, with a view to establishing 'a nationally consistent privacy regime'.

Brief FOI and privacy issues

- The Queensland *Freedom of Information and Other Legislation Amendment Act 2005*, assented to on 31 May 2005, implements some of the recommendations of the report on the FOI Act of a Legislative Assembly committee, and formally establishes the position of Information Commissioner as separate from the position of Ombudsman, who previously held it.

- In May 2005 the new Victorian Ombudsman, Mr GE Brouwer, issued a discussion paper[37] in conjunction with a review of the Victorian FOI Act. The paper deals with a range of matters relating broadly to administration of the Act, review of decisions, relationship with privacy legislation, and the general ethos of open government, but not generally with exemptions. The Ombudsman's report to Parliament is awaited.

- Note the publication of a new text on access to and amendment of government-held information under FOI and privacy legislation in Australia, especially NSW, Victoria and the Commonwealth[38].

Public administration

Statutory authorities and corporate governance – review and changes

In August 2004 the Commonwealth Government responded to the Uhrig report on corporate governance of statutory authorities and office holders, accepting all but one of the review's recommendations. In summary, the report recommended two basic templates for the governance of such bodies, the first being an 'executive management' model, the second a 'board template'. The latter is appropriate where government takes the decision to delegate full powers to act to a board, or where the Commonwealth itself does not fully own the assets or equity of a statutory authority. A system of Ministerial Statements of Expectations of authorities and their responding Statements of Intent will be introduced.

Where it is appropriate that statutory authorities be legally and financially part of the Commonwealth and do not need to own assets (typically budget-funded authorities), the *Financial Management and Accountability Act 1997* (Cth) (FMAA) will be applied. Those that are appropriately legally and financially separate from the Commonwealth and best governed by a board will come under the *Commonwealth Authorities and Companies Act 1997* (Cth). Ministers are considering the authorities in their portfolios, and changes are to be completed by 31 March 2007. The boards of Centrelink and the Health Insurance Commission have been abolished as part of this process (see *Legislative developments*, Spring sittings 2005).

The Public Service Commissioner, Ms Lynelle Briggs[39], has further argued that the overall structure and governance arrangements of a particular body should also influence whether it should be covered by the *Public Service Act 1999* (Cth), noting the flexibility the Act allows in relation to such matters as employment. In her view, the Act is based on values that should apply to authorities under the FMAA, leading to greater cultural coherence in the public sector and contributing to whole-of-government working in such matters as movement of staff between agencies.

Brief items

- Note ANAO, *Performance Audit: Legal Services Arrangements in the Australian Public Service*, Audit Report No 52, 2004–2005, 20 June 2005; available from: www.anao.gov.au. There are also recent ANAO reports into Centrelink's complaints

procedures and other customer relations measures and the Departmental oversight of the Job Network.

- Amendment and disallowance of Public Service Regulation 2.1 following the *Bennett* case: this matter is fully dealt with in Christopher Erskine's article in (2005) 46 *AIAL Forum* 15 at 25–26.

Other developments

US Military Commission developments

On 20 Sept 2005, the Appointing Authority for the US Military Commissions, John Altenburg, lifted the stay on the trial of Australian Guantanamo Bay detainee David Hicks[40], imposed on 10 Dec 2004 pending the decision of an appeal in the case of *Hamdan v Rumsfeld*[41], decided on 15 July 2005. He directed the presiding officer to hold a hearing within 30 days in order to resolve preliminary issues, including objections to the remaining three members of the military commission panel. A first hearing date of 18 Nov 2005 has since been reported.

A Pentagon source stated that the Australian authorities wanted to see the Hicks case moved forward expeditiously. Minor changes to the procedures of the commissions were announced early in September 2005, including restricting decisions on questions of law to the commission's presiding member, while the two members who are not lawyers are to decide only on verdicts and sentences. Classified evidence may now only be presented in closed session if the presiding officer concludes that it would not deny the defendant a full and fair trial. In a strange twist, it has been reported that Mr Hicks, through his US Army-appointed lawyer, Major Mori, has applied for British citizenship on the basis of his mother's citizenship, in the hope that the UK Government might then intervene to secure his release.

The Federal court litigation and other aspects of the military commission process are dealt with in a further report by the Law Council of Australia's independent legal observer, Mr Lex Lasry, QC, who concludes that it is virtually impossible for Mr Hicks and other detainees to obtain a fair trial[42].

The Appeals Court upheld the US Government's submissions on significant issues, finding that the Geneva Convention could not be enforced in US courts and did not in any case apply to Mr Hamdan. It upheld the validity of the establishment of military commissions by the President and refused to consider challenges to their procedures at this stage. The court struck down the District Court's finding that military commissions must have the same procedures as courts-martial. The decision in *Hamdan* runs counter to much of the decision of DC District Court Judge Joyce Hens Green in *In re Guantanamo Bay Cases*[43]. At the time of writing, a decision by the US Supreme Court on whether it would hear an appeal by Mr Hamdan was awaited.

Endnotes

1 For the decisions of COAG and other material see Media Releases on www.pm.gov.au; for examples of opinions see: Gerard Henderson, Sydney Morning Herald, 27 Sept 2005; George Williams, Australian Financial Review, 26 Sept 2005 and Fulbright Public Lecture, 23 June 2005, Gilbert & Tobin Centre for Public Law, www.gtcentre.unsw.edu.au/publications/terrorism.asp . HREOC Media Releases, 'New Terrorism Laws – Tough on terror, Tough on Human Rights', 27 (see also 13) Sept 2005, available from www.hreoc.gov.au; correspondence from ACT Human Rights and Discrimination Commissioner to ACT Chief Minister, 19 Sept 2005 and 30 Aug 2004, available from:www.hro.act.gov.au/index.html

2 Note that the Parliamentary Joint Committee on ASIO, ASIS and DSD (PJCDAAD) is conducting an inquiry into the operations of the detention and questioning regime in Div 3, Pt III of the *Australian Security*

Intelligence Act 1979 and other amendments introduced by the *Australian Security Intelligence (Terrorism) Act 2003* (see (2004) 40 *AIAL Forum* 1-2). The Committee will report by Jan 2006 and has received 113 submissions and held four public hearings. For submissions and other material see www.aph.gov.au/house/committee/pjcaad/index.htm .

3 Report of the Senate Foreign Affairs, Defence and Trade References Committee, *The effectiveness of Australia's military justice system*, June 2005, available from website::www.aph.gov.au/Senate/committee/FADT_CTTE/index.htm; Government Response to the Senate Foreign Affairs, Defence and Trade References Committee, Oct 2005, Statement by Minister for Defence, Senator Hill, 'Enhancements to the Australian Defence Force Military Justice System', 5 Oct 2005, and Media Release, 5 Oct 2005, all available from: www.defence.gov.au/mjs/index.cfm; and see Ombudsman's Media Releases on military justice and on the Joint Review of redress of grievances available on: www.comb.gov.au.

4 Senator Vanstone, Media Releases, 16 & 20 June 2005, on www.minister.immi.gov.au, and Joint Press Conference of the Prime Minister and Senator Vanstone on the Palmer Report, 14 July 2005, on www.pm.gov.au.

5 Transcript of interview with Prime Minister John Howard, 17 June 2005; Senator Vanstone, Media Releases, 28 & 29 July 2005: see above website.

6 Note also ANAO Audit Report No 1, 2005-06, *Management of the Detention Centre Contracts*: Part B, 2005.

7 Mick Palmer, *Report of the Inquiry into the Circumstances of the Immigration Detention of Cornelia Rau*, 6 July 2005, available from; Senator Vanstone, Media Releases, 14 July, 25 May and 26 February 2005, available from above website; Transcript of Prime Minister John Howard's Joint Press Conference with Senator Amanda Vanstone, 14 July 2005, www.pm.gov.au; Statement by Dr Peter Shergold, Secretary of the Department of the Prime Minister and Cabinet, 'Managing Administrative Reform in DIMIA', 14 July 2005, on www.pmc.gov.au/new.

8 Commonwealth Ombudsman, *Report of Inquiry into the Circumstances of the Vivian Alvarez Matter*, Report No 03/2005, 26 Sept 2005, and Media Release, 6 Oct 05, Senator Vanstone, Media Release, 6 Oct 2005; reports from the Secretary of DIMIA, 'Implementation of the recommendations of the Palmer inquiry into the circumstances of the immigration detention of Cornelia Rau' (27 Sept 2005) and 'Response to the recommendations of the report of the Commonwealth Ombudsman of the inquiry into the circumstances of the Vivian Alvarez matter' (4 Oct 2005), available from: www.immi.gov.au/current-issues/issues.htm; interim report of the Senate Foreign Affairs, Defence and Trade References Committee, The removal, search for and discovery of Ms Vivian Solon, 15 Sept 2005, available from the Committee's website.

9 Website: www.aph.gov.au/senate/committee.

10 *Report on Provisions of the Migration Litigation Reform Bill 2005*, available from the Senate Committees' website (above). Examination by Caron Beaton–Wells, 'Judicial Review of Migration Decisions: Life After S157" (2005) 33 Federal Law Review 141, especially at 160–171; and also brief discussion of the bill in (2005) 45 AIAL Forum 1–2, and Parliamentary Library, Bills Digest, 9, 2005–06, 4 Aug 2005.

11 See also the Report on the bill of the Senate Legal and Constitutional Legislation Committee on 11 May 2005: see above website.

12 See Migration Amendment Regulations 2005 (No 6), SLI 2005, No 171, which inserts new reg 5.15C into the Migration Regulations 1994; and Parliamentary Library, 'Excising Australia: Are we really shrinking?' Research Note, No 5, 2005–06, 31 Aug 2005.

13 Human Rights and Discrimination Commissioner, ACT Human Rights Office, Human Rights Audit of Quamby Youth Detention Centre, 30 June 2005: www.hro.act.gov.au.

14 Attorney–General Philip Ruddock, Media Release, 20 Sept 2005; 'ALP urges transparency in court appointments', ABC News Online, 21 Sept 2005; 'Court choices too secretive: judges', Australian, 22 Sept 2005; Helen Irving, 'Judging the judges', *Sydney Morning Herald*, 24–25 Sept 2005.

15 *SAAP v MIMIA* (2005) 215 ALR 162, 18 May 2005

16 *Applicant NABD of 2002 v MIMIA* (2005) 216 ALR 1, 26 May 2005

17 (2003) 216 CLR 473 (see (2004) 41 AIAL Forum 5–6)

18 *Roncevich v Repatriation Commission* (2005) 218 ALR 733, 10 Aug 2005

19 *Ruhani v Director of Police (No 2)* [2005] HCA 43, 31 Aug 2005; for the constitutional issue concerning the competence and nature of the appeal, see: *Ruhani v Director of Police* [2005] HCA 42, 31 Aug 2005)

20 (2004) 208 ALR 124

21 *Jarratt v Commissioner of Police for NSW* [2005] HCA 50, 8 Sept 2005; see also Giuseppe Carebetta, 'Dismissal at Pleasure, Procedural Fairness and 'Off-with-their-heads' Clauses in Public Sector Employment' (2004) 17(2) *Australian Journal of Labour Law 204.*

22 (1990) 170 CLR 596

23 *Ruddock v Taylor* [2005] HCA 48, 8 Sept 2005

24 *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391

25 (2003) 78 ALJR 203 (see (2004) *41 AIAL Forum* 5–6).

26 *The Queen v Coroner Maria Doogan; ex parte Peter Lucas-Smith & ors* [2005] ACTSC 74, 5 Aug 2005; Canberra Times, 18 Aug 2005

27 *Keating v Morris & ors; Leck v Morris & ors* [2005] QSC 243, 1 Sept 2005; ABC Online News, items on Queensland, 6 & 7 September 2005; see also *Parramatta Design & Developments Pty Ltd v Concrete Pty Ltd* [2005] FCAFC 138, 29 July 2005 for a case where a judge's adverse observations on a party's case during trial, reflected in his reasons for decision, led to a finding of apprehended bias.

28 (see (2004*) 43 AIAL Forum* 11–12 which contains a fuller account of the facts. *Vanstone v Clark* [2005] FCAFC 189, 6 September 2005

29 *Combet & anor v Commonwealth of Australia*, 29 September 2005; editorial, 'Court shrinks from its duty', Canberra Times, 30 September 2005; there is also an inquiry in progress into these issues by the Senate Finance and Public Administration References Committee, which is due to report on 10 November 2005, see: www.aph.gov.au/senate/committee/fapa_ctte.

30 *APLA Limited & ors v Legal Services Cmr (*NSW) [2005] HCA 44, 1 Sept 2005

31 *QAAH v MIMIA* [2005] FCAFC 136, 27 July 2005; for detailed examination of the cessation clauses see: *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection*, ed Feller, Turk and Nicholson, Cambridge UP, 2003, Part 8

32 See DCA news release, 26 Aug 2005, on website www.dca.gov.uk/; for previous items on this issue see: (2005) *45 AIAL Forum* 11–12; (2002) *35 AIAL Forum* 7–8).

33 See Commonwealth Ombudsman, Media Releases, 14 July, 28 July 2005, Immigration Bulletins 2 & 3, 1 & 6 Sept 2005, available on: www.comb.gov.au.

34 *McKinnon v Secretary, Dept of Treasury* [2005] FCAFC 135, 2 Aug 2005; see also 'FOI Act may as well be scrapped', editorial, *Canberra Times*, 4 Aug 2005.

35 (2005) *45 AIAL Forum* 14-15.

36 *Office of the Privacy Commissioner,* Getting in on the Act: Review of the Private Sector Provisions of the Privacy Act 1988*, March 2005, available from: www.privacy.gov.au ;* Senate Legal and Constitutional References Committee*,* The Real Big Brother: Inquiry into the Privacy Act 1988*, June 2005, available from: www.aph.gov.au/senate/committee/legcon_ctte/index.htm.*

37 *Review of the Freedom of Information Act: Discussion Paper*, Ombudsman Victoria, May 2005, available from: www.ombudsman.vic.gov.au.

38 Moira Paterson, *Freedom of Information and Privacy in Australia*, LexisNexis Butterworths, Chatswood (Australia), 2005 (pp i–xlix, 1–611).

39 www.finance.gov.au/governancestructures. See also the recently published *Foundations of Governance in the Australian Public Service*, Australian Public Service Commission, 1 June 2005, and note speech by the Secretary of the Department of the Prime Minister and Cabinet, Dr Peter Shergold, 1 June 2005, available from: www.pmc.gov.au

40 'US lifts stay on Hicks trial', 'Guantanamo trial changes "desperate"', ABC News Online, 1 & 21 Sept 2005; 'Hicks to face hearing within 30 days', Australian, 22 Sept 2005; Attorney–General, Media Releases, 22 Sept 2005.

41 On 15 July 2005 the United States Court of Appeals for the District of Columbia (DC) handed down its appellate decision in the case of *Hamdan v Rumsfeld* (No 04–5393) (see (2005) 45 *AIAL Forum* 18–19 for a note on Hamdan and other cases decided by judges of the DC District Court.

42 'United States v David Hicks: Report of the Independent Legal Observer for the Law Council of Australia', Lex Lasry, QC, July 2005; see also correspondence between the Law Council of Australia and the Prime Minister/Attorney–General available on www.lawcouncil.asn.au).

43 31 January 2005 *(see* 45 *AIAL Forum* 18–19).

REVIEW OF COLLEGIATE DECISIONS: JUDICIAL PROTECTION FOR 'PISSANTS'[1]

Vincenzo Salvatore Paparo*

Why review administrative decisions?

The rule of law

Every day, administrative decision-makers make decisions that affect the rights and expectations of individuals, corporate bodies and the community in general. While the merits of a decision can often be challenged,[2] the review of administrative decisions by a superior court[3] at common law[4] is concerned only with their 'lawfulness'[5] rather than their merits.[6]

This supervisory role of the courts can be seen as the enforcement of the rule of law over administrative decision-making[7] but it is necessarily a limited one.[8] Only those decisions where administrators have exercised their discretion outside the framework set down by the relevant legislation may be impugned.[9] The courts will not set aside decisions 'within the bounds of the discretion entrusted to the decision-maker'.[10]

Furthermore, courts have a duty to uphold a rule of law, which recognises not only their own autonomy, but that of the legislature and the executive.[11] This body of administrative law may have developed to cover the perceived deficiencies of the political and legal systems,[12] notwithstanding purported accountability mechanisms such as the doctrine of ministerial responsibility.[13]

Judicial review

Judicial review has long been seen as the enforcement of the rule of law over administrative decision-making.[14] While inherently limited to the review of specific situations,[15] it is a means by which administrative action is prevented from exceeding the powers and functions assigned by the law.[16] This 'control … of statutory power by the courts' is justified in terms of the doctrine of parliamentary supremacy[17] and is seemingly authorised by the statute itself.[18]

Under the rule of law, assumed by the *Constitution,*[19] the courts interpret and apply the law[20] but are constrained from involving themselves in the activities of the legislature or the executive.[21] Consequently, judicial review is portrayed as simply giving effect to the 'limitations inherent in the legislation that created the [administrative action] in the first place,'[22] thereby protecting the interests of individuals.[23]

The judicial review of administrative action may go beyond interpretation of the statute, even to the core of the substantive decision.[24] Using the concept of '*Wednesbury* unreasonableness',[25] for example, the courts have the capacity to strike down decisions considered so unreasonable[26] as to constitute an abuse of power.[27] The concept also allows judicial review and controversy to be avoided where substantive decisions are merely 'unreasonable'.[28] Furthermore, some of the more sophisticated implied limitations, such as

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the ground of taking into account an irrelevant consideration[29] or the 'no evidence rule'[30] can easily be manipulated to achieve a 'public interest'[31] outcome or to set aside an 'unsatisfactory' decision.[32]

While judicial review purports to be a process which will set aside an administrative decision only when the 'exercise of power is excessive or otherwise unlawful',[33] its very nature allows discretion to strike down decisions which are considered unjust or inappropriate.

Councils - a law unto themselves?

The 'anxious consideration' of decisions

Courts do not intervene in administrative decision-making merely because a decision is 'unfair on the merits', since to do so would be a failure to recognise the autonomy of the three branches of government. A court cannot do the very thing which is to be done by the repository of power[34] and invalidate a decision just because 'minds might differ and conclude otherwise.'[35] Judicial review must remain as 'scrutiny of lawfulness rather than of the merits,'[36] notwithstanding the difficulty of avoiding questions of merit.[37]

Nevertheless, 'unreviewable administrative action is a contradiction in terms, at least in the exercise of statutory power'.[38] Consequently, a local government authority, being a public body, must exercise powers given by parliament for the purpose for which they were given and only for the public good.[39] If a local authority exercises its powers reasonably and bona fide, its decisions and action will not be interfered with by the courts.[40] Councils have a wide discretion in making decisions and courts will only infer invalidity after 'anxious consideration'[41] and where the error is 'material', though not necessarily of 'critical or decisive significance'.[42]

The real question is whether judicial review is more tightly constrained for local government authorities than is the case for other administrative decision-makers.[43] If so, what part does the collegiate and political nature of a council play in this?

The collegiate mind

The review of the lawfulness of council decisions presents a number of difficulties, particularly when the statute requires that certain matters 'be considered', the decision-maker 'be satisfied' or the decision-maker is required to 'form an opinion' in regard to various matters. While it may be relatively easy for a court to consider all the written material placed before a council, it is far more problematic 'to get ""inside" mind and thinking process' of a group of decision makers[44] and demonstrate a 'collegiate mind'.[45]

The problem is that a collegiate body such as a council has a 'mind' only in a fictional sense[46] and the court is generally not entitled to have regard to what is in the mind of individual councillors.[47] It is the collective decision of the council that is relevant. In this context, a council's desires, intentions, purposes, motives and beliefs may therefore simply represent convenient shorthand for consideration for the processes leading to an administrative decision.[48] Establishing these will necessarily be more difficult than for the single decision-maker.[49] I

The courts use a variety of tools to draw inferences and to impute attitudes[50] in regard to the collegiate mind. Proof of a state of mind is difficult and onus on the challenger of a council decision is 'heavy'[51] and 'most difficult'.[52] Council's state of mind must be proved by inference from objective evidence[53] of what it does or says or omits to do or say,[54] rather than as an 'exercise in speculation'.[55]

Material from which state of mind can be inferred is not limited to that actually or constructively before the decision-maker.[56] A court may also look beyond the resolutions of council to the actions and memoranda of senior management to determine a state of mind of the collegiate body.[57] Reports from council officers, in absence of indication to the contrary, may reasonably be inferred to have been the basis of council resolutions. Such reports may therefore reveal council intentions, purposes, motives, beliefs and hence a state of mind.[58] In addition, individual councillors do not make decisions in a vacuum but have local knowledge and general knowledge that may be relevant to the collegiate decision.[59]

Collegiate decisions and relevance

Logical inference, not suspicion

What factors a decision-maker is bound to consider in making a decision is 'determined by construction of the statute conferring the discretion'.[60] Beyond this restriction, 'it is largely for the decision-maker' to determine the matters which are regarded as relevant and the comparative importance to be accorded to these matters.[61] Furthermore an administrative decision is invalidated via a process of judicial review only if the failure to take into account the relevant factor is serious in relation to the totality of other relevant factors.[62]

Courts do not lightly conclude failure to consider a relevant factor by local government authorities reaching such a conclusion by inference, not suspicion.[63] In the absence of evidence to the contrary, there is a presumption that a council has given consideration to all matters relevant to making a particular decision.[64] Neither does the need to take into account a particular consideration require the exact detail to be determined before it is weighed against other factors. Much local government decision-making is multi-factorial, complex and necessarily impressionistic[65] so it is not appropriate for the decision-maker to set out in writing every matter which has been taken into account.[66]

Nevertheless, the decision-maker must give 'proper, genuine and realistic consideration'[67] to the merits of the particular case in a real sense[68] and all relevant matters must be taken into account in a 'real and conscientious way'.[69] It should be noted, however, that such consideration might invoke 'language of indefinite and subjective application' in which the decision-making procedures and the substantial merits may be scrutinised.[70]

Councils must therefore have an understanding of the issues and the significance of the decision to be made sufficient to characterise a matter as being taken into consideration.[71] A 'mere assertion by the decision-maker' that a relevant factor has been taken into account is insufficient to establish that it has.[72] Conversely, a finding of a failure to take into account a relevant matter must be based on 'legitimate inference' rather than 'an exercise in speculation'.[73]

Furthermore it is generally up to the decision-making body as to what weight is attached to the various relevant matters that must be considered. A misallocating of weight may be a mistake of planning principle, for example, but not necessarily an error of law.[74] *In Mahoney v Industrial Registrar*[75] an assessor had an obligation to deal with each matter listed in s 90(1) of the *Environmental Planning and Assessment Act* 1979 (NSW) (EPAA) but was entitled to accord to those he found to be relevant the weight considered appropriate.[76] Only a 'quite disproportionate' weight given to one factor would leave a decision susceptible to invalidation by the court.[77]

External evidence may be considered

In establishing the validity of a decision, the court can look beyond the actions of the decision-maker to the actions and memoranda of senior management.[78] Departmental

briefing papers, including summaries, can constitute proper consideration of a relevant matter. These must include the 'salient facts'[79] though 'insignificant or insubstantial' matters can be omitted.[80] The adoption of an officer's report dealing with a particular matter, for example, may be sufficient, in the absence of contrary evidence, to give rise to the inference that a matter was taken into account by a council.[81] Consequently there is a lot more than the council's own resolution that can be considered by the court in reviewing a council's decision.

In addition, some probative weight attaches to discussions antecedent to a council decision.[82] A council may be held to have taken into account a relevant factor if the matter was before it on a previous occasion though the particular issue must be addressed and 'enlivened' in the decision process.[83] Similarly, a matter may have been taken into account if it is uncomplicated and within the general knowledge of the council members.[84] It is presumed, for example, that a local government decision-maker has knowledge of the subject matter of its decision including relevant provisions of its Local Environmental Plan (LEP).[85]

The broader interpretation by the courts of what constitutes acceptable 'consideration' by a collegiate body of a relevant matter may go beyond the general rules of administrative law. It is generally required, for example, that briefing papers and reports on which an administrative decisions are based contain 'the most recent and accurate information that [is] at hand … [ie] the most current material available to the decision-maker'.[86] In *Chisholm*[87] cl 32 of a LEP specified that the council must not grant consent to a development application '… until it has considered a conservation plan that assesses the impact of the proposal on the heritage significance'. There was no such conservation plan available to council at the time it made its decision to grant development consent. However, the decision was held to be valid on the basis that the heritage significance of the conservation area had been clearly identified 'over the period of years' leading up to the meeting where the decision was made.[88]

This case appears to support the principle that council decisions may rely on less-than-recent information. However, the court justified its finding in *Chisholm* on the grounds that the council also had available 'a wealth of other reports,' some referring to the heritage significance of the area subject to the development application.[89] Talbot J held that although the elements of the aim of clause 32 were not brought together in one document, they were nevertheless before council for the purposes of the legislation.[90] In any case there was some doubt that a decision made in breach of the legislation would necessarily be invalid.[91]

Similarly, in *Marnal*[92] council granted development consent for a supermarket pursuant to LEP 56. The development consent was challenged on the ground that there was no material before the council or the Minister when the subject land was rezoned to allow for commercial development. This was rejected by Hemmings J who held that the council had before it sufficient information to determine the matter. This included 'not only the opinion of its servants but submissions from the public and the applicant'.[93] A comprehensive, albeit general, study of all commercial centres was also available, so council was 'relieved of the necessity to require a further study'.[94]

The approach adopted by the judicial review of local government collegiate decisions in this regard may be contrasted with that of other collegiate bodies. In the *Tobacco Institute*[95] case, for example, a ten member working party made recommendations to update a report on the effects of passive smoking. A total of 54 submissions were received as part of the public consultation process and the Working Party was required to 'have regard' to these by s 12 of the *National Health and Medical Research Act* 1992 (Cth).[96]

Summaries of each submission made by academic researchers were provided to the members of the working party who were also able to gain access to the full submissions if they were considered of interest. Nevertheless, Finn J held that in making its recommendations to the council the working party had to give 'positive consideration to… [the] contents …[of the submissions] … as a fundamental element in its decision-making'.[97] This was required to involve an 'active intellectual process' directed at the submissions[98] and is not to be treated as a mere formality.[99]

The court held that while effective summaries may be of some value to the members of the collegiate body, the community was not invited to make submissions to the academic researchers, but to the working party.[100] It could be reasonably expected that the working party would be 'fully aware of the actual contents of all or virtually all submissions received'.[101] There was no evidence that the members had read the submissions and all had chosen not to give evidence on the matter.

Despite there being no obligation by the working party to give any weight at all to the submissions,[102] the recommendations on the passive smoking report were consequently held to be invalid. This could be seen as a harsh result, particularly if it is accepted that statutory terms such as 'have regard' are neutral terms that do not expand the obligation on a collegiate decision-maker but are merely steps in a process.[103]

Proper and genuine consideration interpreted broadly

While all decision-makers are required to take matters into consideration in 'a real and conscientious way',[104] the courts adopt a broad interpretation of this requirement in relation to the council decision-maker. In addition, a rudimentary 'paper trail' is often sufficient for councils to be found to have 'considered' a relevant matter.

In *Norsmith Nominees,*[105] for example, consent for a large residential development was challenged on the basis that council had failed to take into account its effect on the views of neighbours and the effect of the development when viewed from the water.[106] None of the councillors on the Building Development Committee, which had recommended that development consent be granted, were called to give evidence of what was discussed at the meeting.

The applicant argued that the inference should be drawn that their evidence would not have assisted the council case in regard to proper consideration of the relevant matter in accordance with the rule of *Jones v Dunkel.* Stein J rejected this proposition pointing out that the council's planner, who had been present at the Committee meeting, did in fact give evidence and there was no requirement for a response from the councillors.[107]

In reaching his decision, Stein J relied on the fact that the Committee had available before it all council files and officer reports on the proposal, two sets of photos, drawings and plans as well as a scale model and shadow diagrams to illustrate the impact of the development. In addition, the council planner gave evidence that he had explained to the Committee the impact of the development on adjoining owners and the wider neighbourhood in reference to the 'main themes' of views, privacy, height etc.

In *Boulton*[108]*,* council granted consent to itself for the development of a child-care centre. A number of residents challenged the decision on the basis of a failure to give 'real' consideration to relevant matters such as noise levels, parking requirements and traffic flow.

The court rejected the argument on the ground that council imposed conditions on the approval which dealt directly with most of the relevant matters as required by s 90 of the

EPAA.[109] In this case the approval conditions were sufficient to constitute proper and genuine consideration of the relevant matters.

The council decision was also challenged on the basis that it was made to avoid losing a Commonwealth grant for the child-care centre. Hemmings J held that a 'request for early or earliest possible' determination did not suggest a failure by council to consider the application properly. Furthermore, such a matter was held to be a relevant matter, which could be considered by council.[110]

It therefore seems that invalidity based on a failure to take into account a relevant matter requires an almost complete absence of material referring to the particular matter. In *Noble v Cowra Shire Council,*[111] for example, a development application for a proposed development was categorised as a dairy but it also fell within the description of a cattle feedlot under a State Environmental Planning Policy (SEPP 30). Under the EPAA the council was required to take into account[112] the 'provisions of any environmental planning instrument'. The council approval was challenged on the basis that it had failed to do so.

The court held that the council was bound to consider which, if any, provisions in the environmental planning instrument were relevant, and to take them into account. This was particularly in view of the fact that the development was unusual with many environmental and planning consequences.[113] Even though the town planner's report highlighted the potential relevance of SEPP 30, Pearlman J stated that, 'one searches in vain in the council files and reports for any reference as to whether the provisions were in fact relevant'.[114] Furthermore, the minutes of the meeting where the decision was made, made no mention of SEPP 30 and the court inferred that the 'missing parts would not have shown anything different'.[115] The court held that the issue of buffer zones was significant in the environmental and planning assessment of cattle feedlots and council's failure to take SEPP 30 into consideration invalidated its decision.[116]

Similarly in *Schroders,*[117] a decision was challenged on the basis that council had failed to consider a relevant matter. In this case there was no evidence that councillors had directly addressed whether a supermarket development was consistent with zoning requirements. However, the decision was held to be valid because it was sufficient that the matter was canvassed in council files that were 'available in the council chambers' at times when the development was under consideration.[118]

Even where there is some evidence that a relevant factor has not been taken into account, council decision-makers may be given the benefit of the doubt. In *Hospital Action Group,*[119] for example, development consent for a privately operated hospital was challenged on the ground that the council had failed to give 'real' consideration to a relevant consideration as required by s 90(1) of the EPAA.

It was contended that council had not taken into account 23 submissions on the hospital proposal lodged under s 87 of the Act because of erroneous advice given by the council's town planner and solicitors. In particular, it was suggested that the advice indicated that council could only take into account planning matters and not the results of an earlier poll of ratepayers strongly against the private hospital. Pearlman J rejected this argument on the basis that the advice was ambiguous and not an unequivocal direction to council to ignore the poll results.[120]

The duty to inquire

The circumstances under which a decision is invalid for failure to inquire are strictly limited.[121] The duty to inquire is often cast by the legislative framework[122], but there is no general obligation on a council to seek out information in addition to that normally available

to it when making a decision. However, if the council does not bother to check on the existence or significance of additional material that is 'readily available' and 'centrally relevant' to the decision,[123] then the decision may be invalidated. In these circumstances such behaviour may be found to be consistent with the proposition that minds had closed 'and conclusions had been formed.'[124] A court may hold, for example, that a council is unprepared to consider a relevant matter if it 'refuses, declines, or omits to receive or consider, without apparent reason' additional information or representations.[125]

Another challenge to development consent was made in *Hospital Action Group*[126] on the grounds that the council had failed to consider the social and economic effect of the proposal as required by s 90(1) of the EPAA. The challenge to the council decision was rejected [127] since the town planner's report expressly dealt with these matters which were therefore regarded as having been taken into account.[128]

Pearlman J also rejected any suggestion of an 'amplified duty to inquire' in planning decisions which have a wider impact, particularly on third parties, but considered the more restricted obligation on council.[129] Firstly, the applicant submitted that the council should have made inquiries about a taxation constraint preventing the operator of the hospital from providing certain community health services. Pearlman J found that the departmental document dealing with the taxation issue was neither 'centrally relevant' to council's decision nor was it 'readily available' to council.[130] There was more than one way of providing the community health services and the tax constraint was merely seen as 'another factor to be taken into account'.[131]

Secondly, the applicant argued that the contractual arrangements between the private operator of the hospital and the Department of Health provided no certainty that these services would be available at the new facility. Once again invalidation of the council decision based on a breach of the duty to inquire was rejected. The court found that, even if council did have available the final contracts between the private operator and the Department of Health when it made the decision, this would not have advanced its state of knowledge since the matter of community health services was 'far from settled'.[132]

In *Lakeside Plaza,*[133] a council decision approving the expansion of a shopping centre was challenged on the basis of a failure to consider the adverse economic impact on a competing centre some 4 km away.[134] Council had before it competing claims relating to the economic impact of the proposed development and its reporting officer was 'unable to support or refute the competing claims'.[135]

Stein J stated that proof of such claims is extremely difficult and lacking in precision but the council was not required 'go out and get its own independent report' on the matter.[136] Neither was the council criticised for making its decision without the benefit of a report promised by the applicant four months before and which had never been provided. In this case councillors and its officers were found to have had a general awareness of material in other applications, previous town centre studies and environmental planning as well as knowledge of the ongoing competition and hierarchy between the competing shopping centres. According to Stein J, this was sufficient to find that the council had adequately considered the economic impact of the proposal.

While it appears that there is some latitude extended to council decision-makers in regard to the duty to inquire, it may not be significant. Both cases demonstrate that councils, like other decision-makers, must simply comply with a quite limited duty to inquire as proposed in *Prasad*.[137]

Pre-conditions and the exercise of power

A presumption of regularity

Like other administrative decision-makers, collegiate bodies have the benefit of the presumption of regularity.[138] Courts therefore presume that all necessary conditions and formalities have been satisfied until the contrary is proven.[139] Consequently, the presumption is not applied where there is documentary evidence to show otherwise.[140] The key issue is whether the presumption of regularity gives collegiate bodies and councils in particular, a greater advantage in regard to the obligation to take into account considerations relevant to a particular decision.

In *Franklins*[141] cl 32 of LEP 231 required that the council be satisfied that not less than 60% of goods be sold before granting consent for a proposed cash and carry warehouse. Neither the development application, nor council officer reports on the proposal made any express reference to cl 32. Furthermore, council failed to produce any evidence on this point from the officers who reported on the development application or from any councillors who were present at the meeting at which it was approved.

At first instance, Bignold J rejected the proposition that an inference could be drawn that the council had not considered cl 32 when granting development consent or that it could be more confidently drawn in view of the lack of rebuttal evidence provided by council.[142] He considered that there was 'very considerable doubt' to presuppose that the documentary material 'relevantly records and reveals the entirety of the [council's'] collegiate mind' when it determined the development application. While the documentary evidence was held to be 'incomplete in respect to this all-important question', the inference could not be drawn 'as a matter of probability'.[143]

Bignold J then pointed to passages in council reports which he claimed 'expressly adverted' to cl 32. This included a reference to 'wholesale and retail warehouse', an expression found only in cl 32, and a number of other references to LEP 231. As a result it was inferred, consistent with the presumption of regularity,[144] that the council had considered cl 32 in granting the development consent.[145]

On appeal, it was held that the presumption of regularity has no place where certain preconditions must be satisfied before power can be exercised.[146] In these circumstances, the courts require some positive indication that the matter has been considered by the collegiate body. Furthermore, the local knowledge of council was held to be irrelevant since actual knowledge of the 'existence of the mental state of satisfaction' was a pre-condition to the grant of development consent.[147]

Similarly, in *Currey*[148] the council was required under s 91(2) of the EPAA to refuse a development application for the subdivision of land if it contravened a planning instrument. Clause 19 of the LEP entitled 'Foreshore Building Lines' specified that an application must be refused unless the council was satisfied certain offending buildings in the foreshore zone would be removed within a reasonable time. This was subject to exceptions in those cases where the council was satisfied that removal of the buildings would be inconsistent with the objectives of the clause, or unnecessary to achieve those objectives, or unreasonable in the circumstances. It should be noted that one objective of the clause was that there should be no development below the foreshore line 'other than that excepted by this clause', seemingly a rather circular approach.

Once again, at first instance Pearlman J found that there was enough material before council to enable it to be satisfied that removal of an existing boatshed in the foreshore zone was unnecessary to achieve the objectives of cl 19. In this regard, references in reports by

council officers regarding the renovation of the boatshed and a reduction in its size were highlighted.

Furthermore, it was held that individual councillors had a general knowledge of the provisions of the LEP, the history of the development and the contents of a previous development application.[149] The officer's report on the development application noted that 'the land is also affected by a 30m Foreshore Building Line pursuant to cl 19 of SEPP 1993'. Consequently the inference could not be drawn that the council had failed to properly consider cl 19.

However, Stein JA, on appeal, considered that neither the development application itself nor the council officer's report properly canvassed 'cl 19 or the foreshore building line'.[150] In particular, council had an obligation to consider the policy objective of cl 19, which was to enhance waterfront land and to reduce the number of buildings below the water line.[151] While it was reasonable to assume that councillors would have a general knowledge of their principle planning instruments, this did not suggest that such knowledge extended to the detailed provisions and processes of cl 19.[152] Neither was the previous decision sufficiently explicit on the relevant issue.

Consequently the court held that the council had failed to address the precondition set out in cl 19 which mandated that the development be refused or the offending building be removed.[153] Moreover the reference to this process would have suggested that the operation of cl 19 was in fact, not an issue at all.

The approach adopted by the court in both *Franklins* and *Currey* was reinforced in *Weal*[154] where Giles JA held that taking matters into consideration calls for 'more than simply adverting to them'.[155] While the presumption of regularity was insufficient to assist the council decision-makers in these cases, it is nevertheless difficult to argue that councils are required to meet a particularly demanding standard of 'consideration' of relevant matters. It is unlikely that either decision would have been held to be invalid if there were even a rudimentary paper trail in council reports that specifically referred to the relevant clauses of the LEPs. This would have provided a perceived understanding of the relevant matter and the significance of the decision sufficient to warrant the description of the matter being 'taken into account'.[156]

A 'general' or 'special' precondition

The exact nature of a precondition to the exercise of power is also important in regard to the judicial review of a council decision. In *Noble v Cowra Shire Council,*[157] for example, it was alleged that council had failed to take into account cl 9(3) of the Cowra LEP 1990 (the LEP) in granting development consent for a dairy. This required that council 'shall have regard to whether … the development is consistent with the objectives of the zone…'[158]

The challenge was rejected with a finding that there was some evidence that consideration had been given to the consistency of the proposed development with the stated zone objectives.[159] The court was unable to ascertain whether the council had found that the development was in fact consistent with the objectives but this was not significant since cl 9(3) did not require the formation of such an opinion. What was required was consideration of the issue and the formation of an opinion was not a condition precedent to the exercise of power by the council.[160]

Bignold J went on to hold that even if there had been no evidence at all that the cl 9(3) consistency issue had been raised in the documentary material before council, the presumption of regularity would have ensured that the matter had been considered by council.[161] In addition, since cl 9(3) had been generally applied for more than a decade, there

was an inference that the council 'would have been routinely aware of and taken into account, the requirements of [the provision]'.[162]

In any case, the court held a failure to take into account cl 9(3) 'would not have justified setting aside the impugned decision because of the limited nature of the obligation' imposed by the provision.[163] This reasoning is difficult to fault in view of the fact that only 'motor showrooms' and 'residential flat buildings' were prohibited in the relevant zoning.[164]

Noble[165] can be distinguished from other cases where provisions in local environmental plans have in fact operated as conditions precedent to the exercise of power by councils. In *Manly Council v Hortis,*[166] for example, development consent was forbidden '…unless the council..[was] …of the opinion that … the development … [was] consistent with the objectives of the zone…'.[167] Another provision required that the council not grant consent 'unless it..[was]..satisfied' that the development would not have a detrimental effect on the amenity of the foreshore area.[168] Sheahan J, at first instance, concluded that there was no real evidence, either in the minutes of the meeting that granted approval or in the reports that were presented to council, that the council had satisfied the preconditions contained in the planning instrument.[169] The council had therefore committed an error of law and the development consent was held to be invalid.[170]

On appeal, the court held that the 'consistency' provision of cl 10(3) was a general pre-condition to the exercise of power since it applied to all zones.[171] That the council was aware of the issues relevant to this consistency clause may have been sufficient for a court to hold that it was in fact, considered.[172]

However, cl 17 of the LEP, requiring consideration of the detrimental effect of the development on the foreshore area, was found to be similar to the precondition in both *Franklins* and *Curry*.[173] It was also characterised as a *special precondition* in that it contained special provisions that prohibited certain developments in regard to the Foreshore Scenic Protection Area.[174] There was a strict obligation upon the council to consider this issue before the power was exercised. Consequently, the absence of any material to suggest that council had considered the application and significance of cl 17 was sufficient to invalidate the decision.

On the basis of the current case law, it is clear that where there is a *general precondition* to the exercise of power, judicial scrutiny of a council decision is not particularly rigorous. Councillors can be deemed to have constructive knowledge of such provisions. Consequently, there is an inference that a general precondition has been taken into account where it is 'a conventional type of clause' contained in a planning instrument, particularly where it has been 'applied by the council regularly and frequently'.[175]

Degree of compliance with the statute

The degree of compliance with statutory and other requirements demanded by the courts may also illustrate important differences between the judicial review of council decisions and other administrative decisions.

In *Everall,*[176] council initially rejected a development application for the addition of a second storey and carport at an existing residence. Major concerns were inadequate set back, the 'bulky' nature of the development and non-compliance with council's Development Control Plan No 6 (DCP No 6) to do with the maintenance of amenity of the area. Council later reversed its decision but this was challenged on the basis that the opinion expressed by the council planner as to compliance with a building height restriction was erroneous.

Hemmings J accepted the proposition that whether the development complied with DCP No 6 was a relevant fact for evaluation by council but this was not reviewable by the court.[177] However, a decision could be challenged if the council had misdirected itself as to such a fact.[178] Since council may rely on the 'inquiry, advice and recommendations of its officers',[179] such misdirection by the council planner may also invalidate the council decision.[180]

In this case the court held that compliance with the building height restriction was a complex matter which required the selection and application of appropriate data by council officers. Furthermore, the building height was only one of many matters that the council had to consider and weigh up in making its decision.[181] Hemmings J considered that, in these circumstances, 'mere mathematical compliance with the provisions of a discretionary code would have been of lesser significance than the actual impact of the proposed structure on the amenity of adjoining premises'.[182] Consequently the building height restriction was not of such significance to warrant invalidation of the council decision.

The latitude given in *Everall*[183] may be attributed to some extent to the discretionary nature of the council's own DC P. However, it is clear that the courts are prepared to give council decision-makers significant leeway in how they comply with legislation. What is also clear is that the demands upon other decision-makers in regards to compliance with legislation can be particularly onerous as is illustrated in the following cases. In *Minister for Aboriginal and Torres Strait Islander Affairs v State of Western Australia*[184], for example, the Minister was requested to protect a site near Broome under the *Aboriginal and Torres Strait Islander Heritage Protection Act* 1984 (Cth) (the Act). A detailed report on the site was prepared and a submission was received from an Aboriginal community confirming the cultural significance of the site.

Consideration of the representations contained in the submission was mandatory under s 10(1)(c) of the Act and was therefore a statutory precondition to the exercise of power by the Minister.[185] This was also a personal non-delegable task and the failure to discharge it could invalidate the Minister's decision to declare the heritage site.[186]

While the Minister's senior adviser maintained in evidence that the Minister had a practice of 'reading everything', the adviser could not say what the Minister had actually done to consider the representations.[187] The court accepted that the adviser had himself read the representations but there was no evidence to suggest that the Minister had discussed the representations with him. Neither had a summary of the representations been prepared for the Minister.[188]

The court concluded that the task of considering the representations would have taken some days prior to the declaration and there was no evidence that the Minister was in his office at this time. There was no discussion with his adviser and no apparent means by which the Minister could have informed himself of the contents of the representations.[189] In short, the court held that the Minister did not have the opportunity to read the representations and this was given further support by the failure of the Minister to adduce evidence to suggest otherwise.[190] Consequently, the Minister's decision was invalidated by his failure to consider the representations.

This is at odds with other areas of administrative law, such as natural justice, where a decision-maker does not have to discharge an obligation personally as long as the decision-making process overall is fair.[191] However, it may be appropriate that a decision-maker personally 'considers' a relevant matter if it is particularly sensitive and the statute has removed the process from the general rule established in *FAI v Winneke.*[192]

The Minister was also required to consider representations prior to the declaration of an Aboriginal heritage area at Hindmarsh Island in *Tickner v Chapman*.[193] In this case more

than 400 submissions had been received and were attached to a mandatory report to the Minister on the desirability or otherwise of making the declaration.

While the court conceded that the degree of effort would vary according to length, content and relevance, it found that the Minister had an obligation to consider each representation.[194] Furthermore, in view of the fact that the declaration prohibited the construction of a planned bridge to the island seriously affecting the rights of certain individuals, this task was non-delegable by the Minister.[195] This did not mean that the Minister was denied assistance by personal or departmental staff who 'might sort the submissions into categories' or prepare 'effective summaries'.[196]

The court concluded that the Minister had not considered the submissions, despite the fact that his Ministerial adviser had read them. This may appear somewhat harsh but the submissions were received only one day before the declaration was made and were located in Canberra, while the Minister was in Sydney. The claimed discussions between the Minister and the adviser were also held to be 'vague and nebulous'.[197] In these circumstances the court had little option but to hold that the declaration was invalid.

Natural justice - a question of bias

Courts are increasingly imposing the doctrine of natural justice[198] on decision-makers as a 'condition on the valid exercise of power'[199] and implying limitations on the exercise of statutory power.[200] While no inflexible rule can be laid down in relation to bias,[201] justice in administrative decision-making[202] must not only be done but should 'manifestly and undoubtedly be seen to be done'.[203] In applying the rules, the 'whole of the circumstances in the field of inquiry are of importance' and this includes the nature of the jurisdiction and the statutory provisions under which the decision-maker acts.[204]

If the nature of the decision-making body affects the 'precise ambit and nature of the principles' applied in relation to the exercise of powers,[205] the question arises as to how the bias of individual councillors impacts on the validity of council decisions.

Since councils are elected to represent their communities, they are expected to have particular views as to what is in the best interest of the community.[206] Councils are charged with developing and applying broad lines of action in matters of public concern, including creating new rights or modifying existing rights. Consequently, it might be expected that some members might express 'more or less tentative views' on the desirability of change.[207] The very nature of the role of a councillor means that an individual member of council should 'apply [his or her] mind constantly' to general questions of policy, though this scope for the 'formation and expression of opinion' should not undermine confidence in the body by raising a 'suspicion of bias'.[208]

In addition, it is common for the council collegiate body to consider a matter that has already been considered by individual council colleagues sitting on a sub- committee or other body, which then makes recommendations to the full council. An apprehension of bias[209] may therefore arise through institutional loyalty, a 'built-in tendency' of a collegiate body to support previous decisions by individual members of the group.[210] While it may generally be seen as sufficient in these circumstances, for those members to refrain from participating in the later decision,[211] this rarely occurs in the context of council decision-making.

Nevertheless, where councils have statutory powers, these must be exercised in accordance with the law. In particular, a decision cannot be predetermined in the sense that the members of the council must be capable of being persuaded.[212] Hence, a councillor who has already decided a matter before council considers it[213], or gives reason to fair- minded

persons that he or she had already decided the matter[214] is disqualified from participating in the decision.[215]

Nonetheless, the way in which the courts interpret and apply the rules relating to bias and fettering appears to give considerable latitude to council decision-makers. In *IW v City of Perth*[216] for example, a community association sought development approval for a 'drop-in' centre to cater for people living with AIDS. Council's Town Planner recommended that approval be granted but the Town Planning Committee recommended that council refuse the application. The full council subsequently refused the application thirteen votes to twelve.

Following a complaint, the Equal Opportunity Tribunal of Western Australia found that the votes of five councillors in the majority had been based on 'the AIDS factor' in contravention of s 66 of the *Equal Opportunity Act 1984* (WA).

The Supreme Court subsequently held that the Tribunal had erred in law in finding against the council. The High Court upheld this decision, holding that the council decision could only be tainted in a manner similar to that applying to bias in administrative law. In other words, the council decision would not be invalid if a minority of the majority voting to refuse the development application had voted in a discriminatory manner, and hence illegally.[217]

This reasoning does not acknowledge the fact in these circumstances that if the five discriminatory councillors were precluded from voting because of their bias, the application would have been approved twelve votes to eight. Toohey J recognised this point when he agreed with the reasoning of the Tribunal. In particular he claimed that the vote of every member of the majority was 'causative' in the sense that the development application would not have been refused 'but for' each of these votes.[218] Kirby J also rejected the Supreme Court argument that the council decision could only be tainted if it were established that a majority of councillors or a majority of the majority acted unlawfully in reaching their decision.[219]

In contrast, a sitting councillor, Cr Gerrity, in *R v West Coast Council*, made a formal objection to a development application for an advertising sign.[220] His main concern was that the advertising sign was 'not in keeping with the town plan and not in keeping with the town character and development'.[221]

Under s 57(5) of the *Land Use Planning and Approval Act 1993* (Tas) the Council was required to take all objections into account in deciding whether to approve or refuse the development application. In the event that approval was given, the person who made the objection could appeal to the Resource Management and Planning Appeal Tribunal.

Council subsequently approved the application for the sign and only Cr Gerrity voted against it. The court held that, as a result of his formal objection, Cr Gerrity could be seen to have committed himself to a position and that he had closed his mind to doing anything other than voting against the development application.[222] In doing so he had moved from the position of an elected decision-maker, albeit one with strong views, to effectively be a party to the development application.[223] As a consequence the court found that Cr Gerrity was, at least to some extent, a judge in his own cause and his participation vitiated the entire decision-making process.[224]

There is little doubt that Zeeman J in *R v West Coast Council*[225] was able to invalidate the council decision on the basis that Cr Gerrity's submission on the development application had 'statutory significance'. Without that peculiarity, on the reasoning of *IW v City of Perth*[226], the decision would not be set aside because Cr Gerrity was the only vote against the application; hence not even part of the majority vote let alone a majority of members of the collegiate body.[227]

On the other hand, in *Livesey*[228] two judges, in an earlier Supreme Court case, had expressed the view that a barrister may have participated in a 'corrupt scheme' to secure the release of his client on bail. In subsequent proceedings to strike off the barrister, the two judges sat with one other to consider that matter.

The High Court invalidated the decision to strike off the barrister holding that it was not a matter of whether the two judges could 'put from [their] mind evidence heard and findings made in a previous case'.[229] The reasonable observer would assume that a judge would act to ensure 'both the appearance and substance of fairness and impartiality'.[230] This could not possibly be the case in these circumstances since the two judges had already previously decided one of the matters at issue in the Bar Association proceedings.[231] In view of the fact that the collegiate body consisted of judges in this case, it is likely that the fettering of a decision by a minority of one judge would have been sufficient to invalidate the decision.

An even more stringent standard in regard to fettering applies where there is a single decision-maker. In *Aksu*[232], for example, the Minister for Immigration had issued a policy document, Direction No 17, giving guidance to decision-makers in refusing or cancelling visas. This listed three primary considerations to be taken into account[233] in such a decision, stating that 'no [other] individual consideration can be more important than a primary consideration'. In considering whether to cancel a particular visa, the Minister was sent a departmental briefing paper, which indicated that he was bound by Direction No 17 in making the decision.

The court acknowledged that policy might be used to guide the exercise of discretion in the interest of good government and consistency, particularly in high- volume decision-making.[234] However, each administrative decision must be made individually in a fair and impartial manner[235] and could not be fettered by the policy guidelines contained in the Ministerial direction.[236]

In view of the fact that the Minister had 'adopted' Direction No 17 in giving reasons for cancelling the visa, the court held that the Minister had fettered the discretion provided by s 501 of the *Migration Act 1958* (Cth). As a result, the placing of more weight on the primary considerations was based on the policy document and not on the assessment of the individual case.[237] By confirming that he had adopted the document, the Minister was held to have been bound by it, thereby fettering his discretion. This is a curious result in view of the fact that the Minister was not bound by the document and would have known in any event that departmental advice can be accepted or rejected.

The case law illustrates that, while a decision made by a collegiate body where one or more of the members are disqualified for bias is liable to be set aside[238], this generally does not occur in relation to local government decision-makers. Where bias is established only in relation to a particular member or members, such bias will not taint the collegiate body as a whole.[239] This means that council decision-making is not invalidated by virtue of biased decision-making by a minority of the individual members.[240] Clearly, this is a less rigorous approach than that applied by the courts to other administrative decision-makers.

Irrelevance

A council decision may also be invalidated if the collegiate body takes into account 'impermissible' considerations such as possible commercial implications or because of possible legal action.[241] Evidence of debate at the meeting where a decision is made is relevant to whether council has taken into account irrelevant considerations.[242] Nevertheless, an irrelevant factor may be so insignificant that taking it into account could not have affected the decision in a way that would require it to be set aside.[243]

Concern that council might be sued for negligence if it did not approve a dairy proposal was the irrelevant consideration at issue in *Noble v Cowra Shire Council.*[244] The applicant had sworn in an affidavit that a number of councillors had made statements reflecting such concerns at the meeting at which the dairy was approved and claimed that the development consent had been 'impermissibly and improperly influenced'.[245] The decision to approve the development had previously been held to be invalid based on a failure to take into account a relevant consideration.[246]

The court accepted that evidence of what was said by the councillors during the debate was relevant and probative in deciding whether council took into account an irrelevant consideration.[247] However, it failed to find that the statements could support a finding by inference sufficient to invalidate the council decision to regrant the development consent.[248] This was despite council failing to call any witnesses to establish what was said in the debate, and the court finding that an inference favourable to the applicant's version of events could be more favourably drawn.[249] In addition, though the three councillors had allowed this irrelevant consideration to influence their decision, they were in a minority, and this 'fell short of a finding that the collegiate decision was materially influenced by the irrelevant consideration'.[250]

In *Hayden Theatres Pty Ltd v Penrith City Council*[251] a decision to grant development consent for a cinema complex was challenged on the basis that the council took into account an earlier Australian Labor Party caucus decision taken by five of the thirteen councillors.[252] Based on what these five councillors said at the meeting where the decision was made and subsequent comments made by another councillor in the media and in answer to interrogatories, the appellant claimed that the councillors had misunderstood their statutory obligation.[253] In particular, objection was taken to the councillors' 'refrain during the debate that it was not Council's function to be a referee in the market place'.[254]

Bignold J found that some of the evidence by the councillors was not satisfactory[255] but failed to find that the council itself had misunderstood its statutory obligation.[256] Furthermore, it was held that even if the five councillors had misunderstood their statutory obligation, this would not legally taint the collegiate decision to grant development consent since 'they did not command a majority in the vote'.[257] This conclusion was reinforced by the fact that the council decision was, in any case, a unanimous one. Furthermore, there was nothing 'improper or wrong' in the five councillors in a caucus meeting resolving to support the staff report in favour of the development.[258]

In *Hill v Woollahra Municipal Council and Anor*[259]*,* a decision was challenged on the grounds that the council took into account an irrelevant consideration. Specifically, it was claimed that the Mayor believed that council policy required him to approve a development application where the applicant was considered to have a better than 50% chance of success on appeal to the Land and Environment Court. The Mayor subsequently exercised a casting vote in favour of the development application, though this occurred some three months after the conversations that allegedly demonstrated such a belief.

The applicant argued that in exercising the casting vote, the Mayor represented the 'controlling mind of the council' thereby impugned the whole of the decision making process.[260] Talbot J held that there was no evidence that such a policy did, in fact, exist apart from the comments of the Mayor. In any case there was held to be no contemporaneous evidence that the Mayor had maintained such a belief up until the time when the application was determined.

The question as to whether the Mayor's casting vote represented the controlling mind of the council was therefore not determined in this case. Nevertheless, on the reasoning of the majority in *IW v City of Perth,*[261] even if the Mayor's vote were tainted by his belief, the

council decision would not have been invalidated since the vote did not represent a majority of councillors or even a majority of the majority.[262]

Good administrative decision-making

Whether a collegiate body has to act rationally

The primary task of a court in reviewing any administrative decision is to satisfy itself that 'the decision-maker has acted within the bounds of …discretion'.[263] This paper has shown that the standard by which a court will determine whether the bounds have been exceeded appears to be less rigorous for a council decision-maker. One explanation for this difference could lie in the notion of rationality.

It is arguable that rationality is a universal legal requirement of good decision-making.[264] The requirement for rationality in administrative decision-making is generally seen to derive from the implied limits set by the legislature in granting the powers to the decision-maker.[265] There is also some suggestion that these 'common law principles apply of their own force and not on the basis of the intention of parliament'.[266]

This concept requires 'rationality in the exercise of statutory powers based on findings of fact and the application of legal principles to those facts.'[267] Consequently, a 'failure to take into account relevant factors or the taking into account of irrelevant factors' may result in a lack of rationality and 'stigmatise …the decision as so unreasonable that it is beyond power'.[268] A judicial tribunal, for example, 'must act rationally and reasonably' by having regard to 'material considerations' and ignoring irrelevant considerations.[269] A decision-maker must also 'direct himself properly in law' and desist from doing things that 'no sensible person could ever dream … lay within the powers' granted by statute.[270] An error of law will therefore be found if the decision-maker fails to follow a 'logical' process of reasoning that it is bound to follow.[271]

The requirement for rationality in regard to council decisions may simply be seen to have a slightly different flavour than for other administrators. In relation to the specific questions of relevance, irrelevance and bias considered in this paper, this perspective may assist in explaining the apparently different standard adopted by the courts in the review of council decisions. In other words, what constitutes a rational process of decision-making may impliedly take into account that a decision-maker is a collegiate body where individual members are elected and where decisions are made that only affect individuals within a defined community. Such an approach may therefore set the council decision-maker apart from a single unelected decision-maker whose actions may impact on a broader community.

It therefore may be considered rational for a council collegiate decision-maker to have 'considered' a heritage conservation plan even though no single document existed on the basis that other documents existed and the heritage significance of the area in question had been identified over a period of years.[272] Similarly, it could hardly be said that a council had acted irrationally in not specifically referring to zoning objectives when it was routinely aware of such a provision and had taken it into account routinely in previous decisions.[273] Both cases may reflect the reality of what may be seen as a rational decision in the context of the 'grass roots' nature of local government.

Local government as a reflection of the local community

Even if rationality cannot explain away the less rigorous standard of judicial review of council decisions, there are sound practical reasons why such a difference might exist. Local government is there to make a myriad decisions at a local level. In view of the fairly intimate nature of local representation, particularly in the smaller local government areas, the community expects these decisions to be made fairly and quickly. An overly-rigorous process of judicial review would see decision-making bogged down with the courts constantly looking over the shoulder of councils. This would tend to defeat the very purpose and benefits sought from local government.

Expressing views, for example, is part of the electoral process and a councillor should only be disqualified from the decision-making process if the views indicate that the councillor was not prepared to listen to any contrary arguments.[274] To hold otherwise would mean that members of council would have to adopt standards of conduct that may be almost impossible to achieve[275] and would disqualify most councillors.[276] Clearly the legislature can be assumed to have been aware of the hybrid political and statutory role of councillors and could not have intended that expressions of opinion, which would disqualify a member of a judicial tribunal, would also be sufficient to disqualify a local government councillor.[277]

It can therefore be seen as appropriate, that the High Court in *IW v City of Perth* required a much less stringent filter than we might expect for other administrative decisions. So many council decisions are evenly balanced and it would be easy to find bias or illegality in regard to one or two members of the collegiate body sufficient to tip the decision over the edge of invalidity.

Individual or groups of councillors might be expected to express strong personal views on what ought to happen in a particular situation prior to a decision being taken by the collegiate body. Such views may merely indicate that the individuals are 'politically disposed' in favour or against a particular decision and therefore more likely to vote accordingly.[278] In any case, in a smaller local community, councillors will have an opinion on most things. Much less would get done if they were excluded from decision-making.

It is arguable that the task of the courts in upholding the rule of law need not be as rigorous in circumstances where there is a collegiate decision-maker whose members are elected by the community for whom they make decisions. This notion may be supported by the fact that councillors are subject to additional scrutiny, beyond judicial review of their administrative decisions, in the sense that they can be voted out of office every four years.

In the area of council decision-making in particular, perhaps it is appropriate that a court should not be as concerned with 'looseness in the language…or with unhappy phrasing' associated with administrative decisions.[279] It serves no purpose for such decisions to be considered 'minutely' with the objective of uncovering 'the perception of error'.[280] In view of the fact that individual councillors have been elected, it is also appropriate that administrative decisions not be scrutinised via over-judicial review seeking to glean some inadequacy.[281]

Courts do treat councils differently, and do demonstrate a reluctance to interfere with the processes and decision-making of councils. But it is only through such reluctance by the courts that a review of council decisions upon proper principles will be prevented from constituting a reconsideration of the merits of a decision.[282] This, after all, is a fundamental tenet of judicial review.

Endnotes

1 'You are local government pissants' - alleged statement by former Mayor of Sydney Mr Frank Sartor to Mayor Lucy Turnbull after a City of Sydney decision to oppose a government amalgamation proposal; 'Dirty Talk': *Stateline,* ABC, Sydney, 7.30pm, 13 February 2004.
2 In the absence of special statutory provisions such as the *Administrative Appeals Tribunal Act* 1975 (Cth), there is no review of the merits of the decision at common law.
3 In view of their responsibility for interpreting and enforcing all law, the courts have themselves chosen to review administrative decisions to ensure that they also conform to the 'ordinary law of the land': Freker J, *Towards a Modern Federal Administrative Law*, Law Reform Commission of Canada, Ottawa, 1987 at 5.
4 Judicial review can also be codified under statute: eg the *Administrative Decisions (Judicial Review) Act 1977* (Cth) for decisions made under a Commonwealth 'enactment'.
5 This also covers 'the fairness of the procedure adopted… rather than the fairness of the outcome': *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* (2003) 195 ALR 502 at 528 per McHugh and Gummow JJ.
6 *Warringah Shire Council v Pittwater Provisional Council* (1992) 76 LGRA 231 at 249 per Kirby P.
7 Selway B, 'The Principle Behind Common Law Judicial Review of Administrative Action-The Search Continues' (2002) 30 *Fed L Rev* 217 at 218.
8 *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 40 per Mason J.
9 *Associated Provincial Picture House v Wednesbury Corporation* [1948] 1 KB 223 at 228 per Lord Greene MR.
10 *Hill v Woollahra Municipal Council & Anor* [2002] NSWLEC 69 (7 May 2002) at [48] per Talbot J.
11 *Attorney-General for the State of New South Wales v Quin* (1990) 170 CLR 1 at 38 per Brennan J.
12 *Ridge v Baldwin & Ors* [1963] 2 All ER 66 at 76 per Lord Reid.
13 *Brown v West & Anor* (1990) 169 CLR 195 at 205 per Mason CJ, Brennan, Deane, Dawson and Toohey JJ.
14 Selway B, op cit n 7 at 218.
15 Freker J, op cit n 3 at 6.
16 *The Church of Scientology Inc & Anor v Woodward* (1982) 154 CLR 25 at 70 per Brennan J.
17 Cane P, *An Introduction to Administrative Law*, Clarendon Press, Oxford, 1986 at 12-13.
18 *Craig v State of South Australia* (1995) 131 ALR 595 at 600-604 per Toohey, Gaudron, McHugh and Gummow JJ.
19 *The Australian Communist Party & Ors v The Commonwealth & Ors* (1951) 83 CLR 1 at 193 per Dixon J.
20 *Corporation of the City of Enfield v Development Assessment Commission & Anor* (2000) 199 CLR 135 at 152-153 per Gleeson CJ, Gummow, Kirby and Hayne JJ.
21 *Abebe v The Commonwealth of Australia* (1999) 162 ALR 1 at 47 per Gummow and Hayne JJ.
22 Selway B, op cit n 7 at 218.
23 *The Church of Scientology Inc & Anor v Woodward* (1982) 154 CLR 25 at 70 per Brennan J.
24 Aronson M, 'Unreasonableness and Error of Law' (2001) 24 *UNSW L Jo* 315 at 318.
25 *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 at 234 per Lord Greene MR but compare with Attorney-*General (NSW) v Quin* (1990) 170 CLR 1 at 36 per Brennan J.
26 *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 41 per Mason J.
27 *Nottinghamshire County Council v Secretary of State for the Environment* [1986] AC 240 at 249.
28 Cane P, op cit n 17 at 18.
29 Allars M, *Introduction to Australian Administrative Law*, Butterworths, Sydney, 1990.
30 *Australian Broadcasting Tribunal v Bond & Ors* (1990) 170 CLR 321 at 356 per Mason CJ.
31 *Attorney-General for the State of New South Wales v Quin* (1990) 170 CLR 1 at 36 per Brennan J.
32 Basten J, 'Judicial Review: Recent Trends' (2001) 29 *Fed L Rev* 365 at 390.
33 *Attorney-General for the State of New South Wales v Quin* (1990) 170 CLR 1 AT 36 per Brennan J.
34 above, 33, at 37- 38 per Brennan J.
35 *Bentham & Anor v Kiama Municipal Council & Ors* (1986) 59 LGRA 94 at 98- 99 per Stein J.
36 *Warringah Shire Council v Pittwater Provisional Council* (1992) 76 LGRA 231 at 249 per Kirby P.
37 *Hortis v Manly Council* (1999) 104 LGERA 43 at 44 per Sheahan J.
38 *Warringah Shire Council v Pittwater Provisional Council* (1992) 76 LGRA 231 at 247 per Kirby P.
39 *R v Tower Hamlets London Borough Council; Ex p Chetnik Developments Ltd* [1988] AC 858 at 872 per Lord Bridge.
40 *Westminster Corporation v London and North- Western Railway Company* [1905] AC 426 at 430 per Lord Macnaghten.
41 *Parramatta City Council & Anor v Hale & Ors* (1982) 47 LGRA 319 at 345 per Moffitt P; *Boulton & Ors v Burwood Municipal Council* (1988) 66 LGRA 131 at 135 per Hemmings J.
42 above, 41, at 335 per Moffitt P.
43 *North Sydney Municipal Council v PD Mayoh Pty Ltd* (1988) 66 LGRA 352 at 358 per McHugh JA.
44 *Norsmith Nominees Pty Limited v Woollahra Municipal Council & Anor* [1989] NSWLEC 14 (7 March 1989) at 6 per Stein J.
45 *Hospital Action Group Association Inc v Hastings Municipal Council* (1993) 80 LGERA 190 at 194 per Pearlman J.

46 *Tooth & Co Ltd v Lane Cove Municipal Council (No 4)* (1968) 2 NSWLR 17 at 19-20 per Street J.
47 *Kimber v Ku-Ring-Gai Municipal Council* (unreported), The Land and Environment Court, NSW, Cripps J, No 40057 1990, 5 December 1990).
48 *Dunlop v Woollahra Municipal Council* [1975] 2 NSWLR 446 at 485 per Wootten J.
49 *Warringah Shire Council v Pittwater Provisional Council* (1992) 76 LGRA 231 at 248 per Kirby P.
50 *Kelly & Anor v Raymor (Illawarra) Pty Ltd* (1981) 1 NSWLR 720 at 722 per Mc Lelland J.
51 *Boulton & Ors v Burwood Municipal Council* (1988) 66 LGRA 131 at 134 per Hemmings J.
52 *Somerville v Dalby & Ors* (1990) 69 LGRA 422 at 428 per Hemmings J.
53 *Hospital Action Group Association Inc v Hastings Municipal Council* (1993) 80 LGERA 190 at 195 per Pearlman J.
54 *Boulton & Ors v Burwood Municipal Council* (1988) 66 LGRA 131 at 135 per Hemmings J.
55 *Noble v Cowra Shire* [2003] NSWLEC 178 (31 July 2003) at page 15 per Bignold J.
56 *Minister for Aboriginal Affairs and Another v Peko-Wallsend Limited &Ors* (1986) 162 CLR 24 at 31 per Gibbs CJ;*Hospital Action Group v Hastings Municipal Council* (1993) 80 LGERA 190 at 195 per Pearlman J.
57 *Ishac v David Securities Pty Ltd (No 6)* (1992) 10 ACLC 652 at 653 per Young J.
58 *Dunlop v Woollahra Municipal Council* [1975] 2 NSWLR 466 at 485 per Wootten J.
59 *Lakeside Plaza Pty Ltd v Legal and General Properties No2 Ltd and Wyong Shire Council* (1992) 76 LGRA 60 at 65 per Stein J.
60 *Minister for Aboriginal Affairs & Anor v Peko-Wallsend Limited & Ors* (1986) 162 CLR 24 at 39 per Mason J.
61 *Sean Investments Pty Ltd v Mackellar* (1981) 38 ALR 363 at 375 per Deane J.
62 *Everall and Another v Ku-ring-gai Municipal Council & Ors* (1991) 72 LGRA 369 at 374 per Hemmings J.
63 *Parramatta City Council & Anor v Hale and Others* (1982) 47 LGRA 319 at 345 per Moffitt P.
64 *Jang Investments Ltd v Sutherland Shire Council* (LEC(NSW), Hemmings J, No 40048/89, 8 September 1989, unreported).
65 *Weal v Bathurst Council & Anor* (2000) 111 LGERA 181 at 186 per Mason P.
66 *Marnal Pty Ltd v Cessnock City Council* (1982) 68 LGRA 135 at 139 per Hemmings J; also *Somerville v Dalby & Ors* (1990) 69 LGRA 422 at 429 per Hemmings J.
67 *Khan v Minister for Immigration and Ethnic Affairs* (1987) 14 ALD 291 at 292 per Gummow J.
68 *Hindi v Minister for Immigration and Ethnic Affairs* (1988) 91 ALR 586 at 599 per Sheppard J.
69 *Mendoza v Minister for Immigration, Local Government and Ethnic Affairs & Ors* (1991) 31 FCR 405 at 420 per Einfeld J.
70 McMillan J, 'Judicial Restraint and Activism in Administrative Law', (2002) 30 *Fed L Rev* 335 at 336 citing *Minister for Immigration and Multicultural Affairs v Anthonypillai* (2001) 106 FCR 426 at 442 per Heerey, Goldberg and Weinberg JJ.
71 *Currey v Sutherland Shire Council& Ors* (1998) 100 LGERA 365 at 374- 375 per Stein JA.
72 *Turner v Minister for Immigration and Ethnic Affairs* (1981) 55 FLR 180 at 185- 186 per Toohey J.
73 *Noble v Cowra Shire Council* [2003] NSWLEC 178 (31 July 2003) at [53] per Bignold J.
74 *Ladhams v State Planning Authority* (1982) 52 LGRA 32 at 35 per Wells J.
75 *Mahoney v Industrial Registrar of New South Wales* (1986) 8 NSWLR 1.
76 ibid at 4 per Samuels JA.
77 *BP Australia v Campbelltown City Council* (1994) 83 LGERA 274 at 277 per Mahoney JA.
78 *Ishac v David Securities* (No 6) (1992) 10 ACLC 652 at 653 per Young J.
79 *Minister for Aboriginal Affairs & Anor v Peko-Wallsend Limited and Others* (1986) 162 CLR 24 at 66 per Brennan J.
80 ibid at 31 per Gibbs CJ.
81 *Parramatta City Council & Anor v Hale and Others* (1982) 47 LGRA 319 at 346 per Moffitt P.
82 *Tooth & Co Ltd v Lane Cove* (1967) 87 WN (NSW) 361 at 363 per Street J citing *Municipal Council of Sydney v Campbell* (1925) AC 338.
83 *Currey v Sutherland Shire Council & Ors* (1998) 100 LGERA 365 at 374 per Stein JA.
84 *Parramatta City Council and Another v Hale and Others* (1982) 47 LGRA 319 at 339- 340 per Moffitt P.
85 *Lakeside Plaza Pty Ltd v Legal and General Properties No2 Ltd and Wyong Shire Council* (1992) 76 LGRA 60 at 65 per Stein J.
86 *Minister for Aboriginal Affairs & Anor v Peko-Wallsend Limited & Ors* (1986) 162 CLR 24 at 44- 45 per Mason J; *X v Minister for Immigration and Multicultural Affairs* (2002) 67 ALD 355 at 359 per Gray J.
87 *Chisholm v Pittwater Council and Another* [2000] NSWLEC 143 (11 July 2000).
88 ibid at [79] per Talbot J.
89 Ibid at [67].
90 Section 8 of the *Interpretation Act* 1987 (NSW) construes the word 'document' to include reference to a number of documents.
91 *Project Blue Sky Inc & Ors v Australian Broadcasting Authority* (1998) 194CLR 355 at 390 per McHugh, Gummow, Kirby and Hayne JJ.
92 *Marnal Pty Ltd v Cessnock City Council & Anor* (1989) 68 LGRA 135.
93 ibid at 140 per Hemmings J.
94 Ibid 140.
95 *Tobacco Institute of Australia Ltd & Ors v National Health and Medical Research Council & Ors* (1996) 71 FCR 265.

96 In addition, the Second Reading speech in regard to the legislation stated that the NH&MRC would 'operate in a public and open matter': *Tobacco Institute of Australia Ltd & Ors v National Health and Medical Research Council & Ors* (1996) 71 FCR 265 at 273-274 per Finn J.
97 ibid at 277 per Finn J.
98 *Tickner & Ors v Chapman & Ors* (1995) 57 FCR 451 at 462 per Black CJ.
99 See *TVW Enterprises Ltd v Duffy (No 2)* (1985) 60 ALR 687 at 694 per Toohey J.
100 *Tobacco Institute of Australia Ltd & Ors v National Health and Medical Research Council & Ors* (1996) 71 FCR 265 at 278 per Finn J.
101 Ibid.
102 Ibid at 279.
103 McMillan J, op cit n 71 at 359.
104 *Mendoza v Minister for Immigration, Local Government and Ethnic Affairs & Ors* (1991) 31 FCR 405 at 420 per Einfeld J.
105 *Norsmith Nominees Pty Limited v Woollahra Municipal Council & Anor* [1989] NSWLEC 14 (7 March 1989).
106 A head of consideration under s 90 of the EPAA (NSW).
107 *Norsmith Nominees Pty Limited v Woollahra Municipal Council & Anor* [1989] NSWLEC 14 (7 March 1989) at 6 per Stein J.
108 *Boulton & Ors v Burwood Municipal Council* (1988) 66 LGRA 131.
109 These included the impact of noise, traffic etc; ibid at 136-137 per Hemmings J.
110 ibid at 137 per Hemmings J.
111 (2001) 114 LGERA 440.
112 *Minister for Aboriginal Affairs & Anor v Peko-Wallsend Limited & Ors* (1986) 162 CLR 24 at 39 per Mason J.
113 *Noble v Cowra Shire Council* (2001) 114 LGERA 440 at 445 per Pearlman J citing *Parramatta v Hale* (1982) 47 LGRA 319 at 340-341 per Moffit P.
114 *Noble v Cowra Shire Council* (2001) 114 LGERA 440 at 447-448 per Pearlman J.
115 Not all Council Minutes for the meeting where the decision was made were available to the Court; ibid at 448 per Pearlman J.
116 ibid at 449 per Pearlman J.
117 *Schroders Australia Property Management Ltd v Shoalhaven City Council* (1999) 110 LGERA 130.
118 Ibid at 138 per Pearlman J.
119 *Hospital Action Group Association Inc v Hastings Municipal Council* (1993) 80 LGERA 190.
120 ibid at 199-200 per Pearlman J.
121 *Prasad v Minister for Immigration* (1986) 65 ALR 549 at 563 per Wilcox J.
122 eg matters required to be taken into consideration by s 90(1) of the EPAA (NSW): see *Hospital Action Group Association Inc v Hastings* (1993) 80 LGERA 190 at 194 per Pearlman J.
123 *Prasad v Minister for Immigration* (1986) 65 ALR 549 at 563 per Wilcox J.
124 *Parramatta City Council & Anor v Hale and Others* (1982) 47 LGRA 319 at 326 per Street CJ.
125 ibid at 341 per Moffit P.
126 *Hospital Action Group Association Inc v Hastings Municipal Council* (1993) 80 LGERA 190.
127 ibid at 200 per Pearlman J.
128 *Parramatta City Council and Another v Hale & Ors* (1982) 47 LGRA 319 at 346 per Moffit P.
129 *Hospital Action Group Association Inc v Hastings v Hastings Municipal Council* (1993) 80 LGERA 190 at 196 per Pearlman J.
130 Ibid at 201.
131 Ibid.
132 *Hospital Action Group Association Inc v Hastings v Hastings Municipal Council* (1993) 80 LGERA 190 at 201- 202 per Pearlman J.
133 *Lakeside Plaza Pty Ltd v Legal and General Properties No 2 Ltd and Wyong Shire Council* (1992) 76 LGRA 60.
134 As required under s 90(1)(d) of the EPAA (NSW).
135 *Lakeside Plaza Pty Ltd v Legal and General Properties No 2 Ltd and Wyong Shire Council* (1992) 76 LGRA 60 at 65 per Stein J.
136 Ibid.
137 *Prasad v Minister for Immigration* (1986) 65 ALR 549 at 563 per Wilcox J.
138 *Australian Posters v Leichhardt Council* (2000) 109 LGERA 343 at 352 per Bignold J.
139 see *Industrial Equity Limited and Another v Deputy Commissioner of Taxation & Ors* (1990) 170 CLR 649 at 671 per Gaudron J.
140 *P Bartol & Associates Pty Ltd v Randwick City Council* (unreported 26 April 1998) at 6 per Bignold J.
141 *Franklins Limited v Penrith Council* [1996] NSWLEC 273 (10 December 1996).
142 *Jones v Dunkel* (1959) 101 CLR 298 at 306 per Kitto J.
143 *Franklins Limited v Penrith Council* [1996] NSWLEC 273 (10 December 1996) per Bignold J.
144 *Attorney-General (ex rel Goddard) v North Sydney Municipal Council & Anor* (1971) 22 LGRA 225 at 235 per Hope J.
145 *Franklins Limited v Penrith Council* [1996] NSWLEC 273 (10 December 1996) per Bignold J.
146 Whether a fact is a jurisdictional fact preliminary to the exercise of statutory power is dependent on the proper construction of the relevant statute: *Timbarra Protection Coalition Inc v Ross Mining NL* (1999) 46 NSWLR 55 at 65 per Spigelman CJ.

147 *Franklins Limited v Penrith City Council and Campbells Cash and Carry Pty Limited* (CA 40115 of 1997, 13 May 1999) at [28] per Stein JA.
148 *Currey v Sutherland Shire Council & Ors* (1998) 100 LGERA 365.
149 Ibid at 371 per Stein JA (Mason P and Handley JA agreeing).
150 Ibid.
151 Ibid at 372.
152 Ibid at 373.
153 Or an exception be made under clause 19(2).
154 *Weal v Bathurst City Council and Another* (2000) 111 LGERA 181.
155 ibid at 201 per Giles JA.
156 *Currey v Sutherland Shire Council and Others* (1998) 100 LGERA 365 at 374-375 per Stein JA (Mason P and Handley JA agreeing).
157 [2003] NSWLEC 178 (31 June 2003).
158 *Noble v Cowra Shire Council* [2003] NSWLEC 178 (31 July 2003) at [59] per Bignold J.
159 Ibid at [63].
160 Ibid at [69].
161 *Hill v Woollahra Municipal Council & Anor* [2002] NSWCA 106 at [50]-[52] per Hodgson JA).
162 *Noble v Cowra Shire Council* [2003] NSWLEC 178 (31 June 2003) at [74] per Bignold J.
163 Ibid at [78].
164 See *Minister for Aboriginal Affairs & Anor v Peko-Wallsend Limited & Ors* (1986) 162 CLR 24 at 40 per Mason J.
165 *Noble v Cowra Shire Council* [2003] NSWLEC 178 (31 June 2003).
166 (2001) 113 LGERA 321.
167 Clause 10 of the Local Environmental Plan.
168 Clause 17 of the Local Environmental Plan.
169 *Hortis v Manly Council & Anor* [1999] NSWLEC 151 (2 July 1999) at [171] per Sheahan J.
170 Ibid at [172].
171 *Manly Council v Hortis & Anor* (2001) 113 LGERA 321 at 329-330 per Powell, Giles and Fitzgerald JJA.
172 Ibid at 334.
173 Ibid at 330.
174 Ibid at 329-330.
175 *Schroders Australia Property Management Ltd v Shoalhaven City Council* (1999) 110 LGERA 130 at 137 per Pearlman J and affirmed in *Schroders Australia Property Management Ltd v Shoalhaven City Council* (2001) NSWCA 74.
176 *Everall & Anor v Ku-ring-gai Municipal Council & Ors* (1991) 72 LGRA 369.
177 *Minister for Aboriginal Affairs & Anor v Peko-Wallsend Limited & Ors* (1986) 162 CLR 24 at 40 per Mason J.
178 *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 1014 at 1047 per Lord Wilberforce.
179 *Parramatta City Council & Anor v Hale & Ors* (1982) 47 LGRA 319 at 346 per Moffitt P.
180 *Everall & Anor v Ku-ring-gai Municipal Council & Ors* (1991) 72 LGRA 369 at 373 per Hemmings J.
181 Ibid at 374.
182 Ibid.
183 ibid.
184 *Minister for Aboriginal and Torres Strait Islander Affairs v State of Western Australia and Others* (1996) 67 FCR 40.
185 *Tickner v Bropho* (1993) 40 FCR 183 at 209 per Lockhart J.
186 *Minister for Aboriginal and Torres Strait Islander Affairs v State of Western Australia and Others* (1996) 67 FCR 40 at 60 per Black CJ, Burchett and Kiefel JJ.
187 Ibid at 61.
188 Ibid.
189 ibid at 63 per Black CJ, Burchett and Kiefel JJ.
190 *Jones v Dunkel & Anor* (1959) 101 CLR 298 at 320-321 per Windeyer J.
191 *FAI Insurances Ltd v Winneke & Ors* (1982) 151 CLR 342 at 350 per Gibbs J.
192 *Tickner & Ors v Chapman & Ors* (1995) 57 FCR 451 at 462 per Black CJ.
193 Ibid .
194 ibid at 462-463 per Black CJ.
195 Parliament provided for decision-making to be made at the highest level since a declaration 'very seriously affects the interests of third parties'; ibid at 462 per Black CJ.
196 ibid at 465 per Black CJ.
197 Ibid at 464.
198 A term often used interchangeably with 'procedural fairness' in regards to administrative law: see *Laws v Australian Broadcasting Tribunal* (1990) 93 ALR 435 at 439.
199 *Kioa & Ors v West & ANor* (1985) 159 CLR 550 at 582 and 609.
200 *Attorney-General for the State of New South Wales v Quin* (1990) 170 CLR 1 at 36.
201 *Livesey v New South Wales Bar Association* (1983) 151 CLR 288 at 300 per Mason, Murphy, Brennan, Deane and Dawson JJ.

202 The rules also apply to arbitral and administrative decisions; *Builders' Registration Board v Rauber* (1983) 57 ALJR 376 at 385 per Brennan J.
203 *R v Sussex Justices; Ex parte McCarthy* [1924] 1 KB 256 at 259 per Lord Hewart CJ.
204 *R v Commonwealth Conciliation and Arbitration Commission; Ex parte Angliss Group* (1969) 122 CLR 546 at 553 per Barwick CJ, McTiernan, Kitto, Taylor, Menzies, Windeyer and Owen JJ.
205 *R v West Coast Council; Ex parte The Strahan Motor Inn* (1995) 87 LGERA 383 at 389 per Zeeman J.
206 Ibid.
207 *R v Commonwealth Conciliation and Arbitration Commission; Ex parte Angliss Group* (1969) 122 CLR 546 at 553 per Barwick CJ, McTiernan, Kitto, Taylor, Menzies, Windeyer and Owen JJ.
208 Ibid.
209 Apparent bias is generally easier to establish than actual bias; *R v Watson; Ex parte Armstrong* (1976) 136 CLR 248 at 258- 262 per Barwick CJ, Gibbs, Stephen and Mason JJ.
210 *Hannam v Bradford Corp* [1970] 1 WLR 937 at 946 per Widgery LJ.
211 *Casey v Australian Broadcasting Tribunal* (1988) 16 ALD 680 at 685 per Wilcox J.
212 *Old St Boniface Residents' Association Inc v City of Winnipeg* (1990) 75 DLR (4th) 385 at 408- 409 per Sopinka J.
213 *Re Macquarie University; Ex parte Ong* (1989) 17 NSWLR 113 at 135 per Hope JA.
214 *R v Watson; Ex parte Armstrong* (1976) 136 CLR 248 at 262- 263 per Barwick CJ, Gibbs, Stephen and Mason JJ.
215 *Stollery v The Greyhound Racing Control Board* (1972) 128 CLR 509 at 517 per Barwick CJ.
216 *IW v City of Perth and Others* (1997) 191 CLR 1.
217 Ibid at 51 per Gummow J.
218 Ibid at 33 per Toohey J.
219 Ibid at 66 per Kirby J.
220 *R v West Coast Council; Ex parte The Strahan Motor Inn* (1995) 87 LGERA 383.
221 Ibid at 384 per Zeeman J.
222 Ibid at 393.
223 Ibid.
224 *Stollery v The Greyhound Racing Control Board* (1972) 128 CLR 509 at 519-510 per Barwick CJ.
225 *R v West Coast Council; Ex parte The Strahan Motor Inn* (1995) 87 LGERA 383.
226 *IW v City of Perth & Ors* (1997) 191 CLR 1.
227 Ibid at 51 per Gummow J.
228 *Livesey v New South Wales Bar Association* (1983) 151 CLR 288.
229 ibid at 298 per Mason, Murphy, Brennan, Deane and Dawson JJ.
230 Ibid at 299.
231 One of the issues for the Bar Association proceedings concerned whether the money lodged by the barrister's client was her own. The two judges had previously decided that it was not.
232 *Aksu v Minister for Immigration and Multicultural Affairs* (2001) 65 ALD 667.
233 These were the protection of the community, the expectation of the community and the best interests of any children involved..
234 *Minister for Immigration, Local Government and Ethnic Affairs v Gray* (1994) 50 FCR 189 at 206-207 per French and Drummond JJ.
235 *Stringer v Minister for Housing and Local Government* [1970] 1 WLR 1281 at 1298 per Cooke J.
236 *Re Drake and Minister for Immigration and Ethnic Affairs (No 2)* (1979) 2 ALD 634 at 640-641 per Brennan J.
237 *Aksu v Minister for Immigration and Multicultural Affairs* (2001) 65 ALD 667 at 676 per Dowsett J.
238 *Builders Registration Board of Queensland & anor v Raub*er (1983) ALJR 376 at 385 per Brennan J.
239 *Laws v Australian Broadcasting Tribunal* (1990) 170 CLR 70 at 92 per Deane J; also see Casey.
240 *IW v City of Perth & Ors* (1997) 191CLR 1 at 46 per Gummow J but cf Toohey J at 31-3 and Kirby J at 61-66.
241 *Noroton Holdings v Friends of Katoomba Falls Creek Valley Inc* (1996) 98 LGERA 335 at 351-352 per Priestly J.
242 *Emeritus Pty Ltd v South Sydney* (Unreported 1 Feb 1990 per Cripps CJ).
243 *Minister for Aboriginal Affairs v Peko-Wallsend* (1986) 162 CLR 24 at 40 per Mason J.
244 *Noble v Cowra Shire Council* [2003] NSWLEC 178 (31 July 2003).
245 Ibid at [49] per Bignold J.
246 ibid at 448 per Pearlman J.
247 *Emeritus Pty Ltd v South Sydney* (Unreported 1 Feb 1990 per Cripps CJ); *Tooth & Co Ltd v Lane Cove Municipal Council* (1967) 87 WN (NSW) 361 at 363 per Street J.
248 *Noble v Cowra Shire Council* [2003] NSWLEC 178 at [53] per Bignold J.
249 ibid at [52] per Bignold J citing *Jones v Dunkel* (1959) 101 CLR 298 at 306 per Kitto J.
250 ibid at [54] per Bignold J.
251 [1998] NSWLEC 50 (1 April 1998).
252 There were two additional challenges based on a failure to take into account a relevant consideration and on manifest unreasonableness.
253 Imposed predominantly by s 90(1)(d) of the *Environmental Planning and Assessment Act* (1979) (NSW).
254 *Hayden Theatres Pty Ltd v Penrith City Council* [1998] NSWLEC 50 (1 April 1998) at 15 per Bignold J.

255 Ibid at 15.
256 Ibid.
257 Ibid at 16.
258 Ibid at 17.
259 [2002] NSWLEC 69 (7 May 2002).
260 This was distinguished from *Parramatta City Council & Anor v Hale Ors* (1982) 47 LGRA 319 at 335 where Moffitt P held that the court is not entitled to consider the vote of one councillor..
261 *IW v City of Perth & Ors* (1997) 191 CLR 1.
262 ibid at 51 per Gummow J.
263 *Brind v Secretary of State for the Home Department* (1991) 1 All ER 720 at 738 per Lord Lowry.
264 Airo-Farulla G, 'Administrative Law-Rationality and Judicial Review of Administrative Action' (2000) 24 *Melb U L Rev* 543 at 574.
265 *Kruger v Commonwealth* (1997) 190 CLR 1 at 36 per Brennan CJ; *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611 at 650 per Gummow J.
266 Spigleman JJ, 'Foundations of Administrative Law: Toward General Principles of Institutional Law' (1991) 58 *Aust Jo of Pub Admin* 1 at 4.
267 *TCN Channel Nine Pty Ltd v Australian Broadcasting Tribunal & Anor* (1992) 28 ALD 829 at 861 per French J citing *Othman v Minister for Immigration and Ethnic Affairs* (1991) 24 ALD 707 at 711 per French J.
268 ibid .
269 *Australian Broadcasting Tribunal v Bond & Ors* (1990) 170 CLR 321 at 367 per Deane J.
271 *Associated Provincial Picture House v Wednesbury Corporation* [1948] 1 KB 223 at 229 per Lord Greene MR.
271 *Abebe v The Commonwealth of Australia* (1999) 197 CLR 511 at 545 per Gleeson CJ and McHugh J.
272 *Chisholm v Pittwater Council and Another* [2000] NSWLEC 143 (11 July 2000).
273 *Noble v Cowra Shire Council* [2003] NSWLEC 178 (31 June 2003) at [74] per Bignold.
274 *R v West Coast Council; Ex parte The Strahan Motor Inn* (1995) 87 LGERA 383 at 392 per Zeeman J.
275 *R v Amber Valley District Council: Ex parte Jackson* [1985] 1 WLR 298 at 308- 309 per Woolf J.
276 *Old St Boniface Residents' Association Inc v City of Winnipeg* (1990) 75 DLR (4th) 385 at 408- 409 per Sopinka J.
277 *R v West Coast Council; Ex parte The Strahan Motor Inn* (1995) 87 LGERA 383 at 392 per Zeeman J.
278 *R v Amber Valley District Council: Ex parte Jackson* [1985] 1 WLR 298 at 308- 309 per Woolf J.
279 *Collector of Customs v Pozzolanic* (1993) 43FCR 280 at 287 per Neaves, French and Cooper JJ.
280 Ibid.
281 *Minister for Immigraton v Wu Shan Liang and Others* (1996) 185CLR 259 at 272 per Brennan CJ, Toohey, McHugh and Gummow JJ.
282 ibid.