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AUSTRALIAN INSTITUTE OF ADMINISTRATIVE LAW NATIONAL ESSAY PRIZE 2011

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The 2009 Essay prize was won by Tristan Robinson with an essay entitled "Federal FOI Reform and Media Access to Government Information: A Transparency Revolution or Just a Better Foothold?" The essay was published in the *AIAL Forum No.62*.

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2010 AIAL NATIONAL ADMINISTRATIVE LAW FORUM, FACULTY OF LAW, UNIVERSITY OF SYDNEY, SYDNEY, 22 AND 23 JULY 2010: REPORT

Stephen Argument*

On 22 and 23 July 2010, the Australian Institute of Administrative Law held the 2010 National Administrative Law Forum. The Forum was held in Sydney, in the marvellous conference venue at the Faculty of Law, University of Sydney, and organised by the NSW chapter of the Institute. It was the 20th such Forum. The Institute has organised Forums every year since 1991. For over 15 years, the Forum venues have alternated, with Forums being held in Canberra in odd-numbered years and being held in a State or Territory in even-numbered years. All State and Territory chapters of the Institute have organised a Forum at least once and this was the NSW chapter's second

The Forum is now Australia's pre-eminent administrative law conference. It regularly attracts high quality speakers who, in turn, attract consistently strong audiences. The 2010 Forum was no exception, with an impressive array of judges and former judges, senior administrators, administrative law practitioners and academics addressing the Forum and with over 200 registrants attending.

The theme for the 2010 Forum was "Delivering Administrative Justice". The thinking behind the theme was that it would allow those participating in the Forum to discuss contemporary issues in administrative law, share practical experiences and, in particular, consider future changes to administrative law.

The Institute was pleased that the Chief Justice of the High Court of Australia, the Hon Robert French AC, was able to give the opening address at the Forum. The Chief Justice began by noting that this was the 20th Forum, which then gave him pause to reflect on developments in administrative law over the previous half century. He posed 3 questions for the Forum:

- How did the idea of administrative justice arise?
- What is it that administrative justice delivers? and
- Why do we want to know?

The Chief Justice suggested that the last question was perhaps the most important.

The text of the Chief Justice's speech can be found on the High Court of Australia website, at http://www.hcourt.gov.au/speeches/frenchcj/frenchcj22july10.pdf

Following on the Chief Justice's opening address, the first plenary session addressed the topic "Delivering administrative justice" The other plenary sessions addressed the following topics:

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* *Secretary, AIAL (1990 – 2010).*

- The human rights dimensions of administrative justice;
- Challenges for the courts in delivering administrative justice;
- Jason's legacy – The impact of immigration in administrative law;
- The State of Play – Administrative law in review; and
- Information – The foundation for administrative justice.

The "Jason's legacy" session was an innovation for the Forum, with a panel of speakers, all connected to the High Court's 1985 decision in *Kioa v West* (which was the focus of the session), giving a very personal insight into one of the landmark decisions of administrative law. The innovation appeared to work very well, as it was well-received by the audience.

Consistent with its status as the pre-eminent national annual administrative law conference, the line-up for the Forum was impressive. This was a testament to the work of the NSW chapter of the Institute in organising the Forum. Key speakers at the Forum included the Hon Michael Black AC (former Chief Justice of the Federal Court of Australia), Sven Bluemmel (WA Information Commissioner), Professor Mary Crock (Sydney University), Professor Julian Disney AO (UNSW), Stephen Gageler SC (Commonwealth Solicitor-General), Elizabeth Kelly (Commonwealth Attorney-General's Department), Julie Kinross (Queensland Information Commissioner), Professor John McMillan AO (Australian Information Commissioner), the Hon Ron Merkel QC (former Judge of the Federal Court of Australia), Andrew Metcalf (Secretary of the Commonwealth Department of Immigration and Citizenship), Deirdre O'Donnell (NSW Information Commissioner) and the Hon Marilyn Warren AC (Chief Justice of the Supreme Court of Victoria).

The Forum dinner was held on the evening of the first day of the Forum. At the dinner, former Chief Justice of the High Court of Australia, Sir Anthony Mason AC, gave a highly entertaining speech, the text of which is published in this edition of *AIAL Forum*.

The Institute intends that selected papers from the 2010 Forum will be published in the *AIAL Forum*. The first batch of those papers appears in this issue, together with a few papers from the 2009 Forum.

2011 National Administrative Law Forum

In keeping with the "traditional" rotation policy, the venue for the 2011 National Administrative Law Forum will be Canberra. It will be held on 21 and 22 July 2011, at the *hotel realm*, with the (National) Executive Committee as hosts. A Call for Papers in relation to the 2011 Forum should be sent out shortly.

And it's goodnight from him .....

I announced at the 2010 Forum that I would be "retiring" from the Institute, as I do not propose to stand for <u>any</u> position on the (National) Executive Committee at the 2010 Annual General Meeting of the Institute. After 20 years as Secretary of the Institute, it has been difficult to decide when it is time to move on. In the end, one of the prevailing considerations has been that I think that, at this time, the Institute needs a younger, less-grumpy Secretary. So, it's time that I make way for such a person.

There will (presumably) be other occasions for me to say some things by way of "farewell". This is an appropriate context, however, to indicate that, though it was never my reason for accepting the invitation to become Secretary, the fact is that (without ever actively seeking any) I have received great benefits as a result of being Secretary of the Institute. This has

included the benefit of having the opportunity to meet some interesting and wonderful people over the years (not all of them “important” people).

I’m not one to claim credit for my work with the Institute (not the least because no-one would listen!!). I leave it to others to attach importance to whether they are the 3rd-longest or the 4th-longest-serving member of the (National) Executive Committee and to which of the meetings that led to the formation of the Institute they attended. I will, however, say something about the National Administrative Law Forum. One of the things that I am most pleased about is my (modest) role in developing the National Administrative Law Forum into what it had become – an “institution” in the administrative law calendar. Something that people attend year after year after year. Something to be proud of. Something that **I** am proud of.

DELIVERING ADMINISTRATIVE JUSTICE: LOOKING BACK WITH PRIDE, MOVING FORWARD WITH CONCERN

Sir Anthony Mason*

Introduction

This year is the 30th anniversary of the introduction of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) ('*AD(JR) Act*'). It was one of four major reforms recommended by the Kerr Committee, a committee the establishment of which I recommended when I was Solicitor-General and of which I was a member. The reforms were a giant step forward in the delivery of administrative justice.

So, this evening, I feel like a quasi-father who is celebrating the 30th birthday of one of his four children. There is, of course, one big difference. I am neither paying for the party nor giving anyone an expensive present.

When you play a part in creating something new, it is very interesting to look at what has happened thirty years later. You ask yourself two questions. "Has the new régime succeeded?" "Has it worked out as I thought it would?" You could ask yourself a third question "Could we have done better?" I don't intend to ask that question.

The *AD(JR) Act* has lost some of its early glitter; it looks a little tired and could benefit from some surgical enhancement.

The *AD(JR) Act* – was it successful?

That the *AD(JR) Act* has been successful is generally accepted. In providing for judicial review on specified grounds with a right to reasons, it introduced a coherent and simplified regime for judicial review which replaced the incoherent and confused system of review provided by the prerogative writs.

Justice Michael Kirby, who offered some criticism of the *AD(JR) Act*, nonetheless described it as "overwhelmingly beneficial"[1]. The main criticism, one made by Kirby J, has been that the Act stunted the judicial development of the common law grounds of judicial review. In 2004, Professor Mark Aronson, in an illuminating article entitled *"Is the AD(JR) Act hampering the development of Australian administrative law?"*[2], firmly rejected the criticism. At the same time he made some instructive and straightforward suggestions for amendment, a move supported by the Administrative Review Council ('the ARC') and taken up by Kathy Leigh in a splendid paper presented to this Forum in 2009[3] in which she suggested that the law could be simplified in the interests of clarity, effectiveness, accountability and accessibility.

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* *The Hon Sir Anthony Mason AC KBE, former Chief Justice of the High Court of Australia, was guest speaker at the AIAL 2010 National Administrative Law Forum Conference Dinner, held 22 July 2010.*

The grounds set out in the *AD(JR) Act* are declaratory of the common law grounds of review together with two residual umbrella grounds of review, namely "that the decision was otherwise contrary to law"[4] or was an "exercise of power in a way that constitutes abuse of power".[5] These two provisions certainly enabled the courts to move beyond the earlier prescribed grounds of review even if the judges were not minded to develop those grounds of review.

Judges like to think that judicial decisions clarify the law by making certain what was previously uncertain. Kathy Leigh challenged this assumption when she said last year:

> In addition, the grounds for review set down in the ADJR Act have of course been the subject of many court cases in the 30 years since the Act was established. This means that inevitably their meaning is now less clear than it appeared to be when the Act was first passed.

Kathy Leigh is unquestionably right. A cascade of decisions on particular points can create fine points of distinction and lead to confusion, if not uncertainty, especially when alternative regimes are available under the *AD(JR) Act* and s.39B of the *Judiciary Act 1903* (Cth) ('*Judiciary Act*'). So, 30 years on, it is time to repeat the simplification exercise which led to the *AD(JR) Act*.

A criticism made by Stephen Gageler before he became Solicitor-General, was that the *AD(JR) Ac*t contains no statement of general principles.[6] In the 1970s we did not see any occasion to make a choice between the competing theories advanced in *Kioa v West*[7]*;* it was sufficient to declare the common law grounds of review and to supplement them. Indeed, to have gone further and to have raised for decision then the theoretical debate later exhibited in *Kioa v West* would only have ignited a further dimension of controversy to a package of reforms which was very finely balanced as things then stood.

There was, at that time, strong bureaucratic and political resistance to the reforms. Bureaucrats regarded enhanced review of administrative decision-making as a threat, not to "good administration", but to "administrative efficiency", a shorthand expression for the philosophy "because government knows best we do not need to give reasons or to be reviewed". The Kerr Committee made the point that:

> although administrative efficiency is a dominant objective of the administrative process . . . . the achievement of that objective must be consistent with justice to the individual.[8]

To-day there still linger pockets of bureaucratic opposition to review of administrative decision-making as well as political opposition which surges from time to time when decisions with political overtones, like deportation orders, are overturned. So lawyers need to maintain a constant vigilance to ensure that administrative law retains its integrity and vitality.

Innovative legislative reform is a difficult undertaking, much more difficult now than it was in the 1970s. Then the recommendations of an expert committee were likely to carry considerable weight, even on contentious issues. That is not so to-day when political and public relations campaigns, supported by heavy expenditure on advertising, may be harnessed by powerful interest groups against such recommendations, just as they are mounted against controversial legislative proposals. Substantial reform, once driven by expert policy judgment, is now largely a public relations battleground from which an uneasy compromise is cobbled together.

Have things worked out differently?

Some developments in the intervening 30 years have made a difference to judicial review. There was the introduction of s.39B of the *Judiciary Act* and the development of the "constitutional" writs under s.75(v) of the Constitution by the High Court. There was the adoption of the approach of Sir Gerard Brennan in *Attorney-General (NSW) v Quin*[9] which, while it places a politically acceptable face on judicial review, is based on a fictional view of the authority conferred by statute to engage in judicial review. Another development was the decision in *Kable v DPP (NSW)*[10] ('*Kable*') and that certainly surprised me. Although *Kable* was once described as "a guard-dog that barked but once", it promises to be a savage mastiff that is barking with frightening ferocity. A related development has been the identification of jurisdictional error in *Kirk v Industrial Commission (NSW)*[11]('*Kirk*') as the mainspring of both federal and state judicial review. And there has been our pursuit of a path in administrative law which has been described by that outstanding administrative lawyer, the late Professor Mike Taggart, as "Australian exceptionalism".

Some of the developments are to be commended. *Kable*, despite its dubious foundations and the incoherence of the dual but different implications in *Kable* and *Boilermakers*[12], has brought federal courts and state courts exercising federal jurisdiction into a more principled relationship, at least so far as the functions with which they can be entrusted. And the decision in *Kirk* has brought about a more uniform approach to judicial review in federal and state matters.

Australian exceptionalism has been driven very largely by separation of powers considerations. The separation of powers has a more pervasive and dominating influence in our jurisprudence than that of other common law jurisdictions, with the exception of the United States. The impact of this influence is to be seen in the marginalisation of *Wednesbury* unreasonableness, the rejection of proportionality as a ground of review and a pre-occupation with "jurisdictional error". In other jurisdictions where emphasis on the rule of law prevails, the correction of errors of law receives more attention.

The Administrative Appeals Tribunal ('AAT') and merits review

Despite the importance of the *AD(JR) Act*, the major reform was the introduction of "merits review" by the AAT, again coupled with a right to reasons. The introduction of the system of Tribunal merits review was a distinct break from the past. As there were constitutional difficulties in entrusting Ch.III courts with merits review across the board, merits review by the AAT was the preferred approach.

We thought that the establishment of a peak Tribunal with a general review jurisdiction would bring greater status, consistency and acceptability to administrative justice. Our thinking on this point was unquestionably correct. In 1995, the ARC sought to take this approach further by establishing the Administrative Review Tribunal[13]. Unfortunately, legislation to implement this proposal was rejected by the Senate in 2001.

Although the institutional foundations of judicial independence are very much stronger than those that relate to the independence of tribunal members, the AAT has won a high reputation for its impartiality, a reputation which must be maintained at all costs. The AAT is far more heavily engaged in the resolution of disputes to which government or government agencies are a party than are the ordinary courts. That is why the independence and impartiality of the AAT is so important and why any proposals for the creation of specialist review tribunals should be viewed with a critical eye. The general criticism made by Heydon J[14] of specialist tribunals was spectacularly vindicated by the judgment of Gray J in *Merkel v Superannuation Complaints Tribunal*[15].

You will recall that in 2004 the then Attorney-General, Mr Daryl Williams QC sought to introduce amendments which, if adopted, would have eroded the status, independence and effectiveness of the AAT by permitting shorter term appointments, relaxing the qualifications for appointment as President (including allowing the appointment as President of a legal practitioner enrolled for five years) and enabling a multi-member tribunal to sit without a lawyer. In the face of opposition from the Law Council and the ARC, the Government dropped the offending proposals.

One manoeuvre to marginalise or sideline the AAT has taken the form of a suggestion that the money expended on the AAT is wasted and would be better expended on primary decision-making. The very nature of the suggestion reveals a total absence of understanding of the purpose of administrative merits review. It offers independent and impartial review – review that is free from actual or ostensible bias, either for or against government. The primary decision-maker is an officer of government or a government agency. His primary duty is to his employer; he is not independent and he is unlikely to be impartial and even if he is impartial, he won't appear to be. Like the 2004 proposals, this suggestion seems to be designed to make administrative decision-making less independent and more responsive to the views of government.

The Ombudsman

The great success of the office of Ombudsman can be attributed to the dedication of the persons who have held that office, not least the recently retired Ombudsman, Professor John McMillan.

Administrative Review Council

The establishment of the Administrative Review Council was a pivotal element in the new administrative law. It maintained a continuing and constructive oversight of Australian administrative law and its structures with a reporting, advisory and educational role produced many illuminating reports on matters of administrative law, leading the way here and overseas. They included the very influential "*Automated Assistance in Administrative Decision Making".* As Professor McMillan has noted:

> The reports and recommendations of the Council have shaped Australian administrative law. All major aspects of administrative law have been covered.[16]

In recent times the Australian government has not given the ARC the support which it deserves. There was a long delay in the appointment of a President to succeed Jillian Segal, vacancies on the Council were not filled and the ARC no longer has an independent secretariat[17]. What are the reasons for this neglect?

In a response to a letter of concern from the Law Council of Australia, the Attorney-General, after drawing attention to the appointment of the new President and saying that further appointments would be made to the Council in the near future, stated that dedicated officers from the Attorney-General's Department are assigned to manage the Council's work. To deprive the Council of its secretariat and to make it dependent on the Department for services is to impair its independence and virtually to leave its activities to the discretion of the Department.

But that is by no means the complete story. The ARC's annual report for 2009, with reference to the withdrawal of the secretariat and its replacement by assistance from the Department, tells us:

> This change was in the context of the Attorney-General asking the Council to focus for the present on an advisory role, assisting the Department by giving expert input to the Department on matters of current Government priority. At the end of the reporting year, the Council was of the view that it was unable to initiate new projects pursuant to s 51 of the Administrative Appeals Tribunal Act as a result of the changed administrative arrangements. No referrals have been made to the Council under s 51B of this Act in this reporting period.[18]

The passage from the 2009 annual report is revealing. The withdrawal of the Council's independent secretariat is associated with a deliberate transformation in its role from that of an independent body into an advisory role of assisting the Department "*on matters of current Government priority*". In that role it has to rely on departmental officers whose primary loyalty is naturally to the government, not to the Council. Indeed, the ARC has no independent budget allocation; it is entirely dependent on such funds as the Department makes available from its budget. Following its change of role, for 2 years the Council has been unable to initiate new projects; it also has had no referrals.

All this reflects a government approach which looks on agencies simply as instruments in implementing government policies. In this brave new world there is not much space for independent agencies, for people who will look at issues impartially and objectively and may be minded to look at government proposals critically. A climate in which independent or critical views are discouraged or sidelined, presents a serious problem, particularly for members of the legal profession and lawyers whose approach is centred on impartiality and objectivity.

There was a time when the Commonwealth of Australia was at the cutting edge of administrative law, when the initiatives explored and recommended by the ARC led the way elsewhere. That is no longer the case. We are now well back in the pack. The recent publications of the UK Administrative Justice and Tribunals Council[19] illustrate the point. Contrast them with the Attorney-General's Department's draft "*Australian Administrative Justice System: Policy Guide*".

Conclusion

I should offer an apology for striking such a sombre note, a note more attuned to a graveyard burial ceremony than an anniversary. So I shall conclude on a brighter note. The theme of this Conference, "Delivering Administrative Justice", identifies the central purpose of our system of administrative law. It is to do justice to the individual affected by government decision-making as well as to the government. The papers here identify flaws and present issues for consideration and proposals for improvement. What we need is an active, resourced and expert body – and the ARC was such a body - to sift, assess these ideas and others and make recommendations as to what should be done. Administrative law is an ever-changing landscape that needs to be kept under constant surveillance if we are to deliver good administration in the future; administrative justice lies at the very heart of good administration.

Endnotes

1 *Re Minister for Immigration and Multicultural Affairs Ex parte Applicants 20/2002* (2003) 198 ALR 59 at [157].
2 (2004) 15 PLR 202, (2005) 12 AJ Admin.L.29; see also J.Griffiths SC, "Commentary on Professor Aronson's article" (2005) 12 AJ Admin L99.
3 "The Future Architecture of Judicial Review: could we improve accessibility and efficiency?" (2009) National Administrative Law Forum, Canberra, 2009.
4 AD(JR) Act, s.5(1)(j).
5 ibid, s.5(2)(j).
6 "The Underpinnings of Judicial Review of Administrative Action: Common Law or Constitution?" (2000) 28 Fed.L.Rev.303.
7 (1985) 159 CLR 550.

8 Commonwealth Administrative Review Committee Report, Parl.Paper No.144 (1971), [12].
9 (1990) 170 CLR 1.
10 (1996) 189 CLR 51.
11 (2010) 239 CLR 531.
12 *Attorney-General (Cth) v Queen* [1957] AC 288 ('*Boilermakers*').
13 ARC Report No.39, *"Better Decisions: review of Commonwealth merits review tribunals"*.
14 *Kirk v Industrial Relations Commission* [2010] HCA, (13 February, 2010 at [122] (where the Industrial Commission of NSW was the target of trenchant criticism).
15 [2010] FCA 564 at [67-70].
16 The Whitmore Lecture 2009, Sydney, 16 September, 2009, p.9.
17 ARC Annual Report 2009, p.9 (the independent Secretariat was withdrawn in early 2009).
18 ARC annual report, 2009, Ch.3..
19 Consultation Draft, "*Principles for Administrative Justice: the AJTC's Approach"; The Developing Administrative Justice Landscape"*.

PURSUING DECLARATORY RELIEF TO EVADE TIME LIMITS APPLICABLE TO JUDICIAL REVIEW: THE EMERGENCE OF AN AUSTRALIAN ALTERNATIVE TO THE RULE OF PROCEDURAL EXCLUSIVITY

Michael Wait*

Introduction

Time limits of 6 months or less apply to the commencement of judicial review proceedings in all Australian jurisdictions. The rationale for the relatively short limitation periods applicable to judicial review proceedings is to promote certainty and finality in government decision making which has the potential to impact on many and varied interested parties. However, no equivalent time limits apply to the seeking of declaratory relief.

The issue addressed in this paper, and considered recently by the South Australian Supreme Court,[1] is whether a plaintiff can simply walk around the time limits applicable to proceedings for judicial review by seeking declarations of invalidity instead of prerogative relief? On the one hand, access to justice considerations may suggest that the availability of declaratory relief should not be fettered by reference to limitations that may apply to the pursuit of judicial review; the declaration is often lauded precisely because of its procedural flexibility. On the other hand, it seems somewhat incongruous that the growing ascendency of declaratory relief in public law should render the long standing rules applicable to the pursuit of prerogative relief obsolete.[2]

In the United Kingdom, in 1983, the House of Lords developed the so called rule of 'procedural exclusivity' in the case of *O'Reilly v Mackman* to deal with just this problem.[3] *O'Reilly v Mackman* decided that it was an abuse of process for a plaintiff to seek declaratory relief where prerogative relief was available. The rule, which has since been abandoned in the United Kingdom itself, was never adopted in Australia. It is argued in this paper that a similar approach to the rule of procedural exclusivity can be achieved, not by the invocation of principles relating to abuse of process, but rather by resort to the principles that govern the availability of declaratory relief.

Time limits applicable to actions for judicial review

Time limits for the commencement of judicial review proceedings are notoriously short, ranging across the various Australian jurisdictions from 60 days to 6 months.[4] Further, not only is the time within which a plaintiff must commence judicial review proceedings short, it is also well established that delay in commencing proceedings, even prior to the expiry of the time limit, is a basis upon which prerogative relief may be declined.[5] This principle is expressly enshrined in South Australia by rule 200(2) of the *Supreme Court Civil Rules 2006*

* *Michael Wait is a barrister employed by the Crown Solicitor's Office (SA).* *This paper was presented at the 2010 AIAL National Administrative Law Forum, Sydney, 22 July 2010. The views expressed in this paper are those of the author and do not represent those of the Crown Solicitor's Office (SA).**The author would like to thank Sean O'Flaherty for his research assistance in the preparation of this paper.*

(SA) which provides that: "An action for judicial review must be commenced as soon as practicable after the date when the grounds for the review arose and, in any event, within 6 months after that date."

The strictness of time limits for commencing actions for judicial review can be contrasted with much more generous limitation periods that are applicable to commencing other kinds of proceedings. For instance, the general rule is that a plaintiff in an action for tort may wait 6 years before commencing proceedings.[6] And, there is no additional requirement that a plaintiff act promptly within this period. As long as the claim is ultimately lodged within the prescribed period, then the plaintiff may choose to keep a defendant in suspense for whatever reason.

What is the reason for the imposition of such stringent time limits for the bringing of actions in judicial review? Historically the answer may have been found in the discretionary nature of the prerogative remedies. As leave was required from the Crown to challenge one of its own decisions, the Crown hedged this right by imposing a self serving strict time limit. However, this justification does not sit comfortably with our modern, post-Diceyan, understanding of the rule of law that those who administer the law are as much bound by it as those who are the subjects of executive action.[7]

The modern justification for short time limits in judicial review is explained in a number of authorities. For instance, in *O'Reilly v Mackman* Lord Diplock said:[8]

> The public interest in good administration requires that public authorities and third parties should not be kept in suspense as to the legal validity of a decision the authority has reached in purported exercise of decision-making powers for any longer period than is absolutely necessary in fairness to the person affected by the decision.

More recently, Chief Justice Doyle of the Supreme Court of South Australia, in the leading judgment in the matter of *Hall v Burnside*, explained the rationale for the short time period as follows:[9]

> The relatively short limitation period reflects the fact that judicial review is concerned with the validity of decision making by individuals and bodies exercising statutory and other powers that must be exercised in the public interest. Such decisions often have direct and consequential effects on persons other than those immediately affected. In a range of circumstances it will often be a matter of significance for other persons and authorities to know whether or not such a decision is valid or has been subject to a legal challenge. There is a substantial public interest in being able to say, after a specified time, that such a decision can be treated as beyond attack.

The Availability of declaratory relief to evade the time limit for judicial review

Yet, if prerogative relief is unavailable to plaintiffs by virtue of the operation of time limitations then what is to prevent plaintiffs pursuing declaratory relief instead? The ascendency of the declaration as a public law remedy has been commonly noted. For instance, In *Bateman's Bay* it was said:[10]

> Writing extrajudicially, Sir Anthony Mason has said that:
>
> > '[E]quitable relief in the form of the declaration and the injunction have played a critical part in shaping modern administrative law which, from its earliest days, has mirrored the way in which equity has regulated the exercise of fiduciary powers.'
>
> In this field, equity has proceeded on the footing of the inadequacy (in particular the technicalities hedging the prerogative remedies) of the legal remedies otherwise available to vindicate the public interest in the maintenance of due administration. There is a public interest in restraining the apprehended misapplication of public funds obtained by statutory bodies and effect may be given to this interest by injunction. The position is expressed in traditional form by asking of the plaintiff whether there is 'an equity' which founds the invocation of equitable jurisdiction.

This passage was affirmed in *Egan v Willis*[11] and in *Enfield* in which it was also said that:[12]

> Significant questions of public law, including those respecting ultra vires activities of public officers and authorities, are determined in litigation which does not answer the description of judicial review of administrative action by the medium of the prerogative writs or statutory regimes such as that provided by the Administrative Decisions (Judicial Review) Act 1977 (Cth)…
>
> No … common law action was in issue in this litigation. Nor was the proceeding instituted by Enfield one to which r 98 of the Rules applied. The jurisdiction of the Supreme Court which Enfield invoked was its jurisdiction as a court of equity[13] to grant equitable relief to restrain apprehended breaches of the law and to declare rights and obligations in respect thereto.

More recently, Chief Justice French has written:[14]

> The utility of the declaration that makes it worth talking about derives from its flexibility and procedural simplicity. Sarah Worthington made the point explicitly in her monograph Equity:
>
> > 'Declarations can be made that a person is a member of a club; that her purported expulsion is invalid; that she is the owner of land; that the terms in a will or a trust have a particular meaning; that a contract exists or has been breached or terminated; that an agreement is binding or illegal; or that a form of notice is reasonable. The list is endless. Indeed a declaration may prove appropriate in virtually any situation imaginable.'
>
> Well may we ask rhetorically of declarations as Homer Simpson asked of donuts – 'is there anything they can't do?

The time within which declaratory relief must be sought is not restricted in the same way as judicial review. Limitation of actions legislation does not deal generally with the granting of declaratory relief.[15] As such, there is no statutory or rule based prescribed time limit within which to seek declarations.

In light of the absence of a rigid time limit, together with the much lauded procedural flexibility of the declaration, one might ask, 'why would a plaintiff ever bother with the prerogative writs?' Given the Crown's model litigant obligations, a declaration of invalidity would be likely to be just as effective, in practice, as an order for *certiorari* quashing an administrative decision.

The question posed by this paper is, will the ascendancy of the declaration of invalidity, as a means by which to challenge administrative decisions, render the traditionally strict time limit for prerogative relief redundant? Why would a plaintiff, and particularly one who is out of time to bring judicial review proceedings, not simply pursue declaratory relief instead? What implications does this have for the need for public certainty in government decision making?

O'Reilly v Mackman – procedural exclusivity

In the United Kingdom, the case of *O'Reilly v Mackman* established what became known as the rule of procedural exclusivity. O'Reilly was one of four prisoners charged with disciplinary offences while serving sentences in the Hull Prison. The Board of Visitors found the charges proved and imposed penalties. The prisoners alleged that the Board had fallen into various errors, including failing to afford them procedural fairness and bias. However, the prisoners were out of time to commence judicial review proceedings. Therefore, instead, they sought declarations that the penalties were void and of no effect.

Lord Diplock, on behalf of the House of Lords, held that where a plaintiff could have pursued prerogative relief it would be an abuse of process to pursue declaratory relief and thereby evade the time limit and other safe guards applicable to judicial review instead.[16] His Lordship essentially agreed with Lord Denning who in the Court of Appeal had said:[17]

> Where a good and appropriate remedy is given by the procedure of the court – with safeguards against abuse – it is an abuse of process to go by another procedure – so as to avoid the safeguards.

However, it did not take long for cracks to emerge in the apparently simple rule laid down in *O'Reilly v Mackman*. The United Kingdom courts found in practice that its application in certain circumstances was too harsh. Exceptions were created. For example, it was considered unfair to deny defendants to criminal proceedings the capacity to collaterally challenge administrative decisions as part of their defence.[18] This must often be the case given that a defendant would frequently be unaware of the impugned executive act (for example, an invalid search warrant) until well after the expiry of the time limit to seek prerogative relief, and even if the defendant did become aware of the decision there would often be no reason to challenge its validity until criminal proceedings were commenced. For similar reasons, this exception was extended to defendants in civil proceedings.[19]

Yet, the exceptions were extended beyond those who sought to rely upon the declaration as a shield, to those who sought to use it as a sword. Therefore, plaintiffs were able to pursue declaratory relief, rather than judicial review, where any administrative issues that they raised were relatively minor or incidental to an overarching civil claim. Such exceptions were recognised, for instance, where a plaintiff had a contractual relationship with a public authority,[20] or a civil right to debt payable arising out of a statutory scheme.[21]

Almost 20 years after *O'Reilly v Mackman* was decided, Sir William Wade and Christopher Forsyth said in the leading English text that:[22]

> Lord Diplock's speech in O'Reilly v Mackman was a brilliant judicial exploit, but it turned the law in the wrong direction, away from the flexibility of procedure and towards a rigidity reminiscent of the bad old days of the forms of action a century and a half ago.

As a result of growing criticism the effects of *O'Reilly v Mackman* in the United Kingdom were remedied by a combination of changes to the rules and judicial ingenuity.

The rule of procedural exclusivity has not been adopted in Australia.[23] It is the author's view that in light of the importance of the declaration in the development of administrative law in Australia there has been a well founded scepticism about the wisdom of excluding the availability of the declaration for the purpose of challenging the validity of executive decision making.

Yet, without adopting a rule of procedural exclusivity, together with all of the difficulties that were encountered in the United Kingdom, it is arguable that the 6 month time limit that applies to the seeking of prerogative relief can also be brought to bear upon the seeking of declaratory relief. This conclusion was reached in two recent South Australian cases, but for different reasons. I will now turn to consider the way in which this issue was resolved in those cases.

Hall v Burnside **– the doctrine of laches by analogy**

In the *Hall v Burnside* litigation, the Halls were engaged in a bitter local planning dispute with their neighbours. The Halls sought to challenge the relevant development approvals that had been granted to their neighbours to build a house on what the Halls alleged were unstable foundations. They did so by seeking judicial review 5 months after the expiry of the 6 month time limit. The Full Court, relying on the strict time limit applicable to judicial review proceedings, refused an extension of time to do so despite the fact that the Halls had not been, in the words of Justice Gray in dissent, "lying by" as the time limit expired.[24]

The Halls then sought leave to amend their pleadings to include declaratory relief. In support of their application to amend, it was said on behalf of the Halls that had they simply sought declaratory relief in the first instance there could be no time point brought against them.

Justice Bleby refused the application to amend. In dealing with the argument that declaratory relief would not have been time barred His Honour noted that if the Halls had sought declaratory relief at first instance the equitable defence of laches may have been available.[25] The operation of the doctrine of laches was explained in *Knox v Gye*:[26]

> [W]here the remedy in Equity is correspondent to the remedy at Law, and the latter is subject to a limit in point of time by the Statute of Limitations, a Court of Equity acts by analogy to the statute, and imposes on the remedy it affords the same limitation.

In support of the doctrine it has been said that: "It would have been a blot on our jurisprudence if those selfsame facts give rise to a time bar in the common law courts but none in a court of equity".[27] The doctrine of laches is an illustration of the maxim that equity follows the law.[28]

Yet, there are some important limitations to the operation of the doctrine of laches by analogy. First, the analogy must be a sound one. Therefore the defence is limited to cases in which there is a "sufficiently close similarity between the exclusive equitable right in question and the legal rights to which the statutory provision applies."[29] In my view, the analogy between a declaration of invalidity and *certiorari* will generally be good. In this regard, Justice Bleby noted:[30]

> The practical effect of the alternative remedies of judicial review and declaration and injunction is, in this case, identical. They are truly alternative proceedings. Apart from the time limitation, there is no identifiable benefit of one procedure over the other. To allow the application to proceed by way of declaration and injunction would be to allow the plaintiffs to gain a procedural advantage merely because of their reliance on an alternative remedy.

A further limitation upon the operation of the doctrine of laches by analogy is, somewhat unsurprisingly given the doctrine's equitable origins, that the defence will not be applied "if in the circumstances of the case it would be unjust to do so." [31]

Although it was unnecessary for Justice Bleby to make any conclusive finding about the operation of the doctrine of laches in this case (given that the question before him was whether leave to amend should be granted), it appeared open upon His Honour's reasoning that the 6 month time limit applicable to judicial review could be extended to the seeking of declarations of invalidity by analogy.

The decision of Justice Bleby was upheld on appeal,[32] although the reasons of the Full Court did not expressly endorse or reject the operation of the doctrine of laches in this context.

***Tavitian v Commissioner of Highways* – the discretionary nature of declaratory relief**

Most recently, the issue of delay in challenging administrative decisions has been considered by Justice Kourakis in the matter of *Tavitian v Commissioner of Highways*.[33] In this matter the plaintiff owned land that abutted the Sturt Highway, north of Adelaide. In 2003, the Governor, on the recommendation of the Commissioner of Highways, had declared a stretch of the Highway to be a "controlled access road" under the *Highways Act 1926* (SA). The effect of the proclamation was to prevent land owners along that portion of the Highway, including the plaintiff, from entering directly on to the Highway. Instead it was necessary to use side roads. The plaintiff was unrepresented.

After four and a half years of attempting to negotiate with the Department, and the bringing of a complaint to the Ombudsman, the plaintiff filed an application seeking a declaration that the proclamation of the Highway as a controlled access road was invalid, on the basis that he had not been afforded procedural fairness as required by the *Highways Act 1926*. The Crown submitted that the doctrine of laches applied by analogy to the 6 month time limit found in the Supreme Court Rules.

Justice Kourakis rejected the submission that the doctrine of laches had any application. His Honour undertook a detailed survey of the historical origins of the Supreme Court's jurisdiction to grant declaratory relief (including consideration of that jurisdiction which was derived from the Courts of Exchequer, Chancery and the King's Bench), before concluding that the source of the Supreme Court's jurisdiction to grant declaratory relief is now derived from the *Supreme Court Act 1935* (SA), not equity. Having concluded that the source is a statutory one, it followed that the doctrine of laches was not an available defence.[34]

However, despite concluding that the doctrine of laches was unavailable, Kourakis J considered that a question arose as to whether or not relief should be refused on discretionary grounds. That discretion arose, in His Honour's view, from the permissive language of s 31 of the *Supreme Court Act* which empowered the Court to make declarations.[35] His Honour considered that the usual discretionary considerations, such as the length of the delay, the reasons for delay, and the prejudice to the parties caused by the delay, should be weighed in determining whether relief was available.

Importantly, for the purposes of this paper, His Honour held that the policy that informs the strict time limit for judicial review should also be considered in determining whether a declaration of invalidity of an administrative decision should be granted.[36]

Ultimately, His Honour refused the declaratory relief sought by the plaintiff on discretionary grounds, despite also concluding that the plaintiff had been denied procedural fairness. In other words, His Honour concluded that despite his findings that would lead inevitably to the conclusion that the proclamation is invalid, he was not prepared to declare that to be so in light of the long delay.[37]

Conclusion

Recent litigation in the South Australian Supreme Court suggests that despite the fact that Australia has not adopted the rule of procedural exclusivity espoused in the case of *O'Reilly v Mackman*, there are other means by which effect can be given to the important policy that challenges to administrative decisions are made promptly. Those means include the application of the equitable doctrine of laches or the discretionary nature of declaratory relief. Determining which of these approaches is correct turns on a difficult question of the true source of the courts' jurisdiction to grant declaratory relief.[38]

From a practical perspective, however, it probably matters little whether the doctrine of laches 'picks up' the time limit that applies to judicial review and applies it by analogy to proceedings for declaratory relief, or whether the policy considerations that inform the strict time limit are taken account of in the exercise of the courts' discretion.

These approaches share an important advantage over the rule of procedural exclusivity, namely they have a malleability that the rule of procedural exclusivity did not. The flexibility of the defence of laches lies in its equitable origins. If, on the other hand, the source of granting declaratory relief is statutory, then flexibility is derived from the courts' discretion. These approaches, therefore, allow for limitations upon the courts' ability to provide relief to be determined on a case-by-case assessment of such matters as the reasons for delay and the significance of the challenge to a decision to third parties.

In this way, these approaches allow for the appropriate acknowledgment of the need for certainty and finality in administrative decision making without unduly restricting plaintiffs' access to declaratory relief, which has been so instrumental in the development of public law in Australia.

Endnotes

1 This issue was considered in the recent decisions of *Hall v Burnside* (2006) 102 SASR 298, *Hall v Burnside (No 4)* [2007] SASC 460, *Hall v Burnside (No 9)* [2008] SASR 361 and *Tavitian v Commissioner of Highways* [2010] SASC 206 (unreported, Kourakis J, 9 July 2010).

2 Although this paper focuses on time limits, rules other than time limitation that apply to judicial review proceedings but not to the seeking of declaratory relief include, for example, the requirement that plaintiffs set out the grounds of judicial review in a supporting affidavit and obtain leave of the court before serving the proceedings: see, for example, rule 200(3) of the *Supreme Court Civil Rules 2006* (SA).

3 [1983] 2 AC 237.

4 The ACT, NT and Victoria have limits of 60 days. South Australia, Western Australia and the High Court have limits of 6 months. References to the relevant rules are set out in M Aronsen, B Dyer and M Groves, *Judicial Review of Administrative Action* (4th ed, 2009), 830 [12.180]. See also E Campbell and M Groves, "Time Limitations on Applications for Judicial Review" (2004) 32 *Federal Law Review* 29.

5 The relevant authorities are referred to in Aronsen, Dyer and Groves, *Judicial Review of Administrative Action* (4th ed, 2009), 830 [12.180].

6 This is the case in all jurisdictions except the Northern Territory: P Handford, *Limitation of Actions: The Laws of Australia* (2nd ed, 2007), 95 [5.10.740].

7 *Corporation of the City of Enfield v Development Assessment Commission* (1999) 199 CLR 135, 157 [56] per Gaudron J ('*Enfield*').

8 [1983] 2 AC 237, 281 per Lord Diplock. References to a series of statements to similar effect are collected in E Campbell and M Groves, "Time Limitations on Applications for Judicial Review" (2004) 32 *Federal Law Review* 29.

9 (2006) 102 SASR 298, 304 [49].

10 *Bateman's Bay Local Aboriginal Council v Aboriginal Community Benefit Fund Pty Ltd* (1998) 194 CLR 247, 256 [24]-[25] per Gaudron, Gummow and Kirby JJ (footnotes omitted). See also McHugh J at 280 [92]-[94] ('*Bateman's Bay*').

11 (1998) 195 CLR 424, 439 [5] per Gaudron, Gummow and Hayne JJ.

12 *Corporation of the City of Enfield v Development Assessment Commission* (1999) 199 CLR 135, 143-144 [17]-[19] per Gleeson CJ, Gummow, Kirby and Hayne JJ (most footnotes omitted). See also Gaudron J at 157-158 [57]-[58].

13 *Supreme Court Act 1935* (SA), s 17(2).

14 R French, "Declarations: Homer Simpson's Remedy – Is there anything they cannot do?" in Dharmananda & Papamatheos, *Perspectives on Declaratory Relief* (2009), 28-29.

15 Equitable proceedings are generally not directly caught by limitations of action legislation: P Handford, *Limitation of Actions: The Laws of Australia* (2nd ed, 2007), 60 [5.10.270].

16 *O'Reilly v Mackman* [1983] 2 AC 237, 285 per Lord Diplock.

17 *O'Reilly v Mackman* [1983] 2 AC 237, 254 per Lord Denning MR.

18 *R v Wicks* [1998] AC 92 and *Boddington v British Transport Police* [1999] 2 AC 143, 172-173 per Lord Steyn. See also *Ousley v R* (1997) 192 CLR 69.

19 *Roy v Kensington and Chelsea and Westminster Family Practitioner Committee* [1992] 1 AC 624; *Chief Adjudication Officer v Foster* [1993] AC 754; *Wandsworth London Borough Council v Winder* [1985] AC 461, 509-510 per Lord Fraser of Tullybelton.

20 In *Mercury Ltd v Director General of Telecommunications* [1996] 1 All ER 575, the dispute at issue was contractual in nature and the Director General's function, whilst a public one, was one inherently referential to the contract between Mercury Ltd and British Telecommunications.

21 In *Rye v Sheffield City Council* [1997] 4 All ER 747 the statutory scheme of housing grants gave to a person entitled to the benefit of a grant a right to payment of the grant on compliance with the conditions contained in the legislation, and consequently the plaintiff was able to sue in civil proceedings to recover a debt payable. Likewise in *Roy v Kensington and Chelsea and Westminster Family Practitioner Committee* [1992] 1 AC 624, the plaintiff had a "bundle of rights… regarded as his individual private rights against the [defendant]" (at 649 per Lowry LJ).

22 W Wade and C Forsyth *Administrative Law* (8th ed, 2000), 664.

23 *Jacobs v OneSteel Manufacturing Pty Ltd* (2006) 93 SASR 568, 592-593 per Besanko J; *Hall v Burnside (No 9)* [2008] SASR 361, [63] per Doyle CJ.

24 *Hall v Burnside* (2006) 102 SASR 298, 316 [109].

25 *Hall v Burnside (No 4)* (2007) SASC 460, [42].

26 (1872) LR 5 HL 656, 674 per Lord Westbury.

27 *Couthard v Disco Mix Ltd* [2001] 1 WLR 707, 730, referred to with approval in *Duke Group Ltd (Liq) v Alamain Investments Ltd* (2003) 232 LSJS 58, [130] per Doyle CJ. See also *Cia de Seguros Imperio v Heath (REBX) Ltd* [2001] 1 WLR 112.

28 P Handford, *Limitation of Actions: The Laws of Australia* (2nd ed, 2007), 61 [5.10.280]
29 Spry, *Equitable Remedies* (6th ed, 2001), 419, quoted with approval in *Baker v Duke Group Ltd (Liq)* (2005) 91 SASR 167, [83] per Perry J, Duggan and White JJ agreeing.
30 *Hall v Burnside (No 4)* (2007) SASC 460, [38].
31 *Baker v Duke Group Ltd (Liq)* (2005) 91 SASR 167, [82]-[84] per Perry J, Duggan and White JJ agreeing.
32 *Hall v Burnside (No 9)* [2008] SASR 361.
33 [2010] SASC 206 (unreported, Kourakis J, 9 July 2010).
34 *Tavitian v Commissioner of Highways* [2010] SASC 206 (unreported, Kourakis J, 9 July 2010), [53].
35 The equivalent provisions in the other Australian jurisdictions are collected in R Meagher, D Heydon and M Leeming, *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies* (4th ed, 2002), 609 [19-025].
36 *Tavitian v Commissioner of Highways* [2010] SASC 206 (unreported, Kourakis J, 9 July 2010), [62] and [64]. A similar approach was taken in *Hall v Burnside (No 9)* [2008] SASR 361, [69] per Doyle CJ.
37 *Tavitian v Commissioner of Highways* [2010] SASC 206 (unreported, Kourakis J, 9 July 2010), [80] and [84].
38 This question was addressed at some length in paragraphs [13]-[61] of the reasons of Justice Kourakis in the matter of *Tavitian v Commissioner of Highways* [2010] SASC 206 (unreported, Kourakis J, 9 July 2010). It is beyond the ambit of this paper to explore this question in any detail.

THE DATE OF EFFECT OF MERITS REVIEW DECISIONS IN SOCIAL SECURITY AND OTHER CONTEXTS

*David Hertzberg**

Introduction

Among the many contexts of merits review, delivering administrative justice is arguably no more important than in the social security context.[1] Social security recipients, in spite of their financial disadvantage and limited means to buy legal services, are persons whose ability to review decisions about their social security entitlements is regulated by extremely complex legislation.

A particular feature that distinguishes and complicates the social security review and appeal system is that decisions on review can take effect retrospectively in certain circumstances and not others. The rationale of social security review is, after all, to establish a person's entitlement to a payment which is paid in respect of the time that a person is eligible[2] for one. The fact that time passes between an original decision and its review poses an issue of specific interest for social security. On review, the social security law must answer two quite separate questions: firstly, whether the decision under review is correct (or, in some cases, preferable); and, secondly, whether the effect of the new decision, if there is one, can be backdated to the time of the decision under review or another time. The answer to this second question can result in arrears being payable or can establish the quantum of an overpayment. This is the case even though the immediate effect of a decision on appeal from the Social Security Appeals Tribunal ('SSAT') to the Administrative Appeals Tribunal ('AAT') can be stayed[3] or in some cases payment made "pending review".[4]

In spite of the central importance of the time rules or "date of effect rules", which regulate whether a decision made on review can take effect in the past, there has been almost nothing publicly written about them and possibly less understood of how they work or if they do. In three of the most comprehensive Commonwealth reviews of social security review and appeal arrangements in the last 15 years—one instigated by the Department of Education, Employment and Workplace Relations in 2007,[5] one by the Australian National Audit Office, looking at Centrelink processes, published in 2005[6] and the other by, the then, Department of Social Security in 1997[7]—the topic of the date of effect rules was not specifically mentioned.[8]

In non-government instigated commentary on and criticism of the review and appeal system, the date of effect rules also tend to avoid specific mention, with the focus on delays in decision making,[9] costs[10] and the general complexity of the social security review and appeal structure.[11]

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A lack of specific focus on date of effect rules is probably due to:

(a) their complexity and opacity;

(b) an assumption that they are somehow mechanical and therefore predictable in their operation; and

(c) the fact that they appear to, more or less, *work*.

This paper will discuss the date of effect rules not only because they justify some overdue attention, but also because they displace some administrative law presumptions about how merits review works and what it is. In so doing, I wish to outline some of the key areas of the law dictating when social security decisions on review take effect, to begin a discussion:

(a) on whether the rules could be simplified and made more accessible;

(b) to highlight some different approaches tribunals and courts have taken in relation to them; and

(c) on ways in which they could work more rather than less.

What merits review is and does

What is merits review? The answer usually given is deceptively simple; deceptive because it is not exactly true. The answer given is, of course, that a tribunal (or a person conducting internal review) stands in the shoes of the original decision maker. After all, provisions relating to the powers of merits review tribunals, whether they be (in relation to the AAT) in the *Administrative Appeals Tribunal Act 1975* ('AAT Act') or other legislation establishing merits review tribunals, such as the *Migration Act 1958* (which establishes and provides rules about the operation of the Migration Review Tribunal ('MRT') and the Refugee Review Tribunal ('RRT')) or the *Social Security (Administration) Act 1999* (which establishes and provides rules about the SSAT), certainly suggest that a tribunal stands in pre-loved shoes.

Section 43 of the AAT Act states that "the Tribunal may exercise all the powers and discretions that are conferred by any relevant enactment on the person who made the decision [....]". Similar provision is made in relation to the SSAT at section 151 of the *Social Security (Administration) Act 1999* and, in relation to the MRT, section 349 of the *Migration Act 1958* provides that it may "exercise all the powers and discretions that are conferred by this Act on the person who made the decision". Equivalent provision is found at section 415 in relation to the RRT.

These provisions are about powers. However, having the same powers as the original decision maker does not mean that a tribunal, on review, stands in *exactly* their shoes.

A tribunal can have regard to evidence not considered by the original decision maker.[12] It can stand in shoes that *should have* been stood in or *would have* if material not available had been. In some cases, as was established recently in the High Court decision in *Shi v Migration Agents Registration Authority* [2008] HCA 31; 248 ALR 390 (discussed further towards the end of this paper), a tribunal may be able to have regard to facts that postdate the decision on review.

Outside the social security context

Outside the social security context, there is rare uncertainty about when a decision on review, even if new evidence is considered, is to have effect. For example, in the freedom of information jurisdiction, a decision by the AAT to release documents exempted by the

original decision maker is unlikely to raise questions about what point in time the new decision is to have effect.

Subsection 43(6) of the AAT Act, the only specific rule in it that relates to "date of effect", provides:

> A decision of a person as varied by the Tribunal, or a decision made by the Tribunal in substitution for the decision of a person, shall, for all purposes (other than the purposes of applications to the Tribunal for a review or of appeals in accordance with section 44), be deemed to be a decision of that person and, upon the coming into operation of the decision of the Tribunal, unless the Tribunal otherwise orders, has effect, or shall be deemed to have had effect, on and from the day on which the decision under review has or had effect.

Subsection 43(6) of the AAT Act appears as a very simple time rule. If a new decision is made (whether varying or setting aside the original decision) the tribunal's decision has effect from the time of the decision under review, even if years have passed since that earlier decision was made.

Under this provision, where the AAT affirms a decision on review, there is no new decision; the decision reviewed remains intact.[13] The original decision maker's shoes, having been temporarily borrowed by the AAT, are returned to their former feet (see in particular *Re Brian Lawlor Automotive Pty Ltd and Collector of Customs (NSW)* (1978) 1 ALD 167 at 175). However, when a decision is varied or set aside, the decision of the tribunal is said to replace the decision under review (or in the case where the tribunal directs the decision maker to remake a decision in accordance with law, the decision as thus remade effectively replaces the decision).

In a migration case on appeal from the AAT to the Federal Court, *Al Tekriti v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCA 772 (at [19]), Mansfield J said, in discussing the general effect of subsection 43(6) of the AAT Act, that:

> Upon the AAT's decision coming into operation, it has effect or is deemed to have effect on and from the day of the decision under review. In the present matter, the effect of s 43(6) appears to be that the AAT decision of 29 June 2001 (setting aside the decision of the delegate of the respondent and determining that there are no grounds under Art 1F of the Convention to refuse to grant a protection visa to the applicant) has and is deemed to take effect on and from 22 September 2000. In effect, as a result of the AAT decision there is no decision on 22 September 2000 refusing the applicant a protection visa.

That a new decision, as made by a tribunal on review, effectively results in the original decision being nullified (in the sense of it being rendered no decision at all upon a tribunal setting it aside) is, in a sense, one way of paraphrasing the familiar statement in *Drake v Minister for Immigration and Ethnic Affairs* (1979) 46 FLR 409 at 419 that a tribunal makes the correct or preferable decision or of restating the principle that a tribunal offers "*de novo*" review (for example, Merkel J in *Otter Gold Mines Ltd v Australian Securities Commission* (1997) 26 AAR 99 at 106.

A potential "problem"[14] with the rule in subsection 43(6) has been confronted where a decision, which has been "put into effect" is subsequently set aside by the AAT. The "problem" can arise if the decision originally made was relied on and another decision made, by operation of law in reliance upon it.

In *Lesi v Minister for Immigration and Multicultural and Indigenous Affairs* (S672 of 2003) and (S424 of 2002) (2003) 203 ALR 420 *('Lesi')* (another migration matter), the Full Federal Court considered circumstances which, according to the court, "appear[ed] a little curious". In that case the appellant held a permanent residence visa at the time a deportation order was made deporting him from Australia. The decision to deport was the decision on review

at the AAT. The appellant's visa, as a result of the deportation order, was cancelled by operation of the *Migration Act 1958*, which stated that a visa ceased to have effect upon its holder's deportation.

The deportation order, on review, was set aside. A question arose as to whether the permanent residence visa could be reinstated or was deemed to have remained in force: could the date of effect rule in the AAT Act convince the Full Federal Court of a "statutory fiction"[15] that the visa decision, having been made on a basis that no longer existed as a result of the backdating of the effect of the AAT decision, was effectively undone?

In finding a way to reinstate the visa, the Full Federal Court chose between two possible interpretations of subsection 43(6) in order to avoid an "obvious injustice":

> On the one hand, there are obviously strong reasons of principle why the legislature would not intend to visit upon the appellant the consequence of losing his entitlement to remain permanently in Australia based upon the implementation of a deportation order which, now, has been set aside. Nor could it readily be taken to intend that, by reason of the implementation of a deportation order which has been set aside, the appellant is now ineligible to be granted a visa by reason of his deportation. On the other hand it cannot have been intended to render invalid or unlawful a deportation order that was validly and lawfully made and implemented prior to it being set aside primarily for reasons that arose post-implementation.[16]

In choosing the earlier option, the Court effectively "revived" the status of the visa. The applicant was returned to circumstances as they existed prior to the deportation order. The Court said of the provision in the *Migration Act 1958* that had operated to cancel the visa:

> […] its operation is spent and the permanent residence visa reserves its effectiveness. The entitlements of the appellant under the permanent residence visa revived upon the making of the tribunal's decision.[17]

The Social security context

The social security law works differently. Court or tribunal decisions which have attempted to apply the "revival" approach taken in *Lesi* have been essentially overruled or specifically addressed by amending legislation. For example, in the now relatively old Full Federal Court decision in *Secretary, Department of Social Security v O'Connell* (1992) 38 FCR 540; 110 ALR 627 *('O'Connell')*, the respondent's payment was cancelled and she had failed to appeal to the Secretary against the cancellation decision within three months.

The Full Federal Court held that the cancellation was void "*ab initio*" and that the original decision to grant the entitlement was revived so as to put the respondent in the same position as if the cancellation decision had not been made. As a result, full arrears were payable and such arrears were held not to be limited by date of effect rules.

The Full Court approved of the following passage of the single Judge below:

> What is in my opinion important is to recognise that a decision to set aside a decision to cancel a family allowance has its effect when it comes into operation. It makes legally inoperative the decision which it sets aside when it is made, and once the January decision to cancel the allowance ceased to have legal effect there was revived Mrs O'Connell's legal entitlement to receive payment of family allowance payable on each family allowance pay day falling after the cancellation, until some disentitling event or act in the law should supervene.[18]

In response to this decision, the Government introduced legislation, the *Social Security Amendment Act (No. 2) 1993* which specifically addressed and overturned the decision in *O'Connell*. The new provision[19] provided that if:

- the Secretary makes a decision ("the first decision") to grant a social security payment or pay it at a particular rate and the Secretary subsequently cancels the payment or reduces the rate ("the second decision); and

- notice of the second decision is given to the person; and

- the person applies for review of the second decision more than 13 weeks after the notice is given; and

- a further decision (the "review decision") is made by the Secretary, an authorised review officer, the Social Security Appeals Tribunal or the Administrative Appeals Tribunal; and

- the review decision sets aside the second decision; then

- *the second decision does not become void from the time when it was made and the mere setting aside of the second decision does not of itself revive the first decision*.

The Explanatory Memorandum ('EM') to the Bill[20] stated that "[n]ew section 1243A is an express provision contrary to the general administrative law proposition that, if a statutory decision is set aside *ab initio*, the parties are placed in the position that they would have occupied if the adverse decision had never been made".

In fact, the new provision did not establish a shift in social security from the "general law proposition" that a decision, once set aside, revives the circumstances that existed prior to the decision that was set aside. The new legislation merely, as clarified in the EM, "maintained" "Government policy" on "arrears payments".[21] The social security law, since the advent of the date of effect rules, had always intended to treat decisions made on review as not necessarily reviving earlier circumstances.

In short, in the social security context, a decision to set aside (or vary) does not, of itself, nullify the original decision. In particular, if the applicable date of effect rule does not allow a decision to be backdated, or not backdated all the way to the date of the decision on review, the decision on review continues to have "effect" until the new decision has "effect".[22] This means that a wrong decision can remain effective until the new decision comes into effect.

For decisions in other administrative contexts, such as the decision in *Lesi*, when a decision is set aside, doing so does not entail a new decision so much as it entails undoing the earlier decision. The social security law effectively requires a reviewer, including a tribunal, to make a new decision, settle its timing and, therefore, the period during which the faulty decision can continue to have effect.

The Social security date of effect rules

Very simply, there are two basic situations in which a date of effect rule can affect the amount of money a social security recipient is retrospectively entitled to:

(1) When the decision made on review is more "favourable" than the original decision. In this case arrears may be payable.[23]

(2) When the decision on review is "adverse". In this case, there may be a debt.

While the general principle is clear, the date of effect rules in the social security law are lengthy, complex and have been approached in some cases inconsistently by tribunals, undoubtedly because of this complexity.

This complexity is partly due to the numerous stages of review available to social security recipients. Once an original decision is made, a person affected by that decision (or Centrelink on its own motion) may ask for the original decision maker to review that decision. If a person is still unhappy with the decision as reconsidered by the original decision maker, a person can ask an Authorised Review Officer within Centrelink to conduct a full merits review of the decision.[24]

Following this (and only once these stages have been exhausted), further merits review is possible at the SSAT[25] and, thereafter, at the AAT.[26] After this stage, as is the case for any decision that has been to the AAT, merits review is exhausted and the only further avenue of appeal lies in review on a question of law at the Federal Court.[27]

There has been some criticism of this system and, in particular, of the lack of awareness of the difference between review at the original decision maker level and at the Authorised Review Officer level.[28] There has also been suggestion of limiting appeals to the AAT by leave of the tribunal.[29] Partly, the complicated and multi-layered nature of the social security review and appeal structure reflects the very nature of the pressures placed upon it as a result of the vast number of social security recipients in Australia and the fact that decisions are made in respect of each of them relatively frequently.

Given the elaborate review structure, there are a relatively large number of possible merits review avenues a particular decision could take. For instance, an original decision maker could affirm his/her own decision, only to see it set aside by an Authorised Review Officer, subsequently varied by the SSAT and then, the decision as varied, completely set aside at the AAT.

In this context, the social security law provides for date of effect rules which dictate the date of effect of new decisions made at the Authorised Review Officer stage and separate rules for new decisions made at the SSAT stage. There are no specific rules for when a new decision of an original decision maker takes effect (if he/she changes his/her own decision). There is also no provision in the social security law dealing with the date of effect of AAT decisions. However, the AAT has held relatively consistently that the provisions applicable to the SSAT and Authorised Review Officer stages, themselves provide the basis for reviewable decisions and, therefore, are effectively able to dictate the merits review function of the AAT, which, after all, is said to stand in their shoes.[30] In support of this approach, the AAT has also held that, as a matter of statutory construction, the more specific date of effect rules in the social security law effectively override the more general date of effect provision at section 43 of the AAT Act. In other words, subsection 43(6) of the AAT Act (as, for example, applied in *Lesi*) appears not to operate when the AAT is exercising its social security jurisdiction.[31] Further, there has been suggestion that the power to "otherwise order" provided by subsection 43(6) of the *Administrative Appeals Tribunal Act 1975*, effectively provides enough flexibility for this approach.[32]

Given this, it is possible to provide an overview of all of the operative social security date of effect rules by looking at those expressed to be applicable at the SSAT and Authorised Review Officer level.

In sum, the date of effect rules that apply to "favourable determinations" (decisions favourable to the person affected involving a rate increase or a resumption of payment after a suspension) are based on a number of variables, the most central of which are set out below:[33]

- whether a person has received notice of the decision sought to be varied or set aside (if a person does receive notice, arrears can only be paid if he/she requests review in time);

- whether the person has in fact requested review and, if so, whether this has been done within thirteen weeks;

- whether the Secretary (Centrelink) instigates the review on her or his own motion (in this case, arrears can only be paid back to the date the review began);

- whether the decision to increase a rate is as a result of the operation of the provisions requiring indexation of rates of payment;[34]

- whether the decision to which the date of effect rule applies is made as a result of the person informing Centrelink of an "event or change of circumstances";

- whether the decision to which the date of effect rule applies is made as a result of a person providing a "statement" (a term which is not defined and is difficult to distinguish from the provision of information about an "event" or change of circumstances).

In most cases before the AAT involving a question of how a date of effect rule is to be applied, the person whose payment, or its rate, is at issue generally argues that he/she was not given notice of the decision, or that in fact review had been requested in time. This is because if a person does not request review of a decision of which he/she was notified in time, arrears are generally not payable back to the date of the faulty decision. There is a relative paucity of consideration at the AAT level, or at the Federal Court, of the meaning and content of some of the other variables described above.

For the date of effect rules that apply to "adverse determinations" (rate reductions or cancellations or suspensions), variables include:[35]

- whether the new decision was made after a person informed of an event or change of circumstances or whether the person provided a "statement";

- whether or not an instalment of the relevant payment is made after the occurrence of the event or change and before the determination is made;

- whether or not the decision was made because the person earned "employment income" or "ordinary income";

- whether the decision to reduce a rate was made because of arrears of compensation;

- whether or not the person is of pension age;

- whether or not the person contravened the social security law leading to a delay; and

- whether or not the person provided a false or misleading statement.

As discussed further below, these "adverse determination" rules have been the subject of relative disinterest by tribunals.

Notice and requesting review

The general policy behind the most disputed date of effect rules is, more or less, clear: generally, if a person requests review of a decision he/she does not agree with and, as a result of that request, the rate is increased (a new decision is made on review), the person can receive arrears back to the date of the decision reviewed if notice of that decision had been received and review requested in time. If a person does not request review in time, arrears can only generally be obtained to the date of the decision on review if the person can successfully argue that he/she was not *notified* of that decision.

What notice is and what a review is have been the most tested questions in this context. What constitutes good notice for this purpose is not defined in the social security law. It has therefore been left to courts and tribunals to establish jurisprudence on this point.

In a recent decision of the AAT, Justice Downes noted that adequate notice is not always given, or held to be: "for the record, there have been at least 19 Tribunal decisions on adequacy of notice since 2000. Of those, 12 have decided that Centrelink letters are adequate notices".[36]

Relevant decisions indicate that adequate notice for this purpose does not need to provide reasons for the decision (as is required, for example, in relation to decisions under an enactment reviewable to a question of law under the *Administrative Decisions (Judicial Review) Act 1977*).[37] Notice, however, must contain enough information for it to be clear that a decision has been made; enough information for just an inference to be formed is not good enough.[38]

Notice for this purpose, it has also been held, does not need to provide sufficient information that would satisfy a decision maker's obligation to provide procedural fairness.[39] Further, it is generally accepted that the test of whether a person has been notified that a decision has been made is objective, rather than subjective. In other words, a person's actual knowledge that a decision has been made is not at issue in such cases.[40]

In *Secretary, Department of Families, Community Services and Indigenous Affairs and Walshe* [2007] AATA 1861 (16 October 2007) Justice Downes suggested that in order for notices to adequately discharge their function, at least they should set out:

- that a decision has been made changing the recipient's pension entitlement;
- the nature of the change, be it increase, decrease, suspension or cancellation;
- the date the change takes effect;
- the amount of the old entitlement; and
- the amount of the new entitlement.[41]

Another variable which has received the attention of courts and tribunals concerns what constitutes a request for review (generally because only if a request for review has been made within 13 weeks of notice can full arrears be paid).

Again, what constitutes a "request for review" is not defined in legislation. Tribunals and courts have, in the main, accepted that the concept is to be construed quite broadly: to include "repeated enquiries and expression of concern"[42]; such that "the magic word 'review'" need not be used;[43] and to encompass a "query" about a rate.[44]

Curiously, while decisions by original decision makers to limit arrears (that is, to refuse to backdate the effect of a decision favourable to a person's rate of payment) are frequently challenged, there has been almost complete disinterest about the circumstances under which an "adverse" decision (a decision to reduce a rate of payment or a decision to cancel a rate) can be backdated.[45] This would appear (that is, it is only apparent because such reasoning is not to be found on the face of tribunal decisions involved) to be because tribunals effectively read the provisions which dictate the circumstances under which debts can arise as not being limited by rules relating to when adverse decisions can be backdated.

The Social security date of effect rules and recent developments in the law of merits review

The decision of the High Court in *Shi v Migration Agents Registration Authority* [2008] HCA 31; 248 ALR 390 *('Shi')* is a significant recent development in the law of merits review. In that case, the High Court held that evidence of facts that occurred between the decision on review and the date of review of the decision by the AAT could be considered in certain circumstances. The implications of the decision, however, go further than just addressing what constitutes acceptable evidence at the AAT. The decision has been said to indicate "the scope and extent of the Administrative Appeals Tribunal's review functions".[46] Dale Watson, of the Australian Government Solicitor, has described that case as one in which:

> The High Court was asked to determine what is really meant when the task of the AAT is referred to as coming to the 'correct and preferable decision' and unanimously held that generally the AAT was not restricted in any temporal way to its consideration of evidence in determining what is the correct and preferable decision.[47]

The case is worth considering in the context of social security date of effect rules because the issue of when decisions have effect is likely to influence the extent to which *Shi* is accepted as applicable in the social security context.

In short, *Shi* was an immigration case in which the decision on review was a decision to cancel a migration agent's registration based on the conduct of the agent. Part of the evidence provided to the AAT related to the agent's improved conduct since the time of the decision under review.

In the High Court's decision, particular consideration was given to a decision of the Federal Court in a social security matter, *Freeman v Secretary, Department of Social Security* (1988) 19 FCR 342 *('Freeman')*. In that case, the Federal Court had essentially held that the AAT could not have regard to facts which post-dated the decision on review, given the nature of social security entitlement. The decision at issue in *Freeman* was a decision to cancel a payment and the court's reasoning was effectively that, if facts postdating the cancellation decision could be taken into account (in circumstances where such facts, if they had been contemporaneous to the decision being made would have led to the decision not being made) the Tribunal would be assessing a new entitlement to payment rather than reviewing the decision to cancel.[48]

In *Shi* (in particular in the judgment of Kirby J), the High Court held that the nature of the decision on review was such as to allow new evidence (that is evidence of facts post-dating the decision, not necessarily evidence not put before the decision maker) to be taken into account. However, the High Court cautioned that the particular "nature" of the decision under review may not suit new evidence:

> If, for example, under federal legislation, a pension is payable at fortnightly rests, by reference to particular qualifications that may themselves alter over time, a "review" of an administrative "decision" to grant or refuse such a pension, by reference to statutory qualifications, may necessarily be limited to the facts at the particular time of the decision.[49]

Of course if a decision is replaced by a favourable determination that can take effect retrospectively, it would be strange for a person to be able to benefit from evidence of new circumstances post-dating the decision under review. However, this would not appear necessarily to be the case when the applicable date of effect rule does not allow for a decision to be backdated. That is, if the operative date of effect rule allows for a new decision on review to take effect only prospectively, it is difficult to see why the approach taken in *Shi* could not be adopted. How tribunals and courts approach this issue in the social security jurisdiction remains to be seen.

Two social security cases postdating the decision in *Shi* are already sending some mixed messages. In *Baum and Secretary, Department of Education, Employment and Workplace Relations* [2008] AATA 1066 (28 November 2008), the AAT said, in reliance on Kirby J's comment given above in *Shi*, that it could not take into account evidence of the applicant's entitlement to disability support pension that related to a period post-dating the decision on review:

> […] it seems to me that the inherent nature of the decision and the statutory context in which it is made confine me to evidence that relates to Mr Baum's condition, impairment and work capacity during that 13 week period. That does not mean that all of the evidence in the form of reports, assessments or records had to be generated in that period. What it means is that they must relate to that period.[50]

However, in *Hood v Secretary, Department of Education, Employment and Workplace Relations* [2010] FCA 555, in which the applicant had appealed to the Federal Court on a question of law from a decision of the AAT which appeared to take into account facts contemporaneous with the AAT's decision, the Federal Court indicated that this approach was supported by *Shi*, notwithstanding that the decision was made in the context of entitlement to a social security payment. After considering *Shi*, Ryan J stated:

> It is therefore beyond question, in my view, that the Tribunal acted correctly in approaching the matter afresh, in the circumstances which obtained when it came to make the decision. Nothing in s 94 of the *Social Security Act 1991* (Cth) ("the SSA") [that is, the provision setting out the qualification criteria for disability support pension] requires a different outcome.[51]

Conclusion

Among complex rules for social security entitlement and review, the date of effect rules offer further complexity and are almost certainly little understood by persons affected by them. In particular, it is not yet clear whether the High Court decision in *Shi* will be applied only in cases where the decision on review cannot be backdated to an original decision, that is, where it takes effect only prospectively.

However, notwithstanding the issues raised by *Shi*, without specific legislative simplification and clarification, it is likely that the date of effect rules will continue to develop in their application through jurisprudence effectively reading between the lines on issues such as notice, what constitutes a request for review and whether debt decisions are limited by such rules.

More generally, because the date of effect rules distinguish the nature of merits review in the social security context from other jurisdictions, there may be a continued divergence in the approach the AAT takes to social security matters as opposed to review in other contexts.

Endnotes

1 Similar issues arise, in some cases, to payments made under the family assistance law (under the *A New Tax System (Family Assistance) Act 1999* and the *A New Tax System (Family Assistance) (Administration) Act 1999*). However discussion of family assistance is beyond the scope of this paper.

2 While this statement is true of periodic payments, there are some limited "one-off" payments provided for by the social security law that this statement does not apply to. I am using the term "eligible" here to describe the circumstance in which a person is *qualified* for a payment and it is *payable* to them—both emphasised terms being the terms used in social security legislation.
3 Under section 41 of the *Administrative Appeals Tribunal Act 1975*.
4 See section 131 of the *Social Security (Administration) Act 1999* which allows for a payment to made to a person after an "adverse decision" (that is, cancellation, suspension or rate reduction) up until the time of a decision of an Authorised Review Officer if the decision depends on the exercise of a discretion or the holding of an opinion by the decision maker. Similar provision exists in relation to decisions appealed from the SSAT to the AAT at section 145.
5 Instigated by the then Minister for Employment Participation, the Hon Brendan O'Connor MP, *Report of Review of Department of Education, Employment and Workplace Relations Social Security Appeals and Litigation Arrangements*, March 2008, available at http://www.workplace.gov.au/NR/rdonlyres/768E8827-63E3-46BF-846F-7A97C542223E/0/Report_of_Review.pdf.
6 Australian National Audit Office, *Centrelink's review and appeals system*, Canberra, Audit Report No. 35, 2004-05.
7 Margaret Guilfoyle, *Review of the Social Security Review and Appeals System: A Report to the Minister for Social Security*, August 1997.
8 The March 2008 *Report* (note 5) does, however, discuss the importance of implementing a decision immediately unless a stay is obtained (at 5).
9 Welfare Rights Unit, "Social Security Appeals: Practice and the Law", *Red Tape*, May 2006.
10 Debra Jopson and Adele Horin, "Millions lost in fierce legal war on the poor" in the *Sydney Morning Herald*, December 10 2007 available at http://www.smh.com.au/news/national/millions-lost-in-war-on-the-poor/2007/12/09/1197135289361.html?page=fullpage#contentSwap2.
11 See, for example, Lucy Mayes and Phillip A Swain, "Continuing debates as to social security appeals in Australia and Britain: Dancing to the same tune?", *Australian Journal of Administrative Law*, vol. 12, 2005 at 185.
12 Merkel J in *Otter Gold Mines Ltd v Australian Securities Commission* (1997) 26 AAR 99 at 106: "The AAT hears the matter de novo in light of the evidence placed before it".
13 See, for example, discussion in *Mulhallen and Department of Family and Community Services* [2001] AATA 80 (7 February 2001) at [29]: "The SSAT 'affirmed' the ARO [that is, the Authorised Review Officer in Centrelink] decision not to 'pay arrears' of JSA to the applicant, it did not vary or set aside the decision (paragraph 1255(4)(c)) (paragraph 6 above). The decision before the Tribunal [that is, the AAT] is therefore the decision of the ARO as affirmed."
14 See discussion of this provision by Dennis Pearce, *Administrative Appeals Tribunal*, 2nd ed., LexisNexis Butterworths, 2007 at 203.
15 See North J's discussion of *Lesi* in *Secretary, Department of Health and Ageing v Marnotta Pty Ltd* [2005] FCA 1395 at [31].
16 At [47].
17 At [55].
18 At 638.
19 Then section 1243A of the *Social Security Act 1991*, and later numbered as section 137 of the *Social Security (Administration) Act 1999*.
20 Social Security Amendment Bill (No. 2) 1993.
21 See the "Summary of proposed changes" to Part 5 of the Bill in the EM to the Bill.
22 This principle is enshrined in the social security law at section 123 of the *Social Security (Administration) Act 1999*.
23 See Subdivision B, Division 9 of Part 3 to the *Social Security (Administration) Act 1999*.
24 Section 129 of the *Social Security (Administration) Act 1999*. The Secretary can also conduct an own motion review without a request under section 126. See Australian National Audit Office, *Centrelink's review and appeals system*, Canberra, Audit Report No. 35, 2004-05 for a very useful discussion of perceived public uncertainty around the difference between review at the Authorised Review Officer level and the original decision maker level.
25 An application can be made under section 142 of the *Social Security (Administration) Act 1999*.
26 Section 179 of the *Social Security (Administration) Act 1999*.
27 Section 44 of the *Administrative Appeals Tribunal Act 1975*.
28 See, most particularly, Welfare Rights Unit, "Social Security Appeals: Practice and the Law", *Red Tape*, May 2006 at 3. See also Australian National Audit Office, *Centrelink's review and appeals system* (2005) Canberra, Audit Report No. 35 2004-05, which discusses confusion around these two review levels.
29 See Margaret Guilfoyle, *Review of the Social Security Review and Appeals System: A Report to the Minister for Social Security*, August 1997.
30 See *Yachmenikova and Secretary, Department of Employment and Workplace Relations* [2006] AATA 596 (5 July 2006) in which the AAT said at [19]: "Under s179 of the [*Social Security (Administration) Act 1999*] application may be made to the Tribunal for review of the Social Security Appeals Tribunal decision. In the case of such a review, the decision that is before the tribunal is (in the present case) the decision of the ARO as affirmed by the Social Security Appeals Tribunal. For the purposes of review, the Tribunal exercises all of the powers and discretions conferred on the person who made the decision (s43, AAT Act)

and does not exercise judicial powers or power at large. That being so the Tribunal does not have power or discretion to waive the effect of s152 concerning the date of effect of the Social Security Appeals Tribunal decision. The Tribunal may either affirm, vary or set aside that decision. Even if the Tribunal decided to set aside the Social Security Appeals Tribunal decision in a manner favourable to Ms Yachmenikova, subs152(4) would still apply and no amount of Newstart Allowance would be payable to her prior to 23 December 2005. That means the present application, even if successful, could have no practical effect."

31 See *Secretary, Department of Employment and Workplace Relations and Mitchell* [2006] AATA 804 at [58] and *Vine v Secretary, Department of Families, Housing, Community Services and Indigenous Affairs* [2010] AATA 135 (24 February 2010) at [17].

32 See *Re Thiagarajan and Secretary, Department of Employment and Workplace Relations* (2007) ALD 351 at [62] and *Giorgi and Secretary, Department of Families, Housing, Community Services and Indigenous Affairs* [2010] AATA 65 (1 February 2010)

33 See section 109 of the *Social Security (Administration) Act 1999*, which applies to favourable determinations made as a result of a request for review and section 110 which applies to other "favourable determinations". There are also more specific date of effect rules applicable to specific circumstances, such as the resumption of certain payments after "non-compliance" (section 110A).

34 See section 111 of the *Social Security(Administration) Act 1999* and subsection 109(7).

35 See section 118 of the *Social Security (Administration) Act 1999*. Specific rules also apply in relation to carer payment under section 120 and in relation to concession cards (section 122).

36 *Secretary , Department of Families, Community Services and Indigenous Affairs and Walshe* [2007] AATA 1861 (16 October 2007) at [48].

37 As able to be requested by a person under section 13 of the *Administrative Decisions (Judicial Review) Act 1977*. Note that a decision sought to be reviewed under social security law would still remain a "decision under an enactment for this purpose"; however, the jurisdiction of the Federal Court is rarely sought in social security cases because of the availability of merits review through tribunals and as a result of section 10 of the *Administrative Decisions (Judicial Review) Act 1977*.

38 *Austin v Secretary Department of Family and Community Services* (1999) 92 FCR 138; 57 ALD 330; 29 AAR 528; 3(10) SSR 159. See also *Secretary Department of Family and Community Services v Rogers* (2000) 65 ALD 185; 32 AAR 52, in which Cooper J referred to the importance of "the fact that a decision has been made and the content of the decision" (at [33]).

39 In *Rogers* (*supra*), Cooper J stated (at [33] and [34]): "The subsections make no reference to any requirement that the notice contain reasons or sufficient information for the recipient of the notice to understand the main reason for the decision and so be in a position to know whether or not to exercise the person's right to seek a review. Nor, in my view, do any principles of procedural fairness require that such a requirement be read into the provisions of s 299. There is no general rule of the common law or principle of natural justice which requires reasons to be given for administrative decisions even though the decision may adversely affect the interests or defeat the legitimate or reasonable expectations of other persons: *Public Service Board of New South Wales v Osmond* (1986) 159 CLR 656 at 662. The right to reasons for a decision or information explaining the basis for an administrative decision, must be found, if at all, in the Act or some other statute."

40 See *Peura and Secretary, Department of Family and Community Services* [2003] AATA 1123 in which the Tribunal outlined its understanding of the law of notice (at [37]): the Tribunal should identify the decision of which notice is to be given; the letters should be construed objectively; the letters should be intelligible, that is they should inform the recipient of the making of the decision and the content of it; where the rate of pension is changed as a result of changed circumstances or the manner in which those circumstances are assessed, merely advising the recipient of the rate of his or her pension only constitutes advice of the effect of the decision; and the letters need not advise the reasons for the decision.

41 At [41].

42 *Secretary Department of Social Security and Trevisan* (1990) AATA 6581 at [18] see also *Secretary Department of Social Security and Marsh* (1996) AATA 10993 at [14] in which a person's worried phone call was accepted as a request for review.

43 *Frost and Secretary Department of Social Security* (1995) AATA 10360 at 10.

44 *Austin v Secretary Department of Family and Community Services* (1999) 92 FCR 138; 57 ALD 330; 29 AAR 528; 3(10) SSR 159 at [15].

45 See *Natale; Secretary, Department of Family and Community Services* [2003] AATA 717 (30 July 2003), for a rare exception.

46 Dale Watson, "The nature of review in the Administrative Appeals Tribunal: *Shi v MARA*", paper presented to the AGS Administrative Law Forum, 22 October 2008, available online at: http://www.ags.gov.au/publications/agspubs/papers/WATSON_Admin_law_2008.pdf.

47 At 1.

48 See 19 FCR 342 at 344-45.

49 Kirby J at [44].

50 At [48].

51 At [13].

REFORMING JUDICIAL REVIEW AT THE STATE LEVEL

Matthew Groves*

Introduction

Change is one of the few constant features of Australian administrative law. The tribunal system has been fashioned and refashioned in most jurisdictions. Freedom of information legislation has also been subject to regular review and reform. By contrast, the framework of judicial review appears to be static. The key features of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) ('the *ADJR Act*') have remained largely unchanged since their introduction, even though many parts of that Act have been reviewed and refined over the years. Similarly, the three jurisdictions that have adopted legislation modelled on the *ADJR Act* (Queensland, Tasmania and the ACT) have done little if anything to alter the key features of that scheme.[1] The quite different statutory mechanism of judicial review created by the *Administrative Law Act 1978* (Vic) has also remained largely untouched since its enactment more than 30 years ago. The four jurisdictions that have not enacted a statutory mechanism for judicial review (New South Wales, Western and South Australia and the Northern Territory) appear equally unlikely to adopt any significant change to their schemes of judicial review or to adopt a judicial review statute.

The apparently static nature of the various frameworks for judicial review raises several questions. Why are other elements of the administrative law scheme so much more likely to experience radical reform? Why has the federal *ADJR Act* model proved attractive to some States and Territories but not others? Does the existence of differing schemes for judicial review within our federal system have any effect on the substantive law of judicial review in Australia? Is uniformity on such issues desirable within a federal system?

This paper considers the current standing of judicial review at the State level. It examines the arguments for and against the adoption of the *ADJR Act* model by those jurisdictions that have not already done so. An important question that flows from this issue is whether the various statutory models for judicial review have focussed on procedural reform at the expense of any substantive reform. Another question, which has received virtually no consideration, is whether the States should even have a have a statutory vehicle for judicial review. The final section of this paper draws from the Canadian experience, where the combination of a federal system and a heritage of the English common law that has given rise to a more autonomous common law may appear similar to that of Australia. It is useful to rehearse some of the issues affecting the position of judicial review at the State level and how the federal nature of Australia's constitutional system has or may affect the development of judicial review at the State level.

The Commonwealth Constitution – guiding principle or cage?

Although there is considerable debate about the precise basis of judicial review at common law there seems little disagreement that, for much of its early history, judicial review was a fairly 'bottom up' affair in the sense that it did not begin with a single or coherent principle (a

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top down principle). It instead occurred on a case by case basis without clear reference to a single or guiding principle.[2] There also seems little disagreement that the same is true of the early phases of judicial review in Australia. It was transmitted as part of Australia's English legal heritage and occurred for many decades without any obvious recourse to a top down principle by which it might be guided or organised. This distinction between top down and bottom up legal reasoning is a simple one and can only be used when subject to many qualifications.[3] The main one is that even the most ardent 'bottom upper' must have some semblance of a theoretical basis, even if this only takes the form of an adherence to precedent.[4] The important point for present purposes is that judicial review evolved far ahead of any coherent justification for it. In this sense it was a classic bottom up affair.[5] The same may be said for the increasing influence of the Constitution over judicial review in Australia. While the Constitution was adopted long after judicial review had become entrenched in Australia, it also took a considerable time before the full potential effect of the Constitution became apparent upon judicial review in Australia.

In more recent times the Constitution has become a focal point of judicial review and is now clearly the dominant force in Australian administrative law. The growing influence of the Constitution is one consequence of the increased use of the original jurisdiction of the High Court that is entrenched in s75(v) but it is equally a consequence of the privative clauses that have sought to restrict the role of the High Court and other courts of federal jurisdiction. It is no small irony that successive legislative attempts to exclude judicial review have led to the emphatic assertion by the High Court of the entrenched nature of its supervisory position. An equally ironic point is that these repeated attempts to exclude or limit judicial review have provided the platform for a series of cases which have served to reinforce the central role of judicial review within our constitutional structure and, in turn, the role of the Constitution itself. This increased recourse to the Constitution has provided many occasions for the High Court and its observers to assert the central or fundamental role of the High Court and entrenched nature of the jurisdiction of the courts.[6]

Much less attention has been given to the longstanding structural limitations that accompany this entrenched jurisdiction. The most obvious structural limitation in the Constitution of the separation of powers doctrine, which is expressed partly in the text of the Constitution but has been given added force by the High Court's expansive approach to this doctrine. Sir Anthony Mason drew attention to some of the early indications of the possible constitutional influence when he explained that the Constitution provided 'a delineation of government powers rather than a charter of citizen's rights.'[7] This institutional emphasis on governmental structures provided a natural terrain for the 'strict and complete legalism' that has long been associated with Owen Dixon.[8] Mason suggested that this legalism laid the foundation for an important limitation on the constitutionally entrenched jurisdiction that the High Court has emphasised so stridently in recent times. Mason has argued that the various principles developed by the High Court, including its constitutionally protected jurisdiction located in s75(v) of the Constitution, are based upon and restricted by 'the limited Australian conception of content of judicial power' upon which the separation of powers doctrine is founded.[9]

The influence of the separation of powers doctrine is reinforced by s73 of the *Constitution*, which establishes the High Court of Australia as the ultimate Australian court of appeal in matters of both federal and state law. Leslie Zines has identified this provision as the 'unifying element in our judicial system.' [10] That conclusion is reinforced by the repeated statements from the High Court that there should be a single or uniform body of Australian common law, despite the various differences between jurisdictions that might arise as a consequence of our federal system.[11] In effect, the High Court appears to have reached a position by which it will countenance a level of difference between the Commonwealth and the States by reason of our federal structure but, at the same time, it will remain mindful that those differences should not develop in a way that might overturn the inherent connection between all Australian

jurisdictions that is established by the Constitution. There is, in essence, a federal constitutional leash upon the States.

That leash was tightened dramatically in *Kirk v Industrial Relations Commission of NSW ('Kirk')*.[12] In that case the High Court drew together several constitutional threads to hold that State Supreme Courts occupied a constitutionally recognised position which precluded State legislatures from enacting legislation that removed or narrowed core elements of the supervisory jurisdiction of State Supreme Courts. The reasoning of the High Court had several distinct but related parts. The first was the appellate jurisdiction invested in the High Court by s 73 of the Constitution. The Court held that this jurisdiction presumed the continued existence of the State Supreme Courts and also their continued ability to exercise functions which were, at the time of federation, accepted as essential features of State Supreme Courts. One such feature was the supervisory jurisdiction of State Supreme Courts, which provided 'the mechanism for the determination of the limits on the exercise of State executive and judicial power by persons other than the Supreme Court.'[13] The High Court also suggested that its own constitutional position at the peak of Australia's judicial system, recognised by s 71 of the Constitution, was relevant to the constitutional position of State courts.[14] It follows that this express constitutional recognition of the High Court cannot be undermined by State legislation that would deprive State Supreme Courts of original jurisdiction that would, in turn, deprive the High Court of its appellate jurisdiction. The High Court also made clear that Australia's judicial system was integrated at the constitutional level and also at common law. The now constitutionally entrenched supervisory jurisdiction of the State Supreme Courts was exercisable 'in the end' by the principles determined by the High Court.[15]

The High Court accepted that the States could enact legislation to limit or exclude the ability of State courts to review errors of law but only for errors not infected by jurisdictional error.[16] This possibility reinforces the close alignment that *Kirk* drew to judicial review at the State and federal level. The validity of legislation that narrows or excludes judicial review at the federal level has long been determined by reference to the distinction between jurisdictional and non-jurisdictional errors of law. Federal legislation can exclude judicial review of the latter but not the former. That is now the case at the State level. This alignment of federal and State law is not absolute. In other cases the High Court has made it clear that the separation of powers doctrine does not apply to the States with the same force as it does at the federal level, though it clearly has some application to the States. In recent times attention has gone to the incompatibility doctrine which prevents the States from enacting legislation which invests their courts with functions that might be incompatible with the exercise of federal judicial power. Although this doctrine has only been successfully invoked in a small number of cases,[17] it has provided the main focus in recent times for judicial consideration of the potential application of the federal separation of powers doctrine as a limiting factor on State courts.[18]

The recent focus on the incompatibility doctrine has distracted attention from the considerable variations in State and federal administrative law that the more limited application of the separation of powers doctrine at the State level has permitted to arise. The strongest examples have arisen in State tribunals, which are not subject to the same restrictions as those established by federal law.[19] Some State tribunals are empowered to make orders that may be enforced directly, in the same manner as is possible for courts.[20] At the federal level, it is clear that tribunals cannot be invested with such powers.[21] The grant of such powers to State tribunals reflects a trend in recent Australian administrative law which has received relatively little attention, which is the extent to which the limited application of the separation of powers doctrine to the States has been exploited by the States by legislation that invests State tribunals with functions that might be regarded, at least in the strict sense, as judicial in character.[22] The extent of the latitude that may be granted to State tribunals remains unsettled, though it is clear that for the near future some features of State tribunals will occupy the outer edges of their constitutional limits.[23]

Although the federal limits on State administrative tribunals may be relatively unexplored, the same is not true for State courts and their supervisory judicial review jurisdiction. The limited conception of judicial power that Mason traced to the influence of Owen Dixon has many modern adherents who have made clear that this conception of judicial power necessarily limits judicial review. Perhaps the most cited one was Sir Gerard Brennan. In *Attorney-General (NSW) v Quin ('Quin')*[24] Brennan J offered a conception of the judicial power, which in turn directly informed the nature and role of judicial review, which clearly echoed that of Owen Dixon. Brennan J explained:

> If it be right to say that the court's jurisdiction in judicial review goes no further than declaring and enforcing the law prescribing the limits and governing the exercise of power, the next question immediately arises: what is the law? And that question, of course, must be answered by the court itself. In giving its answer, the court needs to remember that the judicature is but one of the three co-ordinate branches of government and that the authority of the judicature is not derived from a superior capacity to balance the interests of the community against the interests of an individual. The repository of administrative power must often balance the interests of the public at large and the interests of minority groups or individuals. The courts are not equipped to evaluate the policy considerations which properly bear on such decisions, nor is the adversary system ideally suited to the doing of administrative justice: interests which are not represented must often be considered.[25]

The current Solicitor-General of Australia – Stephen Gageler SC – has described the reasoning of Brennan J as 'top down reasoning at the highest level.'[26] The reason, Gageler explained, is that:

> From the constitutional conception of the nature of judicial power, there is derived a single principle which then informs both the scope and content of judicial review. That single principle is the duty of the court to declare and enforce the law.[27]

The late Justice Selway thought that the issue was not so clear cut. He accepted that the Constitution provided 'the ultimate justification for judicial review and sets its parameters'.[28] But, he also suggested that the Constitution 'does not explain the detail' of the operation of judicial review. Selway reasoned:

> True it is that the constitutional context means that parliamentary intent as expressed in a statute has primacy over the common law; true it is that the constitutional context means that the courts cannot engage in merits review and are required to differentiate between 'jurisdictional errors' and 'non-jurisdictional errors'. But within these parameters there is still considerable room for debate…[29]

The extent to which there might be 'room for debate' about the nature and scope of judicial review, because it implies that the constitutional constraints upon judicial review which flow from the separation of power, may be more subtle than many believe. There are several cases which indicate that the latitude identified by Selway is largely illusory.

One is *Corporation of the City of Enfield v Development Assessment Commission ('Enfield')*.[30] In that case the High Court rejected the so-called *Chevron* doctrine[31] by which American courts accord considerable deference to the decisions of administrative agencies in the determination of jurisdictional facts. A majority of the High Court held that this doctrine of deference was fundamentally incompatible with the limitations that Australia's constitutional arrangements impose upon the executive and its agencies. Two points may be drawn from this conclusion for present purposes. First, the majority relied heavily upon the approach of Brennan J in the *Quin* case as explained above and the demarcation that this approach imposes between the roles of the executive and the courts.[32] The *Enfield* case concerned the constitutional limits upon the executive and its agencies, the High Court stressed that the similar considerations imposed corresponding limitations upon the courts. More particularly, the court affirmed that constitutional imperatives precluded the courts from entering issues that formed part of the merits of a decision. A separate but clearly related point may be made about the reach of these constitutional principles. *Enfield* was an appeal from a State court in

a case about a State institution, yet the reasoning of the High Court is clearly infused with the scent of federal constitutional doctrine. It may be argued, therefore, that *Enfield* reinforces two important underlying points of the reasoning adopted by Brennan in the *Quin* case, which is that the High Court does not appear willing to sanction significant doctrinal differences between State and federal administrative law.

Another decision which indicates that there is less latitude within the constitutional boundaries of judicial review than Selway suggested is *Lam's* case.[33] That case is partly known for the hesitant approach that several members of the High Court adopted towards the legitimate expectation; however, for present purposes the more relevant issue was the obvious disapproval the Court expressed for the more dynamic successor to the legitimate expectation that has developed in England in the form of substantive unfairness.[34] In short, the doctrine of substantive unfairness draws upon many of the elements of the legitimate expectation in its traditional guise, but extends those notions to the protection of a substantive rather than procedural expectation.[35] An interest or expectation that attracts the protection of the doctrine of substantive unfairness may be disappointed, but when English courts determine whether and how this might lawfully be done by a public official, they will 'have the task of weighing the requirements of fairness against any overriding interests relied upon' by the decision-maker.[36] Later English decisions have stressed that this doctrine does not enable the court to 'order the authority to honour its promise where to do so would assume the powers of the executive.' Judicial observance of this principle would counter criticisms that substantive unfairness veers towards merits review but it would not overcome the criticisms that the concept of abuse of power upon which substantive unfairness is based is so vague it does not bear close scrutiny. More particularly, the empty nature of the concept means it provides a vessel for judicial perceptions of 'right and wrong' rather than 'lawful or unlawful.'[37]

Gleeson CJ approached the issue of substantive unfairness as one that raised 'large questions as to the relations between the executive and judicial branches of government'. He concluded that the jurisdiction secured by s75(v) of the Constitution did not 'exist for the purpose of enabling the judicial branch of government to impose upon the executive branch its ideas of good administration'.[38] McHugh and Gummow JJ, with whom Callinan J agreed on this point,[39] acknowledged that the normative values considered by English courts in substantive unfairness and the wider rubric of abuse of power bore some parallel to those used in Australian law, particularly the 'values concerned in general terms with abuse of power by the executive and legislative branches of government in Australian constitutional law.' But they noted 'it would be going much further to give those values an immediate normative operation in applying the Constitution'.[40] This reasoning suggests that their Honours conception of the separation of powers doctrine precludes judges from undertaking the balancing exercise that English courts have devised to adjudge claims of substantive unfairness. Mason and Gummow JJ also made clear that Australia's constitutional structure demanded careful attention to s75(v) of the Constitution.[41] They reasoned:

> Considerations of the nature and scope of judicial review, whether by this Court under s 75 of the Constitution or otherwise, inevitably involve attention to the text and structure of the document in which s 75 appears. An aspect of the rule of law under the Constitution is that the role or function of Ch III courts does not extend to the performance of the legislative function of translating policy into statutory form or the executive function of administration.[42]

Several propositions may be extracted by the above discussion. One is that the limits that have been accepted as part of the Australian conception of the separation of powers doctrine are not simply structural in character. They limit not only the reach of the courts but the nature of the function that the courts may exercise within their constitutionally accepted role. In other words, the separation of powers doctrine limits both the institutions that may exercise supervisory review and the character of that jurisdiction. This influence clearly extends to the nature and content of grounds of judicial review, such as substantive unfairness, which appear

foreclosed in Australian law. If the High Court views matters of State judicial review through a federally tinted lens it is extremely unlikely that significant innovations in the grounds or content of judicial review could be fostered at the State level. At least not if those innovations depart in any significant way from federal constitutional principles.

Similar considerations would appear to preclude innovation in the judicial law of the States through an entirely different source, namely Bills or Charters of Rights. The *Charter of Human Rights and Responsibilities Act 2006* (Vic) ('*Victorian Charter of Rights*') draws heavily from the *Human Rights Act 1998* (UK).[43] The English Act has led to many dramatic changes in the judicial review law of that country, such as the adoption of a separate ground of proportionality and a more intense standard of review in cases affecting fundamental rights.[44] Paul Craig has argued that the overall effect of the English Act has been to provide a 'justification' for a more rights-based approach to administrative law including judicial review.[45] Craig and other English commentators who advocate this approach essentially seem to believe that the *Human Rights Act 1998* (Eng) provides a basis upon which the courts may call the parliament, the executive and administrative agencies to a stricter standard of judicial review. In simple terms, the *Human Rights Act* constrains the reach of government. At the same time, however, the advocates of this approach do not appear to believe that the human rights legislation imposes any equivalent or significant constraints upon the courts.[46] The changes to English judicial review need to be understood against this background. English judicial review law has expanded in recent years without any equivalent to the structural constraints imposed in Australia by the Commonwealth Constitution. The main consequence of this difference is that the adoption of human rights legislation in the States of Australia will not itself enable the transmission of many of the changes to judicial review that the English equivalent has fostered. Any such changes in Australia would almost certainly run aground on constitutional reefs.

The *ADJR Act* model and its limitations

The *ADJR Act* is the statutory vehicle for judicial review at the federal level. The Act introduced several important reforms to judicial review, such as a uniform test for standing, a general right to reasons for decisions to which the Act applied and a set of streamlined remedies. Although these reforms were arguably procedural in character there is little doubt that replacing many of the technical features of the common law process of judicial review with simplified statutory ones made judicial review much more accessible and therefore constituted a significant substantive reform.[47] The *ADJR Act* did not effect significant changes to the grounds of review and instead appeared to codify the existing common law grounds.[48] This interpretation of the *ADJR Act* was confirmed in several key cases of the 1980s such as *Kioa v West*.[49] In that case the High Court divided on the question of whether the duty to observe the requirements of procedural fairness arose from the common law or the statute that conferred the statutory power in issue. Despite this division on key aspects of natural justice, all members of the High Court appeared to adopt a similar view of the role of the *ADJR Act*. No member of the court suggested that questions on the scope of natural justice might be answered or even illuminated by the *ADJR Act*, even though the case at hand was commenced under that Act.[50] Mason J reached a similar view the following year in his influential judgment in *Minister for Aboriginal Affairs v Peko-Wallsend*[51] when he concluded that the grounds of unreasonableness and relevant/irrelevant considerations were 'substantially declaratory of the common law'.[52] These suggestions that the *ADJR Act* has codified the common law grounds of review in an almost literal manner have never been seriously questioned or revisited.

It is arguable that the architects of the Act had anticipated this problem by the inclusion of two novel and open ended grounds that enable review of a decision that is 'otherwise contrary to law' or is 'an exercise of power in a way that constitutes an abuse of the power.'[53] These grounds do not codify common law grounds of review but they are expressed in sufficiently

open terms that they could embrace new grounds that might arise at common law after the *ADJR Act* commenced. Aronson, Dyer and Groves suggest that the inclusion of these grounds 'acknowledges the common law's capacity to develop new grounds'[54] though those authors shy away from considering whether and how the Australian common law might do so. In my view, these grounds are so rarely used or even mentioned that they may fairly be described as 'dead letters.'[55]

The Law Reform Commission of Western Australia reached a different conclusion in its report on judicial review of 2002. When the Commission recommended the adoption of an *ADJR Act* model it doubted that the codification of grounds had limited the substantive law of judicial review. It also concluded that, even if codification might exert an inhibiting effect, that possibility could be overcome by the inclusion of a clause that enabled review of a decision on the ground that it was 'otherwise contrary to law.'[56] Although this proposed ground clearly mirrors one of the existing open ended grounds included in the *ADJR Act* it is useful to note that the Commission did not explain how the ground might work. In addition, the Commission provided no examples of principle or case law where this ground had been invoked.

Kirby J addressed the wider and possibly negative effect of the *ADJR Act* in *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002*.[57] While he acknowledged that the impact of the *ADJR Act* was 'overwhelmingly beneficial' his praise of the Act was not unqualified.[58] Kirby J noted that the introduction of the *ADJR Act* marked a point at which Australian law had moved away from that of England. His Honour reasoned that many of the innovations which had arisen in English judicial review had bypassed Australia since the introduction of the *ADJR Act*. 'The somewhat arrested development of Australian common law doctrine that followed' the *ADJR Act*, Kirby J concluded, 'reflects the large impact of the federal legislation on the direction and content of Australian administrative law more generally.'[59] These remarks imply an acceptance that the *ADJR Act* had provided many useful procedural changes which in themselves greatly reformed judicial review but, at the same time, the codification of the existing common law grounds of review introduced a new limitation. It could also be suggested that this aspect of the *ADJR Act* was amplified by its procedural reforms which, for the first decade or so of its operation, proved an attractive option for applicants.

It is useful to note that the Law Reform Commission of Western Australia had earlier rejected one of the central conclusions of Kirby J and Aronson, namely that the codification of grounds in the *ADJR Act* had likely stifled the development of the substantive principles of judicial review. When the WA Commission considered the adoption of an *ADJR Act* model it concluded, without a detailed discussion of the point, that the law had not been shackled by codification.[60] The Commission provided the example of review on the ground of denial of natural justice, noting that the *ADJR Act* did not define the rules of natural justice. It reasoned:

> accordingly, the ambit and content of those rules are left to be filled by the general law as enunciated by the courts from time to time. There is thus ample scope for judicial development of the substantive law relating to natural justice within the statutory ground of review.[61]

A review of Victorian law, which recommended the adoption of the *ADJR Act* model appeared considerably less certain about this aspect of that model. While the review supported the codification of the grounds of review, largely in the format used by the *ADJR Act*, it also recommended the inclusion of an additional ground that would enable relief to be granted upon any ground of review not specifically included in the statutory list but which might be available at common law.[62] This 'common law ground' appeared to offer a more explicit recognition that new grounds of review might evolve outside a statutory mechanism for review and that any such ground should be able to be adopted without difficulty.

Mark Aronson offered a broader criticism of the *ADJR Act* when he argued that the various grounds codified in that Act and the manner of their codification reflected an absence of any wider philosophy in the Act itself. He noted that both the *ADJR Act* and its many statutory grounds of review:

> …say nothing about the rule of law, the separation of power, fundamental rights and freedoms, principles of good government or (if it be different) good administration, transparency of government, fairness, participation, accountability, consistency or administrative standards, rationality, impartiality, political neutrality or legitimate expectations. Nor does ADJR mention the Thatcher era's over-arching goals of efficiency, effectiveness and economy…ADJR's grounds are totally silent on the relatively recent discovery of universal human rights to autonomy, dignity, respect, status, and security. Nowhere does ADJR commit to liberal democratic principles, pluralism, or civic republicanism.[63]

Aronson also offered several specific solutions to the perceived limitations of the *ADJR Act*, such as extending both the scope of the Act and its obligation to provide reasons for the decisions to which the Act applied.[64] He did not, however, favour introducing some form of guiding principle or principles that might fill the apparent philosophical gap that he identified in the passage quoted above. Aronson doubted whether such principles were desirable or perhaps even possible. More particularly, he thought it might be difficult if not impossible to devise any grand or unifying principles that were coherent, workable and of significant value.[65]

Even if such principles were drafted, any attempt to devise a general or guiding principle to the *ADJR Act*, or any other statutory vehicle for judicial review, would surely face an uncertain fate in the courts. The recent history of Australian migration law indicates that legislation designed to limit or control judicial review will rarely achieve its desired effect and may even achieve the opposite of its intended result.[66] The question is not whether there would be a judicial response to any legislative attempt to introduce a guiding or grand principle to statutory judicial review, but instead how quickly such legislation might be interred with successive privative clauses.

Aronson also doubted whether the courts might fare any better than the parliamentary drafters. He asked:

> To what extent might it be the judiciary's role (or even duty) to explore, describe, articulate or promote a normative framework for judicial review of administrative action? This is not to question the judiciary's role in articulating general doctrinal principle, but the question being asked here concerns a much deeper level of public law theory….is it the judge's *duty* to explore and expound his or her philosophical underpinnings, and when they do it, are their conclusions "law"?[67]

Aronson reasoned that any conclusions the courts might reach on the grand ideals of judicial review 'would necessarily be piecemeal, fairly vague, and subject to legislative reversal, unless of course, it were sought to embed these theories into the Constitution.'[68] The outcome seems to be the same as Dixonian legalism, even if the path is different. Dixon's conception of the limited judicial function led him to conclude that Australian judges do not have the power to venture down the path of these broad normative questions. Aronson hopes they know better.

Kirby J was not so cautious in *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002*[69] when he reasoned that a judicial remedy for 'serious administrative injustice' might provide some sort of 'default' or 'last chance' relief in judicial review when no other recognised ground of review might apply. His Honour considered that the courts:

> subject to the Constitution or the applicable legislation…reserve to themselves the jurisdiction and power to intervene in extreme circumstances. They do this to uphold the rule of law itself, the maintenance of minimum standards of decision-making and the correction of clear injustices where what has occurred does not truly answer the description of the legal process that the Parliament has laid down.[70]

Several issues were rolled up within this remarkable ambit claim. One is that the invocation of such a jurisdiction in cases of serious injustice harks to a line of recent English cases that have issued relief in cases of 'conspicuous unfairness'.[71] Relief has been granted on the basis of such unfairness in many English cases in recent years, though the principle that supposedly underpins such cases has been questioned. The similarity between Kirby J's wish to grant relief for serious administrative injustice and the English approach is that both would appear to be available to correct serious failings in the standards of decision-making. The English principle of conspicuous unfairness has been criticised on the grounds that it appears to enable a court to issue relief simply because it believes 'something has gone wrong, even if the court cannot quite put its finger on it.'[72] Kirby J's notion of 'serious administrative injustice' appears as subjective, impressionistic and arguably lacking in any clear legal principle as the English equivalent.

The remedy suggested by Kirby J also appears to have a more obvious weakness in its internal logic. His Honour implied that the grant of relief in cases of serious administrative injustice lay within an orthodox understanding of the scope of judicial power because the impugned conduct did not meet what had been prescribed by parliament. The difficulty with this suggestion is that its emphasis on 'standards' of administrative decision-making appears to venture beyond the traditionally accepted notions of judicial power that Kirby J appeared so anxious to assure that his reasoning remained within.

The Three different State models of judicial review

A striking feature of the judicial review schemes in Australia is their lack of coherence. The *ADJR Act* has been reproduced in the *Administrative Decisions (Judicial Review) Act 1989* (ACT), the *Judicial Review Act 1991* (Qld) and *Judicial Review Act 2000* (Tas). Victoria long ago enacted the *Administrative Law Act 1978* (Vic) which might be described as a 'no frills' form of statutory judicial review which is explained in more detail below. The introduction of *ADJR Act* style legislation has been proposed, though apparently not accepted, in Victoria (in 1999) and Western Australia (in 2002).[73] No such reform appears to be currently under consideration in New South Wales, South Australia or the Northern Territory. Judicial review in each of those jurisdictions is available only in its common law form, as governed by rules of court. That same common law jurisdiction also remains available as a parallel or default avenue of review in those jurisdictions that have introduced some form of statutory judicial review.[74]

Adoption of the ADJR Act – Are there benefits in uniformity?

The most recent consideration of the apparent arguments in favour of uniformity in judicial review legislation was provided by the Law Reform Commission of Western Australia, in its (apparently shelved) report that recommended the adoption of the *ADJR Act* model. The Commission noted that the 'obvious advantage' of such a change was 'uniformity of the substantive law governing judicial review of administrative decisions, irrespective of whether or not those decisions are made under state or Commonwealth law.[75] The obvious reply to this assertion is that uniformity already exists in the grounds of review, which suggests that this benefit of uniformity is more imagined than real. The other benefit of uniformity that the Commission identified was that it would enable Western Australia (and of course any other jurisdiction that adopted the *ADJR Act* model) to essentially adopt the body of law that had developed in the interpretation of that Act.[76] The Commission explained that benefit of the *ADJR Act* model in the following terms:

> Litigation under that Act is now the predominant source of the general body of law relating to judicial review in Australia. The enactment of…legislation which follows, as far as possible, the terminology used in the Commonwealth Act will enabled that body of law to be applied directly to litigation under the state Act.[77]

This reasoning invites several comments. First, the notion that proceedings under the *ADJR Act* are the primary vehicle for judicial review at the federal level takes no account of the role of s75(v) of the Constitution or the provisions of the *Judiciary Act 1903* (Cth) which invest the lower federal courts with an equivalent jurisdiction. In light of the increasing role of those avenues of review, it is somewhat misleading to suggest that the *ADJR Act* exerts some sort of dominant influence at the federal level. If it did, that time has passed. Secondly, the primary argument made in favour of the adoption of the *ADJR Act* appears to be one of convenience. That argument is one of pragmatism rather than principle because it does not provide any critical analysis of the law that would be adopted. Thirdly, adoption of the *ADJR Act* would not only bring the relevant State into alignment with the Commonwealth. It would also align the adopting jurisdiction with those that had already adopted the *ADJR Act* model. Finally, the perceived advantages of uniformity imply or assume that the relevant statutes will remain the same as far as possible and, more controversially, will be amended in a like manner. The history of Commonwealth-State relations suggests that goal is often an aspirational one. This last point presents a particular obstacle to further reform to judicial review because, if the *ADJR Act* model as enacted at the federal level is seen as the benchmark, it is difficult for those jurisdictions which adopt that model to undertake further reform without the effective consent (and perhaps the lead) of the Commonwealth.[78]

A separate and far more controversial point that arises from the almost unquestioning acceptance by the Law Reform Commission of the supposed benefits of uniformity in judicial review legislation is whether such legislation should be adopted. No such scheme has been adopted in New South Wales, South Australia or the Northern Territory. While the Territory appears to have a relatively small number of judicial review applications, the same cannot be said of New South Wales or South Australia. The experience of these States could be argued to provide support for the proposition that the absence of a statutory template for judicial review does not itself hinder the willingness or ability of people affected by administrative decisions to seek judicial review of those decisions. This argument is enhanced in New South Wales by the reversal of the common law in one important area, namely the right to obtain reasons for administrative decisions that was confirmed in *Osmond's* case.[79]

The No-frills statutory model – Victoria's Administrative Law Act 1978

Victoria adopted an entirely different vehicle for statutory judicial review only a year after the *ADJR Act* was enacted. The *Administrative Law Act 1978* (Vic) adopted many of the procedural advantages of the *ADJR Act*, in the form of a simplified approach to standing,[80] the introduction of a right to reasons for decisions to which the Act applied,[81] and a simplified single remedy in the form of an order to review that essentially reproduces the remedies available at common law, though without the need to apply for a particular order.[82] The Act did not adopt the *ADJR Act* formula that confers jurisdiction over 'decisions' that are 'of an administrative character' which are made 'under an enactment' but instead enabled decisions of 'tribunals'. A tribunal is defined as any person or body (which is not a court or tribunal presided over by a Supreme Court Judge) who is required to observe one or more rules of natural justice.[83]

There are many obvious flaws in this scheme. One is that the definition of 'tribunal', which determines the scope of decisions to which the Act applies, excludes any body headed by a Supreme Court judge. That definition excludes the Victorian Civil and Administrative Tribunal and many other bodies, such as the parole board, which are headed by members of the Supreme Court. The definition of tribunal by reference to a requirement to observe the rules of natural justice has also proved uncertain in cases where the nature or extent of any obligation to act fairly by an initial decision-maker is unclear.[84] Another issue is that the statutory right to gain reasons is qualified by a provision that enables decision-makers to decline to provide reasons if they conclude this is 'against public policy' or that reasons would be against the interests of the person primarily affected by the decision. This provides an uncertain

exemption from the right to obtain reasons. Another flaw is that s4(1) of the Act, which establishes a time limit for making an application, has been held to deprive the Supreme Court of jurisdiction to review under this Act once the prescribed time limit has expired.[85] Such an inflexible time limit is plainly undesirable, particularly in a statute that was intended to introduce procedural reform. A final flaw is that much of the apparent procedural flexibility introduced by the Act is of little importance since the various writs available through the common law avenue of judicial review were replaced by a single order that can be sought by an originating motion.[86]

Perhaps the most notable flaw of the Victorian scheme is the one that has received no real attention. The Victorian Act did not codify any grounds of judicial review and could, therefore, have side stepped the problems that Aronson suggested had flowed from the codification of existing common law grounds in the *ADJR Act*. The Victorian scheme has not stimulated an energetic or innovative approach to judicial review.[87] Just as the codification of existing grounds by those jurisdictions which have adopted an *ADJR Act* model appears to have tacitly limited the scope of review to those grounds, the absence of codification does not appear to have provided an impetus in Victoria for a more adventurous approach. The Victorian experience suggests that an entirely pared down version of the *ADJR Act*, which focussed solely on procedural simplicity and reform and did not codify existing grounds of review, might make no difference.

A review of the Victorian legislation in 1999 found little benefit in this scheme. It recommended the adoption of the *ADJR Act* model, in terms that left no doubt that the 1978 Act was regarded as a failure. While this review provided a detailed examination of judicial review and made a strong case for reform, it had the misfortune to be published around the time there was a change of State government. That change of government involved many high profile policy shifts and led to many law reform projects in administrative law and public governance, including changes to FOI legislation and greater independence for independent public bodies such as the Office of Public Prosecutions and the Auditor-General. But the possible reform of judicial review was not one, even though the exclusion and limitation of rights of review to the Supreme Court had attracted considerable attention in the period leading up to the change of government. The proposed changes to judicial review were quietly shelved and have not been revisited.

Some lessons from the Canadian experience of procedural uniformity in administrative law

The Australian and Canadian systems of law and government share many common features, such as a heritage of the English common law and many Westminster traditions such as responsible government, a federal system and a written constitution; however, their systems of administrative law have unfolded in quite different ways. These differences are partly explicable by the absence of any entrenched doctrine of the separation of powers in Canada, which enables Canadian courts and tribunals to undertake a variety of functions that would almost scandalise Australian observers.[88]

Canada has not adopted a statutory vehicle for judicial review such as the *ADJR Act*, though Aronson's criticisms of that Act noted above suggest that the absence of a clear equivalent at the federal level in Canada may not be a matter of regret. But it could be argued that a broad parallel could be drawn between the *ADJR Act* and the *Federal Courts Act* RSC *1985* (Can). Strictly speaking this Canadian Act does not represent a true parallel to the *ADJR Act* because it deals more generally with the powers of federal courts, but some of the provisions governing judicial review are not unlike the key features of the *ADJR Act*. Section 18(1) of the Canadian Act enables the federal Attorney-General or 'anyone directly affected' by 'the matter in respect of which relief is sought'. This simple formula does not adopt the various requirements of the *ADJR Act* for a 'decision' or 'conduct' that is 'of an administrative

character' and is made 'under an enactment. In the absence of those limiting requirements it is hardly surprising that Canadian law is not replete with decisions about the scope of this right of review.

Earlier this year when the Supreme Court considered the nature and scope of s18 of the *Federal Courts Act* it concluded that any interpretation of the provision:

> must be sufficiently elastic to apply to the decisions of hundreds of different 'types' of administrators, from Cabinet members to entry-level *fonctionnaries*, who operate in different decision-making environments under different statutes with distinct grants of decision-making powers. Some of these statutory grants have privative clauses; others do not. Some provide for a statutory right of appeal to the courts; others do not.[89]

In later parts of the same case a majority of the Supreme Court of Canada indicated that the legislature could alter or even oust the common law of judicial review but noted that most Canadian attempts to do so took the form of legislation affecting the grounds of review that could be sought rather than the standard of review applicable to any case (the latter point being a particularly difficult one in Canadian law).[90]

This approach to the *Federal Courts Act* suggests that Canada has struck an interesting balance at the federal level by the introduction of a stripped down statutory codification of judicial review that expresses the basic elements of judicial review but does so in a way that does not constrain the common law. In particular, the brief statutory coverage of the grounds of review and the lack of any generic provision covering the applicable standard of review leaves considerable room for judicial manoeuvre. It could be argued that this approach strikes a 'middle ground' by introducing a bare statutory framework for judicial review, which confirms the statutory jurisdiction of federal courts and articulates the basic elements of that framework but leaves much of the detail, including the detail of the grounds, to the courts. The result is a statutory framework interpreted against a common law background.

An interesting aspect of this scheme is that the courts have not advanced the common law as stridently as in England. An example is the *Mount Sinai* case,[91] where the Supreme Court of Canada rejected the (then) new doctrine of substantive unfairness only a year after it had been decisively recognised in England. The Supreme Court side stepped the English cases that had accepted the possibility of either substantive unfairness or the closely related possibility of estoppel in public law on the grounds that those trends represented 'a level of judicial intervention in government policy that our courts, to date, have not considered appropriate in the absence of a successful challenge under' the Canadian Charter of Rights.[92] Although the *Mount Sinai* case concerned provincial law, the rejection of substantive unfairness is generally understood in Canada to be one of wider general application. The reasoning in the *Mount Sinai* case suggests that the Canadian courts may approach the apparent latitude that exists for the development of judicial review principles with some moderation.

The Canadian experience at the provincial level

At the provincial level Canada has undertaken a quite different experiment in the codification of its administrative law. Several provinces have adopted some form of model statutory procedures for administrative bodies, some of which could be broadly equated with the American *Administrative Procedure Act 1946* (5 USC). The most widely studied is Ontario's *Statutory Powers Procedure Act 1990*.[93] Some form of administrative code has also been adopted in Alberta, Quebec and British Columbia.[94] These codes have come under sustained criticism on the ground that they are inflexible and therefore counterintuitive because they seek to release administrative decision-makers from many of the constraints that arise from the curial model of adjudication but do so by introducing a different form of inflexibility.[95] The

movement to codify administrative law in Canada appears to have lost much of its energy. The Canadian provinces appear to have an odd array of statutes that each codify different parts of each province's administrative law system and do so in differing ways. One notable feature of these statutes is that, although they are ostensibly directed to the powers of administrative officials and tribunals they often address the principles that courts must use in applications for judicial review of tribunal decisions, including the applicable standard of review.[96] In this sense, legislative control that sets standards for administrative tribunals and officials also regularly extends to how those standards may be enforced by the courts.

Another striking feature of these various provincial arrangements is that they are designed to provide codes for either administrative officials or many different tribunals, but they have not encouraged any move to the creation of tribunals of general jurisdiction such as Australia's AAT or its various State counterparts. One commentator has suggested that many of these Acts have not introduced any significant innovation but have instead simply codified the existing common law which may be causing the ossification of administrative law at the provincial level.[97] This criticism clearly echoes some of the concerns expressed by Aronson about the overall effect of the ADJR Act.

Concluding observations

Several tentative conclusions can be drawn from the above analysis. One is that the influence of the Commonwealth Constitution is in many ways a restrictive one. While the Constitution may preserve the role of the courts, particularly the High Court, and also a minimum standard of judicial review, the doctrine that has been devised to support and protect these principles also serves to limit the role of the courts in the exercise of their supervisory jurisdiction. In particular, it limits the extent to which supervisory judicial review might extend to the perceived merits of decisions as opposed to legal issues. The result is that innovation in judicial review is subject to some significant doctrinal limits. Those limits almost certainly apply equally to the States even though they are not subject to the separation of powers doctrine to the same extent as it applies at the federal level. The difficulty for the States is that the structural limits created at the federal level appear to restrain the capacity of all Australian courts to venture beyond the established grounds of review, particularly if any such venture might tread towards constitutionally dubious territory as appears to be the case with the English principle of substantive unfairness.

The *ADJR Act* appears in some ways to have imposed another obstacle to the possible reform of judicial review at the State level. Many of the procedural reforms effected by the *ADJR Act*, notably the ability to obtain reasons for decisions to which the Act applies and the simplification of traditionally difficult technical issues such as standing and remedies, were clearly important and useful steps forward. At the same time, however, the codification of the grounds of review appears to have inadvertently discouraged any significant development in the substantive law of judicial review. The overall effect of the *ADJR Act* could be argued to have funnelled much of the energy of judicial review down a single path, or at least until the revival of the constitutionally entrenched right of review under s75(v) of the Constitution. The *ADJR Act* presents a particular disadvantage to the States if it is viewed as the preferred or dominant model for judicial review in Australia because that characterisation of the Act necessarily precludes the adoption of different and perhaps more advantageous models. It also provides the Commonwealth with an apparent monopoly upon the future of judicial review, which is a possibility that deserves careful scrutiny particularly in light of the enthusiasm of successive federal governments in their efforts to limit or exclude the scope of review in particular areas.

Endnotes

1 Those jurisdictions are, in order of the adoption of an *ADJR Act* style of statutory judicial review: *Administrative Decisions (Judicial Review) Act* 1989 (ACT); *Judicial Review Act* 1991 (Qld); *Judicial Review Act* 2000 (Tas).

2 The classic historical analysis notes that judicial review arose as one consequence of the increasing separation of functions between the executive and the courts in England. This occurred during the seventeenth century when the courts began to assert their power to decide the legality of (selected) actions of the executive: Louis Jaffe and Edith Henderson, 'Judicial Review and the Rule of Law: Historical Origins' (1956) 72 *Law Quarterly Review* 345. Jaffe and Henderson do not, however, ascribe this as some form of top down doctrine of the separation of powers as it might be understood in modern parlance.

3 The taxonomy of top down and bottom up reasoning is mainly deployed in constitutional law. See, eg, Keith Mason, 'What is Wrong With Top-Down Reasoning?' (2004) 78 *Australian Law Journal* 574. The taxonomy, in the context of judicial review, is discussed in Stephen Gageler, 'The Underpinnings of Judicial Review of Administrative Action: Common Law or Constitution?' (2000) 28 *Federal Law Review* 303.

4 This seems the implicit point in Kirby J's pointed suggestion that even the most crude bottom uppers must 'have some concept of the principle by which the analogy is to be discovered' by which they will be guided: *Pyrenees Shire Council v Day* (1998) 192 CLR 330, 397.

5 On this point it is useful to note the date of Oliver's influential article which stimulated energetic English debate on the basis of judicial review: Dawn Oliver, 'Is the Ultra Vires Rule the Basis of Judicial Review?' [1987] *Public Law* 543. The appearance of such a piece around four centuries after judicial review had become part of the English legal landscape, and the uncertainty about the basis of judicial review that it revealed, provides compelling evidence of the bottom up nature of English judicial review.

6 The most notable recent example being *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 and the voluminous literature which followed that case.

7 Sir Anthony Mason, 'Procedural Fairness: Its Development and Continuing Role of Legitimate Expectations' (2005) 12 *Australian Journal of Administrative Law* 103, 109.

8 The expression is taken from 'Two Constitutions Compared' in Owen Dixon, *Jesting Pilate* (1965) 247. Dixon's legalism and its legacy are discussed in Jeffrey Goldsworthy, 'The Australian Devotion to Legalism' in Jeffrey Goldsworthy (ed), *Interpreting Constitutions* (2006).

9 Sir Anthony Mason, 'Procedural Fairness: Its Development and Continuing Role of the Legitimate Expectation' (2005) 12 *Australian Journal of Administrative Law* 103, 109. Sir Anthony expressed similar views more recently in Sir Anthony Mason, 'Mike Taggart and Australian Exceptionalism' in Linda Pearson, Carol Harlow and Mike Taggart (eds), *Administrative Law in a Changing State* (2008).

10 Leslie Zines, *Cowen and Zines's Federal Jurisdiction in Australia* (3rd ed, 2002) 182.

11 See, eg, *Lange v Australian Broadcasting Commission* (1997) 189 CLR 520 CLR 562-3; *Kruger v Commonwealth* (1997) 190 CLR 1, 175. There is, however, considerable authority which also confirms that Australia's federal system enables a fair level of variation between the States and the Commonwealth in some areas. See, eg, *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2004) 218 CLR 146 at [3] (Gleeson CJ); *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at [36] (McHugh J); *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501 at [84] (French CJ), [229] (Kirby J).

12 (2010) 239 CLR 531.

13 (2010) 239 CLR 531 at [98].

14 (2010) 239 CLR 531 at [98].

15 (2010) 239 CLR 531 at [99].

16 (2010) 239 CLR 531 at [100].

17 In *Kable v DPP (NSW)* (1996) 189 CLR 51 ('*Kable*'). The case and its consequences are explained in Peter Johnston and Rohan Hardcastle, 'State Courts: The Limits of *Kable*' (1998) 20 *Sydney Law Review* 216 and Fiona Wheeler, 'The *Kable* Doctrine and State Legislative Power over State Courts' (2005) 20(2) *Australasian Parliamentary Review* 15. The doctrine was also successfully invoked in *International Finance Trust Co Ltd v NSW Crime Commission* (2009) 240 CLR 319 and *Totani v South Australia* (2009) 105 SASR 244.

18 See, eg, *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575; *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45; *Gypsy Jokers Motorcycle Club v Commissioner of Police (WA)* (2008) 208 CLR 532; *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501. Attempts to invoke the incompatibility doctrine failed in all of these cases.

19 In *Kirk v Industrial Relations Commission of NSW* (2010) 239 CLR 531 at [69] the High Court noted that the distinction between courts and tribunals 'may not always be drawn easily, for there is not, in the States' constitutional arrangements, that same separation of powers that is required at a federal level by Ch III of the Constitution.' This cryptic passage might be interpreted as an acceptance of the blend of judicial and administrative functions that has arisen in some State tribunals.

20 See, eg, *Victorian Civil and Administrative Tribunal Act* 1998 (Vic) s122; *State Administrative Tribunal Act* 2004 (WA) s86.

21 This is a consequence of *Brandy v Human Rights & Equal Opportunity Commission* (1995) 183 CLR 245 where the High Court held that the power to enforce determinations was an aspect of judicial power that could only be exercised by bodies that met the requirements of a court established under ChIII. The High Court held that any determination of a tribunal could only be made enforceable upon 'an independent exercise of judicial

power': (1996) 183 CLR 245, 261 (Mason CJ, Brennan and Toohey JJ), 270-1 (Deane, Dawson, Gaudron and McHugh JJ).

22 Some of the wider themes in this point are explored in Geoffrey Kennett, 'Fault Lines in the Autochthonous Expedient: The Problem of State Tribunals' (2009) 20 *Public Law Review* 152, 157-65.

23 Kennett suggests that the issue might require the High Court to revisit the implications of s77 of the Constitution: Geoffrey Kennett, 'Fault Lines in the Autochthonous Expedient: The Problem of State Tribunals' (2009) 20 *Public Law Review* 152, 160-65.

24 (1990) 170 CLR 1.

25 (1990) 170 CLR 1, 37.

26 Stephen Gageler, 'The Underpinnings of Judicial Review: Common Law or Constitution?' (2000) 28 *Federal Law Review* 303, 307.

27 Stephen Gageler, 'The Underpinnings of Judicial Review: Common Law or Constitution?' (2000) 28 *Federal Law Review* 303, 307.

28 Bradley Selway, 'The Principle Behind Common Law Judicial Review of Administrative Action – The Search Continues' (2002) 30 *Federal Law Review* 217, 235.

29 Bradley Selway, 'The Principle Behind Common Law Judicial Review of Administrative Action – The Search Continues' (2002) 30 *Federal Law Review* 217, 235.

30 (2000) 199 CLR 135.

31 Established in *Chevron USA Inc v Natural Resources Council Inc* 467 US 837 (1984). The *Chevron* doctrine is explained in Richard Pierce, *Administrative Law Treatise* (4th ed, 2004) 139-191.

32 *Corporation of the City of Enfield v Development Assessment Commission* (2000) 199 CLR [43]-[44] 135, 152-4 (Gleeson CJ, Gummow, Kirby and Hayne JJ), citing *Attorney-General (NSW) v Quin* (1990) 170 CLR 1, 35-6 (Brennan J). A separate but related point is that the deference accorded to administrative agencies by the United States Supreme Court has long been criticised on the ground that it involves a retreat from the sole jurisdiction over legal issues by the courts that was so forcefully asserted in *Marbury v Madison* (1803) 1 Cranch 137; 5 US 87 (and relied upon by Brennan J in *Quin*). The apparent retreat marked by *Chevron* has its supporters. See Cass Sunstein, 'Beyond *Marbury*: The Executive's Power to Say What the Law Is' (2006) 115 *Yale Law Journal* 2850.

33 *Minister for Immigration and Multicultural Affairs; Ex parte Lam ('Lam')* (2003) 214 CLR 1.

34 The discussion by the High Court of substantive unfairness was somewhat curious given that Lam only relied on a strictly procedural variant of the legitimate expectation.

35 The key case was *R v North and East Devon Health Authority; Ex parte Coughlan* [2000] QB 213. That case is examined from an Australian perspective in Cameron Stewart, 'Substantive Unfairness: A New Species of Abuse of Power?' (2000) 28 *Federal Law Review* 617; Matthew Groves, 'Substantive Legitimate Expectations in Australian Administrative Law' (2008) 32 *Melbourne University Law Review* 470.

36 *R v North and East Devon Health Authority; Ex parte Coughlan* [2000] QB 213, 242.

37 Mark Elliott, 'Legitimate Expectation, Consistency and Abuse of Power: The *Rashid* Case' [2005] *Judicial Review* 281, 285; Matthew Groves, 'The Surrogacy Principle and Motherhood Statements in Administrative Law' in Linda Pearson, Carol Harlow and Michael Taggart (eds), *Administrative Law in a Changing State* (2008) 90.

38 (2003) 214 CLR 1, [28].

39 Callinan J agreed that the legitimate expectation could 'on no view…give rise to substantive rights rather than procedural rights': (2003) 214 CLR 1, [148].

40 (2003) 214 CLR 1, [72].

41 As opposed to the increasing influence of European law, which McHugh and Gummow JJ suggested had greatly affected the reasoning in *Coughlan*: (2003) 214 CLR 1, [73]-[74].

42 (2003) 214 CLR 1, [76]. See also [102].

43 On the history and scope of the *Victorian Charter of Rights*, see Priyanga Hettiarachi, 'Some Things Borrowed, Some Things New: An Overview of Judicial Review of Legislation under the *Charter of Human Rights and Responsibilities*' (2007) 7 *Oxford University Commonwealth Law Journal* 61.

44 It has also almost certainly played a role in the adoption of the doctrine of substantive unfairness in England because substantive unfairness is perhaps the best instance of the increased rights-based focus of judicial review that Craig has identified.

45 Paul Craig, *Administrative Law* (6th ed, 2008) 1-025. The suggestion that the *Human Rights Act* 1998 (Eng) provides a 'justification' for rights-based review is somewhat ironic because it might be taken to imply that Craig (and the judges who have so ardently pursued this rights based approach in England) were searching for a convenient basis upon which to affix an approach that may have been waiting in the wings for some time.

46 Craig pointedly rejects arguments to the contrary on the basis that 'in a constitutional democracy it is both right and proper for the courts to impose limits on the way in which power is exercised in order to prevent abuse of that power': Paul Craig, *Administrative Law* (6th ed, 2008) 1-034. It does not seem to occur to Craig that similar considerations of democratic pluralist values could support some limits upon the role of the courts as well as the executive and its officials. A similar view appears to be favoured by Jowell, who argues that the *Human Rights Act* 1998 (Eng) has fundamentally altered the relationship between the courts and the parliament, to essentially increase the reach of the courts. Jowell also does not appear to conceive that this new judicial power might or should be accompanied by limits: Jeffrey Jowell, 'Parliamentary Sovereignty Under the New Constitutional Hypothesis' [2006] *Public Law* 562.

47 The history of the *ADJR Act* and other contemporaneous reforms to administrative law are detailed in Robin Creyke and John McMillan (eds), *The Kerr Vision of Australian Administrative Law at the Twenty Five Year Mark* (1998).
48 An obvious exception is the 'no evidence' ground in ss 5(1)(h)(3) and 6(1)(h)(3) of the *ADJR Act*. This statutory ground clearly alters the common law equivalent.
49 (1985) 159 CLR 550.
50 The ground of denial of natural justice is available in ss5(1)(a), 6(1)(a) of the *ADJR Act*.
51 (1986) 162 CLR 24.
52 (1986) 162 CLR 24 , 39-42.
53 These grounds are ss5(1)(j), 6(1)(j) [otherwise contrary to law] and ss5(1)(e)(2)(j), 6(1)(e)(2)(j) [an improper exercise of power amounting to an abuse of power] in the *ADJR Act*.
54 Mark Aronson, Bruce Dyer and Matthew Groves, *Judicial Review of Administrative Action* (4th ed, 2009) 3.165. Wade reached a similar view many years earlier: HWR Wade, *Constitutional Fundamentals* (revised ed, 1989) 90.
55 I used this description in 'Substantive Legitimate Expectations in Australian Administrative Law' (2008) 32 *Melbourne University Law Review* 470, 518.
56 Western Australian Law Reform Commission, *Report on Judicial Review of Administrative Decisions* (Project No 95, 2002) 23-4.
57 (2003) 198 ALR 59.
58 (2003) 198 ALR 59, [157].
59 (2003) 98 ALR, [157].
60 Western Australian Law Reform Commission, *Report on Judicial Review of Administrative Decisions* (Project No 95, 2002) 23.
61 Western Australian Law Reform Commission, *Report on Judicial Review of Administrative Decisions* (Project No 95, 2002) 23.
62 This was recommended in P Bayne, *Judicial Review in Victoria* (Victorian Attorney-General's Advisory Council, Expert Report No 5, 1999), recommendation 12.
63 Mark Aronson, 'Is the ADJR Act Hampering the Development of Australian Administrative Law?' (2005) 12 *Australian Journal of Administrative Law* 79, 94.
64 Mark Aronson, 'Is the ADJR Act Hampering the Development of Australian Administrative Law?' (2005) 12 *Australian Journal of Administrative Law* 79, 96. Aronson suggested that the scope of the Act extend beyond 'decisions of an *administrative* character'.
65 Mark Aronson, 'Is the ADJR Act Hampering the Development of Australian Administrative Law?' (2005) 12 *Australian Journal of Administrative Law* 79, 96.
66 The obvious example is the series of attempts to codify the requirements of the hearing rule before the Refugee Review Tribunal and exclude the implication of other requirements of natural justice.
67 Mark Aronson, 'Is the ADJR Act Hampering the Development of Australian Administrative Law?' (2005) 12 *Australian Journal of Administrative Law* 79, 96 (emphasis in original) .
68 Mark Aronson, 'Is the ADJR Act Hampering the Development of Australian Administrative Law?' (2005) 12 *Australian Journal of Administrative Law* 79, 96.
69 (2003) 198 ALR 59.
70 (2003) 198 ALR 59 [161].
71 The foundation case was *R v Inland Revenue Commissioners; Ex parte Preston* [1985] AC 835 where the House of Lords granted relief to an applicant who claimed unfairness in relation to a tax decision. The Lords relied on a novel mixture of natural justice principles and abuse of power, though they did not elaborate on the latter concept. The reliance in *Preston* upon abuse of power appeared to provide the basis a year later for the grant of relief on the basis of 'conspicuous unfairness' in *R v Inland Revenue Commissioners; Ex parte Unilever plc* [1996] STC 681, 695. The notion of conspicuous unfairness was revised with gusto by the Court of Appeal in *Secretary of State for the Home Department v R (Rashid)* [2005] EWCA Civ 744.
72 Mark Elliott, 'Legitimate Expectation, Consistency and Abuse of Power: The *Rashid* Case' [2005] *Judicial Review* 281, 285.
73 This was recommended in P Bayne, *Judicial Review in Victoria* (Victorian Attorney-General's Advisory Council, Expert Report No 5, 1999) and Law Reform Commission of Western Australia, *Report on Judicial Review Administrative Decisions* (Project No 95, 2002).
74 The nature of those jurisdictions is explained in Mark Aronson, Bruce Dyer and Matthew Groves, *Judicial Review of Administrative Action* (4th ed, 2009) ch2.
75 Western Australian Law Reform Commission, *Report on Judicial Review of Administrative Decisions* (Project No 95, 2002) 26.
76 These benefits were also recognised by the author of the 1999 review of the Victorian scheme in Peter Bayne, 'Reform of Judicial Review – A New Model?' (1996) 79 *Canberra Bulletin of Public Administration* 65, 68-9.
77 Western Australian Law Reform Commission, *Report on Judicial Review of Administrative Decisions* (Project No 95, 2002) 26.
78 See the example given in Mark Aronson, Bruce Dyer and Matthew Groves, *Judicial Review of Administrative Action* (4th ed, 2009) 2.285 where a reform recommended to the *ADJR Act* by the Administrative Review Council was rejected by the Commonwealth but adopted by Queensland.

79 Practice Note SC CL 3 enables applicants for judicial review to obtain reasons for decision. The main drawback of this right is that it is triggered only upon commencement of proceedings for judicial review, which is not required in the various statutory rights to obtain reasons.

80 Section 3 of the Act enables 'any person affected' to seek judicial review of a decision to which the Act applies. This approach abolishes the old common distinctions in standing that existed between the various prerogatives writs.

81 Section 8. This provision is much simpler than the *ADJR Act* equivalent in s13.

82 Section 7.

83 Section 2.

84 This uncertainty can be traced to *FAI Insurances Ltd v Winneke* (1982) 151 CLR 342 in which Brennan J suggested that the Victorian Act did not extend to a hearing in which an official advised the ultimate decision-maker. The issue was important in *FAI* because the 'adviser' in the case was a minister and the nominal decision-maker was the Governor in Council. The other members of the High Court did not address this point and it has remained unresolved. Another similarly technical issue surrounding the Victorian Act that remains unresolved is whether the definition of 'tribunal' includes a decision-maker who may not be obliged to meet the requirements of fairness but is subject to a right of review that may attract that obligation. There is authority that the original decision-maker is not a 'tribunal' for the purposes of the *Administrative Law Act* 1978 (Vic): *Footscray Football Club Ltd v Commissioner of Payroll Tax* [1983] 1 VR 505.

85 *Keller v Bayside City Council* [1996] 1 VR 357; *Quality Packaging Service Pty Ltd v City of Brunswick* [1996] VR 829; *Kuek v Victorian Legal Aid* [1999] 2 VR 331, 336.

86 The *Supreme Court Act* 1986 (Vic) s3(6) replaced the old common law judgments and prerogative writs with a single order or judgment. The latest version of the originating motion, by which the new order or judgment may be sought, is contained in *Supreme Court (General Civil Procedure) Rules* 2005 (Vic) O 56.

87 This approach was arguably established by early cases which adopted a cautious interpretation of the Act. See Leslie Glick, 'Get Behind Me Satan: Or Some Recent Decisions on the Administrative Law Act 1978' (1980) 12 *Melbourne University Law Review* 417.

88 For example, courts may issue advisory opinions about proposed Bills. This possibility was accepted by the Privy Council and then the Supreme Court of Canada: *Attorney-General (Ontario) v Attorney-General (Canada)* [1912] AC 571 (PC); *In re Succession Reference* [1998] 2 SCR 217 (SCC). Aspects of Canadian administrative law are examined from an Australian view in more detail in Matthew Groves, 'The Differing and Disappearing Standards of Judicial Review in Canada' (2009) 16 *Australian Journal of Administrative Law* 211.

89 *Canada (Minister for Immigration and Citizenship) v Khosa* [2009] 1 SCR 339, [28] Binnie J (McLachlin CJ, Le Bel, Abella, Charron JJ agreeing).

90 *Canada (Minister for Immigration and Citizenship) v Khosa* [2009] 1 SCR 339, [50] Binnie J (McLachlin CJ, Le Bel, Abella, Charron JJ agreeing).

91 *Mount Sinai Hospital Center v Quebec (Minister of Health and Social Services)* [2001] 2 SCR 281 *('Mount Sinai')*.

92 Ibid, at [27] (Binnie J).

93 A useful analysis of these criticisms is given from an Australian view in Margaret Allars, 'A General Tribunal Procedure State for New South Wales?' (1993) 4 *Public Law Review* 19.

94 See Alberta's *Administrative Procedures Act RSA 2000*; Quebec's *Administrative Justice Act SQ 1996*; and British Columbia's *Administrative Tribunals Act SBC 2004*.

95 An exception would appear to be the scheme adopted in Quebec which consists of several statutes governing administrative agencies and a procedure that is strongly influenced by French administrative law. This scheme is usefully explained in Denis Lemieux, 'Codification of Administrative Law in Quebec' in Grant Huscroft and Mike Taggart (eds), *Inside and Outside Canadian Administrative Law* (2006).

96 See, eg, the description of the British Columbia Act given in Diane Flood, Elizabeth Loughran and Richard Rogers, 'British Columbia's New *Administrative Tribunals Act*' (2005) 18 *Canadian Journal of Administrative Law and Practice* 217.

97 M Rankin, 'The *Administrative Tribunals Act*: Evaluating Reforms of the Standard of Review and Tribunals' Jurisdiction Over Constitutional Issues' (2005) 18 *Canadian Journal of Administrative Law and Practice* 165. It is useful to note that quite different concerns have been expressed about the equivalent statutes of the various States of the USA, which many commentators argue have been subject to partisan reforms which reflect particular political views about the level of regulation to which administrative agencies should be subject. An informative account is contained in Jim Rossi, 'Politics, Institutions and Administrative Procedure: What Exactly Do We Know from the Empirical Study of State Level APAs and What More Can We Learn?' (2006) 58 *Administrative Law Review* 961.

THE OBLIGATION TO ACT AS A MODEL LITIGANT

Zac Chami*

The focus of administrative law has traditionally been on process, rather than on outcome. This is so for good reason: a fair procedure provides the safest path to a fair outcome. This principle extends to the conduct of proceedings in a court. Fairness by a government litigant towards an aggrieved opponent will increase the likelihood that the court will arrive at a fair decision. In this way, the delivery of administrative justice requires that government litigants conduct themselves in the course of litigation in a manner which promotes the fairness of the proceedings, and thereby increases the likelihood of those proceedings resulting in a just outcome.

The courts have long expected that government litigants act in proceedings against private litigants in accordance with standards of conduct higher than those expected of their opponents. More recently, the governments of the Commonwealth and some States and Territories have introduced policy guidelines to ensure adherence to those standards. The obligation to adhere to those standards is commonly referred to as the obligation to act as a model litigant.

The obligation to act as a model litigant extends beyond merely obeying the law and abiding by the ethical obligations which apply to legal practitioners. Those other important obligations provide minimum standards of conduct, whereas the model litigant obligation involves striving for more aspirational standards of the highest character. Like so many other legal concepts, aspects of the obligation which lie at its core are uncontroversial and simple to grasp. The duty to assist the court is one such aspect. Some of the aspects of the obligation which lie at its periphery, such as a postulated duty to achieve legal accuracy, are more contentious.

This paper will explore the nature of the model litigant obligation by reviewing the sources from which the obligation arises, the justifications for the imposition of the obligation on government litigants, the content and scope of the duties to which the obligation may give rise and the manner in which compliance with the obligation may be enforced.

Sources of the obligation

Judicial pronouncement

The model litigant obligation can be traced back at least as far as the comments of Griffiths CJ in *Melbourne Steamship Co Ltd v Moorehead*:[1]

> The point is a purely technical point of pleading, and I cannot refrain from expressing my surprise that it should be taken on behalf of the Crown. It used to be regarded as axiomatic that the Crown never takes technical points, even in civil proceedings, and a fortiori not in criminal proceedings.

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> I am sometimes inclined to think that in some parts - not all - of the Commonwealth, the old-fashioned traditional, and almost instinctive, standard of fair play to be observed by the Crown in dealing with subjects, which I learned a very long time ago to regard as elementary, is either not known or thought out of date. I should be glad to think that I am mistaken.

Other expressions of the obligation include the comments of King CJ in *Kenny v South Australia*[2] and the Full Federal Court in *Yong Jun Qin v Minister for Immigration & Multicultural Affairs*.[3]

It is hardly surprising that the primary source of the model litigant obligation is judicial pronouncement. As those who preside over litigation and deliver judgments to resolve controversies, it is to be expected that a body of judicial opinion would develop in respect of the proper conduct of proceedings by government litigants.

More recently, administrative tribunals such as the Administrative Appeals Tribunal have added their own contributions to this field of discourse. The content of those contributions has necessarily been shaped by the nature of the proceedings over which those administrators have presided. In that regard, it is important to note that proceedings in the Administrative Appeals Tribunal are inquisitorial rather than adversarial, although they often take on the appearance of adversarial proceedings.[4] It is also significant that s.33(1AA) of the *Administrative Appeals Tribunal Act 1975* (Cth) provides that the maker of the decision under review must use his or her best endeavours to assist the Tribunal to make its decision, rather than simply defending the correctness of the original decision. Nevertheless, the views of Members of the Administrative Appeals Tribunal in particular echo very closely the opinions expressed by judicial decision makers in relation to the content of the model litigant obligation.[5]

Legal Services Directions

The obligation to act as a model litigant now emanates from the Executive, as well the Judicial branch. The Commonwealth Attorney-General has issued directions which apply to the performance of Commonwealth legal work. These directions have a statutory basis in Part VIIIC of the *Judiciary Act 1903* (Cth). The first version of the *Legal Services Directions* came into effect on 1 September 1999 and has been subsequently amended. Appendix B to the *Legal Services Directions* is entitled, "*The Commonwealth's obligation to act as a model litigant*".

The scope of Appendix B to the *Legal Services Directions* is broad. It extends beyond litigation to the settlement of claims prior to the commencement of proceedings, alternative dispute resolution and merits review proceedings. Note 2 to Appendix B summarises the obligation as follows:

> In essence, being a model litigant requires that the Commonwealth and its agencies, as parties to litigation, act with complete propriety, fairly and in accordance with the highest professional standards.

State and Territory policies

Following the introduction of the *Legal Services Directions* at the Commonwealth level, New South Wales, Victoria, Queensland and the Australian Capital Territory have each introduced their own model litigant policies in the form of guidelines which apply to the provision of legal services in matters involving the agencies of those respective jurisdictions. In New South Wales, Cabinet has approved a policy document which was developed from an earlier policy introduced by the Attorney General's Department of that State.[6] In Victoria, the government has prepared guidelines which have now been incorporated in the Standard Legal Services to Government Panel Contract, so that they are binding on external providers of legal services to Victorian government agencies.[7] In Queensland, Cabinet has formalised

a statement of model litigant principles[8] and in the Australian Capital Territory, the Attorney General has issued its own guidelines.[9] In each case, the guidelines mirror reasonably closely those set out in Appendix B to the *Legal Services Directions*.

New South Wales Civil Procedure Act

The *Civil Procedure Act 2005* (NSW) s.56(1) provides that "*[t]he overriding purpose of this Act and of rules of court, in their application to civil proceedings, is to facilitate the just, quick and cheap resolution of the real issues in the proceedings.*" Interestingly, one Justice of the Supreme Court of New South Wales has suggested that the effect of that provision is that all litigants in civil proceedings in New South Wales, including private litigants, are required to act in accordance with the model litigant standards which have traditionally been expected only of government litigants.[10] Although it does not appear that that approach has been taken up in subsequent cases, it represents a possible future direction for the model litigant obligation. As legislatures and the courts continue to clamp down on conduct in litigation which increases the strain placed on limited judicial resources, it may well be the case that the courts come to expect all those who appear before them to act in the manner already expected of government litigants.

Justifications for the obligation

Restoring the balance

No single principle provides the sole justification for why government litigants are held to higher standards of conduct than those expected of private litigants. One justification was explained in *Hughes Aircraft Systems International v Airservices Australia* as follows:[11]

> There is, I consider much to be said for the view that, having no legitimate private interest in the performance of its functions, a public body (including a state owned company) should be required as of course to act fairly towards those with whom it deals at least in so far as this is consistent with its obligation to serve the public interest (or interests) for which it has been created.

That is a highly significant justification. It may well be sufficient in itself to justify the imposition of the obligation on government litigants. Yet judicial discourse also points to another more controversial justification, namely that, in order to do justice, the imbalance in power and resources between government and private litigants requires that government litigants act in a manner which is more restrained than that expected of their opponents.

In *Melbourne Steamship Co Ltd v Moorehead*, Griffiths CJ equated the notion that the Crown ought not take technical points with the "*standard of fair play to be observed by the Crown in dealing with subjects*".[12] But why should fairness prevent only one side, and not the other, from being entitled to take technical points? The answer implicit in Griffiths CJ's observations is that, if both sides were equally entitled to engage in conduct such as taking technical points, the government litigant would be in a position of unfair advantage, presumably by reason of the imbalance of power and resources between the parties.

It is indeed the case that, very often, government litigants are better equipped to engage in litigation than their private opponents. Yet this is by no means always the case. In circumstances where it is not the case, the imposition of the model litigant obligation has the potential to provide the private opponent with a positive advantage. This was recognised in *ACCC v Leahy Petroleum Pty Ltd*, where Gray J observed that the obligation "*is of significant value to parties against whom the Commonwealth is involved in litigation.*"[13]

Unrepresented litigants

It is, however, certainly the case that there is an imbalance of power and resources when government litigants appear against opponents who are not legally represented. In those circumstances, primary responsibility for ensuring the fairness of the proceedings must lie with the presiding judicial officer. That duty was summarised in *Tomasevic v Travaglini*, where Bell J said:[14]

> A judge has a fundamental duty to ensure a fair trial by giving due assistance to a self-represented litigant, while at the same time maintaining the reality and appearance of judicial neutrality. The duty is inherent in the rule of law and the judicial process. The human rights of equality before the law and access to justice specified in the International Covenant on Civil and Political Rights are relevant to its proper performance. The assistance to be given depends on the particular litigant and the nature of the case, but can include information about the relevant legal and procedural issues. Fairness and balance are the touchstones.

A related responsibility is that of the court to "*assume the burden of endeavouring to ascertain the rights of parties which are obfuscated by their own advocacy.*"[15]

There are limits on how far judges can go to assist unrepresented litigants consistent with their duties to remain impartial and to be seen to remain impartial. These limits were the subject of comment in *Malouf v Malouf*, where Bryson JA noted the danger of affording procedural concessions to an unrepresented litigant to the point where it becomes advantageous to appear without legal representation.[16] Similarly, Flick J has warned that excessive readiness to formulate arguments that could be advanced on behalf of an unrepresented litigant could risk extending to the unrepresented litigant a positive advantage over his or her represented opponent.[17]

If, then, judges are limited in their capacity to limit the disadvantages faced by a litigant who appears without legal representation against a represented opponent, some of the remaining imbalance can be made up by that opponent being held to the standards of conduct expected of a model litigant. However, as is the case with judges, even lawyers who act for model litigants are limited in their capacity to assist an unrepresented opponent in the context of adversarial proceedings. This is especially so in view of the fiduciary duties which lawyers owe to their clients. But, at the very least, if represented parties and their lawyers refrain from conduct which would place them at risk of taking advantage of an unrepresented opponent, this would go some way towards redressing the imbalance which is inherent when one party participates in litigation without legal representation.

What this will involve in the circumstances of any particular case will vary widely. However, if one steps back from the perspective of a participant in a particular controversy, and instead views the matter from the broader perspective of ensuring that justice is both done and seen to be done, a reasonably arguable case can be made for the proposition that, at least in circumstances where they appear against unrepresented litigants, comparatively well resourced litigants such as government agencies ought to be held to higher than usual standards of conduct. This will help to avoid a situation in which the represented government litigant takes advantage of its position of power *vis-à-vis* its unrepresented opponent, which the Full Federal Court found had occurred in *Scott v Handley*, and which it criticised accordingly.[18]

Content of the obligation

Duty to assist the court

The duty of lawyers to the courts, which trumps even their duties to their clients, is familiar territory. Various practitioners' rules and ethical norms require high levels of candour and honesty in all dealings with judicial officers. What is less clear is how far a lawyer ought to go, whilst acting for a model litigant, to assist the court in circumstances where the provision of that assistance could potentially be injurious to the interests of the lawyer's client.

The case of *Mahenthirarasa v State Rail Authority of New South Wales (No 2)* is illustrative of what the courts expect in terms of receiving assistance from the Executive branch.[19] In that case, the applicant sought to appeal to an Appeal Panel of the New South Wales Workers Compensation Commission. The Authority persuaded a Registrar of the Commission to refuse to permit the appeal to proceed on the basis that certain statutory preconditions had not been satisfied.

The applicant challenged the Registrar's decision unsuccessfully in the Supreme Court of New South Wales and then successfully in the Court of Appeal. In both Courts, the Authority filed a submitting appearance save as to costs, by which it neither consented to nor opposed the orders sought by the applicant.

Basten JA found that it was inappropriate for the Authority to file a submitting appearance and thereby deprive the Court of the assistance of the Executive branch. His Honour cited[20] the following observations of Mahoney J in *P & C Cantarella Pty Ltd v Egg Marketing Board (NSW)*:[21]

> The duty of the executive branch of government is to ascertain the law and obey it. If there is any difficulty in ascertaining what the law is, as applicable to the particular case, it is open to the executive to approach the court, or afford the citizen the opportunity of approaching the court, to clarify the matter. Where the matter is before the court it is the duty of the executive to assist the court to arrive at the proper and just result.

His Honour went on to review the authorities regarding the standards expected by the courts of the Executive branch in its conduct of litigation, and applied those observations to the circumstances of the case before him as follows:[22]

> On the appeal, this Court expressly invited the State Rail Authority to reconsider its position and provide assistance to the Court. It declined to do so. Again, it should be assumed that, upon the institution of the appeal, the State Rail Authority gave consideration to whether it should actively defend the benefit it had obtained in the lower Court or concede that the judgment should fairly be set aside. Whatever view was formed, on appropriate advice, this Court did not have the assistance which might have been offered consistently with the view adopted by the State Rail Authority. The principles applicable to a model litigant required it to deal with claims promptly, not to cause unnecessary delay, to endeavour to avoid litigation wherever possible, not to resist relief which it believes to be appropriate and not to decline to provide appropriate assistance to the court or tribunal whether expressly sought or not. It is probable that those principles were not applied.

The case of *SZLPO v Minister for Immigration and Citizenship (No 2)* is significant for its illustration of how the obligation to act as a model litigant is capable of giving rise to duties to act in a manner adverse to the interests of government litigants.[23] In that case, the Full Federal Court had decided an appeal in favour of the Minister for Immigration and Citizenship. Following the handing down of judgment, the Minister's solicitor informed the associate of the presiding judge that the Court had overlooked one of the appellant's grounds of appeal. The Court set aside its earlier orders, proceeded to consider the overlooked ground and, in the result, reversed its decision. The Court expressed its

gratitude to the Minister's solicitor for bringing the oversight to the Court's attention and commended her for acting as a model litigant.[24]

By acting as a model litigant in the circumstances of this case, the Minister put at risk, and ultimately lost, the benefit of a judgment in his favour. A litigant who did not proceed in that matter may well have kept that benefit. However, when one bears in mind the view expressed in *Hughes Aircraft Systems International v Airservices Australia* that a public body has no legitimate private interest, this result changes in appearance from one in which compliance with the model litigant obligation was injurious to the interests of the Minister to one in which compliance with the obligation served the broader interests of justice.[25]

Duty not to impose an unfair burden

Another aspect of the model litigant obligation which is uncontroversial in nature is the duty not to impose an unfair burden on one's opponent. The *Legal Services Directions*, for instance, require that Commonwealth legal providers pay legitimate claims without litigation and not put their opponents to proof of matters which they know to be true. Duties such as these flow from a broader duty to minimise the incidence of litigation and, in circumstances where litigation is unavoidable, to keep its costs to a minimum.

A related duty is, if a government litigant is the initiating party to proceedings, to tailor claims with some care to the precise needs of the case.[26] Similarly, the model litigant obligation may require a government litigant, if it is the defendant to proceedings, to consider carefully which matters to dispute when filing a defence. The case of *Parkesbourne-Mummel Landscape Guardians Inc v Minister for Planning* is one in which the Court found that a materially incorrect assertion made in a pleading gave rise to a breach of the obligation.[27]

In that case, the Minister for Planning and the Director-General of the Department of Planning filed a joint defence in which they asserted that a particular project comprised critical infrastructure for the purposes of the applicable legislation. The Court found that that assertion caused the plaintiff to believe that it was necessary to continue the proceedings to preserve its rights to challenge the approval of the project. However, documents subsequently produced by the Department disclosed that, when the defence was filed, the Director-General considered that the project did not comprise critical infrastructure and that the Minister was yet to form a view on the matter. The Court criticised the conduct of the government defendants in filing their defence as misconduct, unreasonable and a departure from the standards expected of a model litigant.

Duty of legal accuracy

The duties of model litigants to assist the court and to not impose an unfair burden on their opponents are reasonably non-contentious, despite there being room for debate about the proper scope of those duties. A more contentious duty, for which there is some authority, is that model litigants must attain a high standard of legal accuracy in the positions which they adopt and the submissions which they make before a court. Arguably, Appendix B to the *Legal Services Directions* provides some statutory basis for such a duty insofar as it compels Commonwealth government agencies to act "*in accordance with the highest professional standards*". The attainment of such standards must necessarily involve a level of diligence which goes beyond compliance with procedural obligations,[28] and extends to the thorough preparation of cases and exercise of careful consideration of the merits of arguments to be advanced. There are 2 High Court cases which lend support to this postulated duty of legal accuracy.

The first case is *Burrell v R*.[29] In that case, the New South Wales Court of Criminal Appeal had dismissed the appellant's appeals against his conviction and sentence for murder. After

the Court's reasons had been published and its orders formally entered, the Court discovered that its reasons contained substantial factual errors and purported to re-open the appeals.

The appellant was granted special leave to appeal to the High Court. The prosecution contested the special leave application and appeal, arguing that the proceedings in the High Court were unnecessary because it was open to the Court of Criminal Appeal to re-open the appeals. The High Court was unanimous in finding that the Court of Criminal Appeal did not have power to act in that way.

Kirby J was critical of the prosecution's contest of the proceedings in the High Court. His Honour observed:[30]

> In the present appeal, both on the relisting before the Court of Criminal Appeal and in this court, the prosecution asserted the existence of the jurisdiction and power of the Court of Criminal Appeal to act as it did. It contested the necessity, or occasion, for this court's intervention. In the light of the outcome of this appeal, it may be hoped that a reconsideration of prosecution practice in this regard will be one outcome. Traditionally, prosecutors for the Crown observed the highest standards as befits a model litigant. Such standards should be maintained. In light of this decision, and others, they will need to be reinforced.

On one reading, Kirby J's observations appear to encompass an obligation of a model litigant to state the law correctly, even in circumstances where the correct state of the law is far from clear. Admittedly, his Honour made those observations in a context in which the prosecution had contested the proceedings in the High Court, notwithstanding its acceptance that the Court of Criminal Appeal's decision was affected by material error. Yet, as his Honour also observed, there was a reasonably arguable basis for the prosecution's position that intervention by the High Court was unnecessary.[31] In view of the potential significance of the point in dispute, the prosecution appears to have had a sound basis for seeking to clarify the state of the law. In those circumstances, it is open to interpret his Honour's observations in relation to the standards expected of a model litigant as a criticism of the prosecution simply for getting the answer wrong.

The second case is *Roads and Traffic Authority (NSW) v Dederer*.[32] In that case, a child had dived from a bridge into shallow water, struck his head on the bottom and become a paraplegic. One of the issues to be resolved was whether it was the RTA or the local council which controlled the bridge from which the child had jumped. Initially, in response to a request from the child's solicitors, the RTA advised the child's solicitors that the RTA controlled the bridge. Acting in reliance on that advice, the child's solicitors commenced proceedings against only the RTA. Some time later, the RTA changed its position and the child's solicitors joined the council as an additional defendant. However, by the time the council was joined, new legislation had come into effect which caused the action against the council to fail.

Heydon J observed that, though no doubt unintentional, the effect of the RTA's conduct was to mislead the child's solicitors into a course of action which deprived the child of an opportunity to obtain a benefit to which he may otherwise have been entitled. His Honour said:[33]

> It is a truism that statutory bodies of that kind should be model litigants: counsel for the RTA accepted that this was so "without question". A terrible thing had happened to a child. The solicitors for that child were not busybodies. Their request of the RTA was not a trivial one. It was possible that the RTA - a very wealthy and powerful organisation - was liable in tort. It was also possible that the Council - doubtless much less wealthy, but better resourced than the plaintiff and his parents - was liable. There is nothing wrong with wealthy and powerful defendants requiring plaintiffs to prove their cases, but in the circumstances, as a matter of common humanity, not legal duty, the RTA ought not only to have attempted to tell the plaintiff's advisers who controlled the bridge, as it did, but also to have stated the underlying facts correctly.

Heydon J's observations in relation to the Court's expectations of the RTA drew on the disproportionate power relationship between the RTA and the child to provide a foundation for the RTA's model litigant obligation, and on notions of "common humanity" to provide content to that obligation in the form of a duty to do "correctly" what the RTA had attempted, but failed, to do. As with Kirby J's observations in *Burrell v R*, they lend support to the view that model litigants ought to act in accordance with not only the highest standards of fairness, but also the highest standards of legal accuracy.

Admittedly, the observations of Kirby J and Heydon J in these cases provide only limited evidence of a judicial expectation that model litigants ought to attain high standards of legal accuracy. Further, this postulated duty has received only limited endorsement elsewhere.[34] Nevertheless, as there is at least some authority for the proposition that a duty to attain high standards of legal accuracy forms part of the obligation to act as a model litigant, it cannot be disregarded.

If such a duty were to receive further judicial attention and development, difficult questions would arise concerning the extent to which the model litigant obligation requires government litigants to actually achieve, as distinct from to endeavour to achieve, the outcomes which the obligation is intended to advance. The distinction is important: duties such as those to assist the court and to not place an unfair burden on one's opponent are directed at process, whereas the postulated duty to attain legal accuracy is directed at outcome. Without further consideration by the courts, however, the possible future directions which this postulated duty might take remain speculative.

Duty of compassion and common humanity

Heydon J's observations in *RTA v Dederer* also provide some support for another contentious aspect of what may, on one view, form part of the model litigant obligation, namely a possible duty to act in a manner which gives sufficient regard to notions of "common humanity". This is another concept which has not received much judicial attention. There is even some authority against it. In *Pinot Nominees Pty Ltd v Commissioner of Taxation*, Siopis J observed:[35]

> Further, although compassionate considerations may from time to time, as a practical matter, weigh with the Commissioner in determining how to deal with the taxation liability of a taxpayer, the question of whether the Commissioner has acted with compassion, is not, without more, a relevant factor in considering whether he has acted unreasonably or failed to act as a model litigant in the conduct and settlement of litigation.

Nevertheless, Siopis J's comments leave room for compassionate considerations, or the notions of common humanity invoked by Heydon J, when taken together with other relevant factors, to influence the content of the model litigant obligation in an appropriate case. It is possible that such considerations may lead courts in future cases to expect more of model litigants in their conduct of litigation.

Limits on the scope of the obligation

Despite the breadth of the model litigant obligation, it is not the case that government litigants must forego invoking their fundamental legal rights and privileges, or that they must "roll over" in the face of determined opposition. As Whitlam J has observed:[36]

> While the Commonwealth is no doubt a behemoth of sorts, it is not obliged to fight with one hand behind its back in proceedings. It has the same rights as any other litigant notwithstanding it assumes for itself, quite properly, the role of a model litigant.

To similar effect are Heydon J's observations in *RTA v Dederer,* that wealthy and powerful defendants are entitled to put plaintiffs to proof of their cases where there is a genuine dispute.[37] Further, in *ABB Power Transmission Pty Ltd v ACCC*, the Full Federal Court found that the model litigant obligation did not prevent reliance by the ACCC on well-established legal privileges.[38]

The picture which emerges from these authorities is that model litigants remain participants in an adversarial system of justice, the efficacy of which depends upon the ability and willingness of the parties to stand up for their own interests. While model litigants are expected to play their role in that system according to higher standards of conduct than those that apply to other participants, they are not required to sacrifice their status as the adversaries of their opponents. Though model litigants have a duty to assist the court, they are not required to assist their opponents.

Enforcement of the obligation

Judicial pronouncement

As it remains the case that the primary source of the model litigant obligation is judicial pronouncement in relation to the standards of conduct expected of government litigants, so it remains the case that the primary method of sanction for departure from those standards is judicial criticism. It is a very bad look for any government agency or legal services provider to be the subject of judicial criticism. It is an even worse look to be subjected to such criticism on a regular or sustained basis. Conversely, it is a good look for a government agency or legal services provider to be commended by the courts for compliance with the model litigant obligation, such as was the case in *SZLPO v Minister for Immigration and Citizenship*.[39]

Other than expressing their opinion, however, there are few tools available to the courts to hold government litigants accountable to the standards of conduct expected of a model litigant. This is inherent in the nature of the obligation, which is an aspirational goal of fluid content, rather than a minimum standard of a more fixed nature. It is one thing to comment on behaviour which falls short of the highest standards, but an entirely different thing to impose a sanction for that departure. This is all the more so in circumstances where the imposition of any such sanction would have the effect of elevating the obligation into a rule of law, which is discriminatory in its application only to government litigants.

Discretion to award costs

One tool which is, arguably, available to enforce compliance with model litigant standards is the application of the court's discretion in relation to the making of costs orders. The usual rule is that the successful party in litigation will recover from the unsuccessful party a proportion of its costs reasonably incurred in prosecuting or defending the proceedings, unless some conduct of the successful party disentitles it from recovering its costs. The rule is, however, subject to a wide judicial discretion.

There is now a substantial number of cases in which unsuccessful litigants have opposed costs orders sought by successful government litigants, or successful litigants have sought to recover a higher proportion of their costs from unsuccessful government litigants, on the basis that the government litigant has breached its obligation to act as a model litigant. In a large majority of those cases, the court has found that the government litigant had not fallen short of the standards of conduct expected of it. There is also some authority that considerations of whether or not there has been compliance with the model litigant obligation should be treated as irrelevant to the exercise of the discretion whether to award costs.[40]

In some cases, however, the courts have invoked a departure from model litigant standards as one reason, amongst others, for exercising the discretion in relation to costs adversely to government litigants. In *Parkesbourne-Mummel Landscape Guardians Inc v Minister for Planning*, the Court ordered that the Minister for Planning and the Director-General of the Department of Planning pay the plaintiff's costs from the time at which they filed the defence which the Court found to be misleading and to have caused the continuation of proceedings which were eventually shown not to be necessary.[41] In *Mahenthirarasa v State Rail Authority of New South Wales (No 2)*, the Court ordered that the Authority pay the applicant's costs, despite it having not taken any active role in opposing the proceedings, and noted that it was the position taken by the Authority before the Commission and its subsequent failure to make any concession in relation to the correctness of the Commission's decision that made the judicial review and appeal proceedings necessary.[42] Similarly, in *Galea v Commonwealth (No 2)*, the Court found that the Commonwealth had failed to facilitate the just, quick and cheap resolution of the real issues in the proceedings, in accordance with s.56(1) of the *Civil Procedure Act 2005* (NSW) and the standards expected of a model litigant, and relied on these breaches in support of a costs order adverse to the Commonwealth.[43]

What is notable about these cases is that, although the model litigant breach was in each case raised in the context of the Court making a cost order adverse to the government litigant, it is not at all clear that the breach gave rise to the making of an order any more adverse than would have been made in any event. The filing of the misleading defence in *Parkesbourne-Mummel*, the causation of the commencement and continuation of unnecessary proceedings in *Mahenthirarasa* and the failure to comply with s.56(1) in *Galea* each provided, by themselves, a sufficient rationale for the adverse costs order made, regardless of their Honours' observations in relation to the consequential breaches of the model litigant obligation by the government litigants in those cases.

There is a similarity in that regard between those cases and the decision in *ASIC v Rich*.[44] In that case, Austin J found that certain breaches of the model litigant obligation alleged by the defendants against ASIC did not take matters any further than they were already taken by his Honour's application of settled rules of law confining ASIC to its pleaded case and affecting the weight that should be placed on evidence led by ASIC.[45] This case therefore lends support to the view that the existing rules of law and established discretionary considerations, which are equally applicable to all parties, leave the courts limited scope to impose any additional sanction for breach of model litigant obligations within the context of the litigation in which the breach occurred, regardless of the desirability or otherwise of the imposition of any such sanction.

Limitations imposed by the Judiciary Act

In relation to the Commonwealth's obligation to act as a model litigant, as set out in Annexure B to the *Legal Services Directions*, s.55ZG(2) of the *Judiciary Act* provides that compliance with the directions is enforceable only by the Attorney-General or by a court of competent jurisdiction on the application of the Attorney-General. Section 55ZG(3) provides that the issue of non-compliance with the *Legal Services Directions* may not be raised in any proceeding except by or on behalf of the Commonwealth. Section 55ZI has the effect that it is only in very limited circumstances that an act done or omitted to be done in compliance or purported compliance with the *Legal Services Directions* will give rise to any legal liability.

These provisions were relied on by Austin J in *ASIC v Rich* in support of his Honour's finding that the defendants in that case were restricted in their ability to raise the issue of non-compliance by ASIC with its statutory model litigant obligations in the context of those proceedings. Nevertheless, his Honour went on to find that the *Legal Services Directions* may still be "*referred to as an aid to understanding the content of the litigation duty*".[46]

Commonwealth Office of Legal Services Coordination

Clause 11.1(d) of the *Legal Services Directions* requires that certain Commonwealth agencies report any possible or apparent breaches of the *Legal Services Directions* to the Attorney-General or to the Office of Legal Services Coordination ('OLSC') in the Attorney-General's Department as soon as practicable. If the OLSC makes a finding that the model litigant obligation has been breached, it is a matter for the OLSC and the Attorney-General to determine what further action ought to be taken.

Although the OLSC does not publish figures on breaches of the *Legal Services Directions*, it has been kind enough to provide some statistics in relation to the possible breaches reported to it, or otherwise identified by it, since the *Legal Services Directions* came into effect more than a decade ago. Since that time, the OLSC has reviewed 121 cases of possible breaches of the model litigant obligation imposed by the directions, of which 12 resulted in a finding of breach, 96 resulted in a finding of no breach, 5 did not result in any finding and 8 were still being investigated as at May 2010. A spike in the volume of cases, and a corresponding increase in findings of breach, appears to have taken place between 2006 and 2008, while the numbers have dropped back since that time.

The 12 breaches found by the OLSC were for the government litigant in each case relying on a technical defence against counsel's advice and without giving advance notice to the opposing party, threatening to seek personal costs against an opposing party's solicitor, breaching an implied undertaking not to use documents other than in the context of the proceedings in which they were produced, causing unnecessary delay by serving a witness statement in breach of the timetable imposed by the court, failing to making proper discovery, serving subpoenas without giving notice to a party's lawyers, failing to provide an opposing party with relevant documents despite several requests by the court to do so, causing unnecessary delay in the settlement of a claim, failing to correct misstatements made in a pleading, handling a matter improperly, failing to appear at a court date and causing unnecessary delay in the recovery of costs pursuant to a court order. It therefore appears that 3 of the 12 breaches found by the OLSC were for the government litigant causing unnecessary delay in the conduct of proceedings, while a general lack of care and diligence probably contributed to some of the others.

It would be inappropriate to "name and shame" the government agencies against whom the most allegations have been made and breaches found, as such details could only be useful if put in their proper context, which would require a more wide-ranging analysis, including in particular an assessment of the volume of litigation in which those agencies are involved. The relatively low number of breaches found by the OLSC may be taken, however, to suggest that Commonwealth agencies have been very effective in ensuring that they comply with their statutory obligation to act as a model litigant pursuant to the *Legal Services Directions*.

Conclusion

The obligation to act as a model litigant is something that has long been expected of government litigants by the courts. More recently, it has acquired statutory force at the Commonwealth level, and has acquired the status of formal government policy in some States and Territories. The justifications commonly provided for the imposition of the obligation on government litigants, and why similar standards of conduct are not expected of private litigants who utilise judicial resources in their pursuit of justice, are not without their contentious points. Likewise, the precise content of the obligation, like so many other legal principles, is fluid and must be adapted to the circumstances of each particular case. In that sense, the pursuit of model litigant standards of conduct is akin to the pursuit of an aspirational target, whose attainment will rarely be commended but whose non-attainment

will often be chastised. Yet, however it may be justified or interpreted, the model litigant obligation must be kept at the forefront of the minds of all those who perform legal work for government clients. Those who lose sight of it may find themselves being reminded of it, very possibly in a judgment published for all to see.

Endnotes

1 (1912) 15 CLR 333 at 342.
2 (1987) 46 SASR 268 at 273.
3 (1997) 75 FCR 155 at 166 per Beaumont, Burchett and Goldberg JJ.
4 *Bushell v Repatriation Commission* (1992) 175 CLR 408 at 424 to 425 per Brennan J.
5 See *Re Moline and Comcare* (2003) 77 ALD 224 at [4] to [13]; *Re VBN and Australian Prudential Regulation Authority* (2006) 92 ALD 259 at [246] to [249]; *Re Summers and Secretary, Department of Family and Community Services* [2005] AATA 125 at [30] to [31]; *Re General Merchandise & Apparel Group Pty Ltd and Chief Executor of Customs* (2009) 114 ALD 289 at [140] to [144]; *Re Pitkin and Secretary, Department of Family and Community Services* (2005) 87 ALD 119 at [4] to [6].
6 Available at http://www.lawlink.nsw.gov.au/lawlink/lms/ll_lms.nsf/vwFiles/CabinetApp-MLP.pdf/$file/CabinetApp-MLP.pdf.
7 Available at http://www.opp.vic.gov.au/wps/wcm/connect/18c9ac00404a14a4abfafbf5f2791d4a/15_Application_of_model_litigant_guidelines.pdf?MOD=AJPERES.
8 Available at http://www.justice.qld.gov.au/__data/assets/pdf_file/0006/43881/20100505095729872.pdf.
9 Available at http://www.jcs.act.gov.au/eLibrary/papers/model_litigant_guidelines.pdf.
10 *Priest v New South Wales* [2007] NSWSC 41 at [34] per Johnson J.
11 (1997) 76 FCR 151 at 196 per Finn J.
12 (1912) 15 CLR 333 at 342.
13 (2007) ATPR ¶42-200 at [25].
14 (2007) 17 VR 100 at [155].
15 *Neil v Nott* (1994) 121 ALR 148 at 150 per Brennan, Deane, Toohey, Gaudron and McHugh JJ.
16 (2006) 65 NSWLR 449 at 452.
17 *SZJOG v Minister for Immigration and Citizenship* [2010] FCA 244 at [19].
18 (1999) 58 ALD 373 at [46] per Spender, Finn and Weinberg JJ.
19 (2008) 72 NSWLR 273.
20 (2008) 72 NSWLR 273 at [16].
21 [1973] 2 NSWLR 366 at 383.
22 (2008) 72 NSWLR 273 at [22].
23 (2009) 255 ALR 435.
24 (2009) 255 ALR 435 at [4] per Lindgren, Stone and Bennett JJ.
25 (1997) 76 FCR 151 at 196 per Finn J.
26 *Director-General, Department of Aging, Disability and Home Care v Lambert* (2009) 74 NSWLR 523 at 548 to 549 per Basten JA.
27 [2009] NSWLEC 155.
28 See *Commissioner of Main Roads v Jones* (2005) 215 ALR 418 at [84] per Callinan J.
29 (2008) 238 CLR 218.
30 (2008) 238 CLR 218 at [93].
31 (2008) 238 CLR 218 at [36].
32 (2007) 234 CLR 330.
33 (2007) 234 CLR 330 at [298].
34 See also *Deputy Commissioner of Taxation v Cumins* [2007] FMCA 1841 at [45] to [46] per Lucev FM.
35 (2009) 181 FCR 392 at [41].
36 *Brandon v Commonwealth* [2005] FCA 109 at [11].
37 (2007) 234 CLR 330 at [298].
38 [2003] FCAFC 261 at [35] per Heerey, Stone and Bennett JJ.
39 (2009) 255 ALR 435.
40 *ACCC v Leahy Petroleum Pty Ltd* (2007) ATPR ¶42-200 at [25] per Gray J.
41 [2009] NSWLEC 155 at [48] to [52] per Pain J.
42 (2008) 72 NSWLR 273 at [23] to [24] per Basten JA.
43 [2008] NSWSC 260 at [18] to [21] per Johnson J.
44 (2009) 236 FLR 1.
45 (2009) 236 FLR 1 at [558] to [567].
46 (2009) 236 FLR 1 at [527].

MISFEASANCE IN PUBLIC OFFICE, EXEMPLARY DAMAGES AND VICARIOUS LIABILITY

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Introduction

Although misfeasance in public office had been recognised and applied occasionally by State Supreme Courts it was not until 1995 that it was first considered by the High Court of Australia in *Northern Territory v Mengel*.[1] That was followed, in Australia, by the High Court decision in *Sanders v Snell*,[2] which added at least some discussion of the tort. The New Zealand Court of Appeal also considered the tort at some length, in *Garrett v Attorney-General*,[3] and rather more briefly in *Hobson v Attorney-General*,[4] while the House of Lords spent a considerable amount of time dealing with a variety of issues concerning this tort, in *Three Rivers District Council v Bank of England (No 3)*.[5] However, despite the extent of discussion in those cases, in none of them was the defendant found to have committed the tort; in each case, the respective courts were dealing with matters of principle, rather than considering how those principles might apply to a particular set of facts.

In the light both of the fact that this tort has had only a relatively brief exposure to judicial consideration, and that such exposure is relatively recent, it is not surprising that there are some aspects of liability that have not been fully developed. It is my purpose in this paper to consider more fully two of the areas where some doubt remains: (a) the circumstances in which an employer may be vicariously liable for the commission of this tort; and (b) whether such vicarious liability extends to a liability to pay exemplary damages.

The reason for considering these two aspects of the tort is that this head of liability is one that can be imposed only on one who holds a "public office" – a phrase which encompasses those who owe duties to members of the public, and who exercise those powers and functions for the benefit of the public. Hence, the rationale for this liability has been put on the basis that in a legal system based on the rule of law, executive and administrative power must be exercised for the public good, and not for an ulterior or improper purpose.[6] However, it is my submission that an employer of such a public officer is likely to be vicariously liable only in limited circumstances, and that such vicarious liability does not extend to the awarding of exemplary damages, with the result that many who have suffered loss by some act of maladministration will be deterred from taking proceedings, as they might find that the public officer who is solely liable does not have the resources to provide the compensation or other damages which have been awarded.

The Tort of misfeasance in public office

The tort of misfeasance in public office permits an individual to recover for the loss or damage suffered consequent upon action taken by the holder of a public office, if the officer acted maliciously or knew that the action was beyond power and was likely to harm the

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plaintiff. The action is not confined to positive conduct by the defendant, but includes a deliberate failure to fulfil a public duty cast upon him or her.

It must be stressed that this action requires, as one element, some form of intention to cause harm to the plaintiff. It has been argued on occasion that one who suffers financial harm as the direct consequence of administrative action which turns out to be invalid may recover that loss by an action in tort, but that argument has been steadfastly rejected.[7] No action lies against a public officer who causes loss by reason of an act which is later found to be without force, so long as the officer acted in good faith and without knowledge of the invalidity.[8]

Each of the elements of liability need to be considered in turn. However, before undertaking that consideration, it is useful to consider a relatively recent case, in which the action was successful, in order to get an overall view of liability under this tort.

A Case study: De Reus v Gray

De Reus v Gray[9]serves to illustrate many of the aspects of liability under this tort and is, therefore, an excellent vehicle to introduce a discussion of this form of liability. Ms Grey was a single mother of four children who had accrued some $400 of parking fines but, being unable to pay that amount, a warrant was issued for her arrest and imprisonment. The warrant was executed by WPC Pike, who took Ms Gray to the Narre Warren Police Station, where Sgt De Reus, the officer at the "Charge Counter", said that he wanted Ms Gray strip-searched. WPC Pike carried out this procedure, assisted by a probationary woman constable. Sgt De Reus gave no reason for this search, and Ms Gray said nothing in response to the order for her to be strip-searched, because she thought that if she resisted she would be forced to comply.

The search involved Ms Gray being asked to remove all her clothes, which she did. While the clothes were being searched, she was not given any alternative clothing. Furthermore, the search took place, not in a cell or enclosed room, but at the end of a corridor, adjacent to a cell which Ms Gray thought (apparently incorrectly) had some sort of two-way mirror in the door, through which she could be observed. In all, Ms Gray was detained for some three to four hours before being released. On the following morning she returned to the Police Station to do two hours community work, in expiation of her parking fines. She sued for damages for assault and negligence, as well as for misfeasance in public office. She succeeded in all three causes of action.

To summarise the elements of the action for misfeasance in public office considered more fully below, the Court accepted that Sgt De Reus was the holder of a public office for these purposes, and the jury found that he either knew that he was not authorised to conduct a strip-search in these circumstances, or recklessly disregarded the means of ascertaining whether he had that power, and that his conduct was likely to cause harm to Ms Gray.

Holder of a public office

As already mentioned, this tort is capable of being committed only by a person or body who fulfils some public function, but the precise circumstances in which a defendant may come within the ambit of the wrong have yet to be authoritatively determined. One can do little more than provide some examples of those who come either within, or outside, this concept.

A public officer includes government employees undertaking duties for the purpose of eradicating diseases in stock,[10] a Minister of the Crown either when deciding to withdraw funding from a women's shelter[11] or when considering whether or not to deport a non-citizen,[12] prison officers,[13] parole officers,[14]and a member of the police force, whether

carrying out coercive duties[15] or investigating alleged criminal activity.[16] However, the chief executive officer of a government department is not regarded as the holder of a public office for these purposes when exercising managerial functions in relation to the staff of the department.[17] The same is true of counsel briefed to prosecute for the Crown and an instructing solicitor, because neither, in the course of performing their duties, exercises any power which might be misused.[18] So too a subordinate officer of a government department whose task is to prepare a report on the conduct of a fellow officer is not a public officer for these purposes.[19]

A body corporate is just as capable of committing this tort as an individual. So, a statutory corporation has accepted that it may be liable, if the other elements of the tort were to be proved,[20] and a State, acting through its Ministers, its emanations and its officers has been held liable.[21] The same has been held to be true for a local body when exercising a public function such as those relating to town planning.[22] But the Society of Lloyd's, in carrying out its insurance business, is not a public officer for these purposes, as its operations are commercial, not governmental.[23]

Of course, if it is a group of people that is sued — such as the members of a borough or municipal council — to prove the necessary bad faith on the part of all the members of the group may be difficult, but certainly not impossible.[24] Indeed, it appears that, when a local body is purporting to carry out a power which is for the benefit of the borough or municipality as a whole, it is irrelevant that in the particular instance the power is derived from a lease rather than from legislation.[25]

Acting in bad faith

The second element of this tort which the plaintiff must prove is that the defendant acted in bad faith. This may be established in either of two ways.[26] First, that the defendant was motivated by a purpose quite foreign to that for which the public power or duty had been bestowed, and that the impugned conduct was undertaken with the intention of harming the plaintiff.[27] Secondly, and alternatively, the defendant's lack of good faith will have been demonstrated if the acts or omissions complained of were undertaken in the knowledge that they were beyond power[28] or with reckless disregard of that fact, and were likely to harm the plaintiff.[29] A matter which has not yet been conclusively determined is the extent to which a defendant who acts in conscious disregard of his or her authority must direct the acts to harming the plaintiff. Despite some judicial observations which may suggest otherwise,[30] it is not sufficient that the defendant merely knows that he or she has acted beyond power and that damage has consequently been caused to the plaintiff.[31] The High Court of Australia, in *Northern Territory v Mengel*,[32] inclined to the view that the defendant's ultra vires acts must have been carried out with the intention of harming the plaintiff or with reckless indifference to the harm that was likely to ensue,[33] while the New Zealand Court of Appeal, in *Garrett v Attorney-General*,[34] would have limited the tort somewhat, by requiring the plaintiff to show that the public officer actually knew of the consequences for the plaintiff of the disregard of duty, or was recklessly indifferent to those consequences. Subsequently, the House of Lords, in *Three Rivers District Council v Bank of England (No 3)*,[35] agreed with the New Zealand Court of Appeal that it is necessary for the plaintiff to show that the defendant has acted in the knowledge that his or her act would probably injure the plaintiff.[36] More recently, the Supreme Court of Canada adopted the same approach as these latter two courts, saying that one element of the tort is that 'the defendant must have been subjectively reckless or wilfully blind as to the possibility that harm was a likely consequence of the alleged misconduct.'[37]

Whatever precise formulation is eventually decided upon, it may be that Gray J, in *Trevorrow v South Australia*,[38] read too much into earlier comments of the High Court on this tort. His Honour concluded[39] that the State, through its Ministers, the members of the Aborigines

Protection Board and other officers, knew that it was unlawful to remove the plaintiff, a 13 month old Aboriginal child, from his natural family, and place him with a non-indigenous family for long-term fostering, and thus fulfilled the first aspect of liability. But in dealing with the intentions of those who authorised that removal, his Honour said that they either foresaw the risks to the plaintiff's health from that removal, or ought to have foreseen those risks.[40] It is not clear that there was a finding of either an intention to harm the plaintiff or reckless indifference to whether harm would ensue.

Damage

This tort is derived from the action on the case, with the result that the plaintiff must show that loss or damage has been suffered. Hence when a prisoner complained that prison officers had wrongfully opened his correspondence with his legal advisers, the House of Lords held that, although the officers had acted beyond power and in bad faith, the plaintiff could not show that he had suffered material damage and hence his claim was dismissed.[41] The damage which is the gist of the action may assume a variety of different forms; it includes the adverse effects of the administrative action on the plaintiff's person – whether the injury is physical[42] or psychological[43] - or on his or her property[44] or reputation.[45] Thus a person may sue for the revocation of a licence to sell alcohol[46] or to pilot a ship[47] or to import turkeys.[48] The action also lies for damage resulting from striking a dentist off the register of practitioners,[49] forcing the closure of an hotel,[50] refusing to acknowledge the legality of a tax minimisation scheme,[51] or denying consent to a change of use of land.[52]

Vicarious liability

A plaintiff who seeks redress under this tort, and brings the proceedings against the employer of the perpetrator, faces a number of difficulties in seeking to impose vicarious liability on the employer. First, if the public officer who is alleged to have committed the tort is employed by, or in the service of, the Crown, the latter will not be vicariously liable if the tortfeasor, in the course of committing the acts or omissions which constitute the relevant tort, was carrying out an independent duty cast upon him or her by the law. However, this rule has been abrogated with respect to the conduct of police officers. In all jurisdictions in Australia, and in New Zealand, police officers may render the Crown vicariously liable for torts committed by them in the exercise, or purported exercise, of their duty.

Another difficulty which a plaintiff faces, even if the tortfeasor was not exercising an independent discretion, is that vicarious liability still requires that the employee be acting in the course of employment in order to fix the employer with liability. But this tort is committed only when the employee is either using his or her position for a purpose quite foreign to that for which it had been bestowed, or is acting in conscious disregard of his or her lack of authority. In neither case, it may be argued, is the employee's conduct in the course of employment.

The "independent duty" rule, its abrogation for police officers, and the question of what comes within the course of employment for these purposes may each be considered in turn.

The "independent duty" rule

This rule is based on the rather dubious notion that a public employee who is obeying the authority of an Act of Parliament is not at that time subject to the control of the employer, and thus liability ought not to be imposed on that employer.[53] These comments were made at a time when the general immunity of the Crown had only recently been removed,[54] and it is understandable that a degree of caution was exercised in re-imposing liability on to the Crown. More recently, the rule has come under sustained criticism,[55] since it transfers the plaintiff's loss to an individual who is unlikely to be able to distribute that loss, rather than

putting the liability on the Crown, where it could be readily absorbed. In view of such comments, it is not surprising that this anomalous rule has been abrogated completely in New South Wales,[56] South Australia[57] and New Zealand,[58] and proposed for abolition in Victoria,[59] Queensland[60] and with respect to the Crown in right of the Commonwealth,[61] although none of those proposals has yet been implemented.

In those jurisdictions where it has not been abrogated, the rule has been applied to negative vicarious liability in the case of magistrates,[62] legal aid officers,[63] Crown prosecutors,[64] collectors of customs,[65] the Commissioner of Taxation[66] and the former Director of Native Affairs in the Northern Territory[67] but has not been applied to school teachers[68] nor to such statutory office-holders as the Comptroller-General of Prisons[69] or the Director of Community Welfare.[70] The exception may also apply to a Minister of the Crown in the conduct of his or her portfolio.[71]

Vicarious liability for police officers

At common law, the above "independent duty" rule applied to police officers while carrying out functions special to their appointment.[72] However, in all Australian jurisdictions that rule has been abrogated by statute, and the Crown is vicariously liable for torts committed by police officers in the exercise or purported exercise of their duty.[73]

The legislation for the Commonwealth and Queensland treats the Crown, for all purposes, as a joint tortfeasor with the police officer.[74]

The legislation in the other jurisdictions provides that if a police officer is alleged to have committed a tort, he or she does not incur any civil liability, and that such liability attaches instead to the State or Territory. However, in all jurisdictions other than New South Wales, that transfer of liability applies only when the police officer was acting in "good faith",[75] or honestly[76] or "without corruption or malice".[77]

As a matter of statutory interpretation, this limitation renders it unlikely that the Crown would be vicariously liable for a police officer who had committed the tort of misfeasance in public office. As Evans J, in the Supreme Court of Tasmania, said in *Holloway v Tasmania*,[78] in order for the plaintiffs to establish liability "for the tort of misfeasance in public office, they must prove that [the defendant's] conduct was otherwise than an honest attempt to perform the functions of his office. Such conduct would not be in good faith for the purposes of" the legislation. This view was upheld on appeal to the Full Court.[79] Similarly, in *Victoria v Horvath*,[80] the Court of Appeal considered that the conduct of a police officer warranting the award of exemplary damages must necessarily be the antithesis of conduct for which the legislation provides immunity.

But as a matter of practice, the State may, if it wishes, concede the point. Thus, in *De Reus v Gray*,[81] the action for misfeasance in public office which I discussed earlier and in which the State was joined with the police officers as a defendant, Winneke P noted that admissions were made by the State "of the relevant facts necessary to transfer to the State any liability incurred by the two police officers … in accordance with [the relevant legislation]."

The Course of employment

Vicarious liability is established by showing that the alleged tortfeasor (a) is an employee of the defendant; and (b) committed the tort in the course of that employment.[82] Assuming that a tortfeasor is, for these purposes, an employee, because he or she is not regarded as exercising an independent duty, it is still necessary to show that the impugned conduct is within the course of employment. Although authority is sparse, it is my contention that the

courts in Australia would be unlikely to find that an employee who commits this tort fulfils this requirement.

The only High Court comment directly in point is that made by the majority of that Court, in *Northern Territory v Mengel*,[83] that "although the tort is the tort of a public officer, he or she is liable personally and, unless there is de facto authority, there will ordinarily only be personal liability." The Full Court in South Australia made the same point, in *Rogers v Legal Services Commission*,[84] that because the tort is one of intention, the employer would not normally be liable unless it had authorised the conduct, at least impliedly, an authorisation which would be difficult to establish.[85] The House of Lords appears to be more ready to find vicarious liability. Lord Jauncey, in *Racz v Home Office*,[86] was prepared to concede – for the purpose of refusing to strike out a statement of claim – that if (in that case) prison officers were shown to have been engaged in a misguided and unauthorised method of performing their authorised duties, that might be sufficient to impose vicarious liability on the respondent.[87] It might, however, be argued that if the prison officers' lack of authority were "misguided", they would be unlikely to have the necessary knowledge of, or reckless indifference to, that fact, and therefore not be liable in any event.

Of course, the whole matter of vicarious liability for deliberate conduct has been considered by the High Court in *New South Wales v Lepore.*[88] But the principles to be derived from the various judgments in that case are not easy to state, and do not appear to support a finding of vicarious liability for a tort such as misfeasance in public office. Thus, Gleeson CJ[89] and Kirby J[90] were of the view that vicarious liability might be imposed if there is a sufficiently close connection between the tortfeasor's conduct and the type of conduct which he or she was engaged to perform. But misfeasance in public office is committed when the tortfeasor is either knowingly going beyond what he or she is authorised to do, and acting in such a way as to be likely to harm the plaintiff, or is motivated by a purpose which is quite foreign to that for which the power or duty has been bestowed. In either case, it is submitted, any connection between that conduct and that for which the employee was engaged is no more than temporal. Similarly, while Gummow and Hayne JJ[91] were prepared to allow vicarious liability for some intentional torts of an employee, their Honours considered that such liability should not be extended beyond the two kinds of case identified by Dixon J in *Deatons Pty Ltd v Flew*:[92]

> first, where the conduct of which complaint is made was done in the intended pursuit of the employer's interests or in the intended performance of the contract of employment or, secondly, where the conduct of which complaint is made was done in the ostensible pursuit of the employer's business or the apparent execution of the authority which the employer held out the employee as having.

It is suggested that the commission of the tort of misfeasance in public office does not come within either of those kinds of case.

Vicarious liability and exemplary damages

Since the tort of misfeasance in public office is founded on the ill-will of the defendant, it is one which is peculiarly appropriate for the award of exemplary damages. But the purposes of awarding exemplary damages have been variously described as imposing punishment on the defendant for a high-handed disregard of the plaintiff's rights, deterring the defendant in order to prevent him or her from reaping a gain from the wrongdoing, assuaging any feelings on the part of the plaintiff to seek revenge for the hurt done, and marking the condemnation of the court for the defendant's conduct.[93] Such purposes appear not to be applicable to an employer whose only connection with the commission of the tort is the fact of employing the tortfeasor.

In the light of my submission above, that an individual who commits the tort of misfeasance in public office is unlikely to render his or her employer vicariously liable, it might be thought that any discussion of vicarious liability for exemplary damages is unnecessary. If the employer is not vicariously liable for compensatory damages, I can see no basis for such an employer being liable for exemplary damages. However, I am prepared to concede that that submission as to vicarious liability for compensatory damages may not be correct. If that is the case, and if an employer is vicariously liable for compensatory damages, I submit that there are two bases at least for arguing that such an employer would also be liable for any exemplary damages that may be awarded.

Before considering those two bases for the award of exemplary damages against an employer, it is necessary to refer briefly to the legislation mentioned above, which renders governments liable for the torts of police officers.

In Relation to police officers

Of the legislation discussed above which renders a government liable for the torts of a police officer, four jurisdictions expressly proscribe that liability extending to the payment of exemplary damages.

In the Commonwealth and Queensland – where the legislation treats the Crown and the police officer as joint tortfeasors – that joint liability does not "extend to a liability to pay damages in the nature of punitive damages",[94] thereby leaving the police officer as the only one liable to pay such damages. In Western Australia, where the Crown is liable, instead of the police officer, for damages arising from the officer's tortious conduct, if done "without corruption or malice", any such substitution of liability "does not extend to exemplary or punitive damages."[95] And in the Northern Territory, where the legislation merely imposes vicarious liability on the Territory for the conduct of police officers, that liability does not extend to one to pay exemplary or punitive damages.[96] In both of the two last-named jurisdictions, the individual police officer remains liable for exemplary damages.

Despite these provisions, it can scarcely be said that there is any national legislative policy against rendering a government liable for exemplary damages based solely on the conduct of an employee. In the other four States – New South Wales, South Australia, Victoria and Tasmania – it appears that if the State is liable for compensatory damages for the conduct of a police officer,[97] it will also be liable for such exemplary damages as may be awarded.[98]

In Relation to other holders of public office

Assuming that the tortfeasor who has committed misfeasance in public office is not exercising an independent duty, and therefore may render his or her employer vicariously liable, and assuming further that, despite having either knowingly gone beyond what he or she is authorised to do, and acting in such a way as to be likely to harm the plaintiff, or being motivated by a purpose which is quite foreign to that for which the power or duty has been bestowed, the tortfeasor is nevertheless found to have rendered his or her employer vicariously liable for any compensatory damages, the question remains whether such conduct may render the employer also vicariously liable for exemplary damages.

It is submitted that there are two arguments – each quite separate from the other – which support an employer's vicarious liability for exemplary damages.

The first argument is based on comments of the High Court in *New South Wales v Ibbett*.[99] Police officers had trespassed on Mrs Ibbett's property, and in her action against the State she was awarded exemplary, as well as compensatory, damages in the District Court, an award which was upheld by the Court of Appeal. The State appealed to the High Court, one

of its arguments being that it was wrong in principle to "fix the State with vicarious liability for the conduct of persons who are not before the court, who have not been identified, whose conduct is not the subject of allegations in the pleadings, whose conduct has not been investigated at the trial and against whom no specific findings have been made."[100] A unanimous High Court rejected the State's submission, and quoted with approval the comments of Priestley JA in *Adams v Kennedy*,[101] that the amount of exemplary damages awarded against the State for the conduct of police officers

> should indicate my view that the conduct of the [police officer] defendants was reprehensible, [and] mark the court's disapproval of it. The amount should also be such as to bring home to those officials of the State who are responsible for the overseeing of the police force that police officers must be trained and disciplined so that abuses of the kind that occurred in the present case do not happen.

The court noted that similar views had been expressed by Lord Devlin in *Rookes v Barnard*,[102] by Lord Hope in *Kuddus v Chief Constable of Leicestershire Constabulary ('Kuddus')*,[103] and by the Federal Court of Appeal in Canada, in *Peeters v Canada*.[104] The comments of Lord Hope in *Kuddus* have since been followed by the English Court of Appeal in *Rowlands v Chief Constable of Merseyside Police*,[105] in holding the defendant vicariously liable for exemplary damages awarded to a plaintiff who had succeeded in an action for assault, false imprisonment and malicious prosecution.

In light of the fact that *Kuddus* was an action for misfeasance in public office, it might be said that the High Court's approval of the views expressed there is authority for the proposition that an award of exemplary damages against the Crown as an employer serves the useful purpose of bringing it home to senior officers in a position of control within the Public Service that conduct meriting the award of such damages by junior officers in public employment will not be tolerated, and that the senior officers must maintain discipline and proper behaviour at all times.

The second argument in support of an employer's vicarious liability for exemplary damages depends upon identifying the theory by which vicarious liability is imposed in any particular situation.

There are two such theories. The first is that it is only the acts of the employee – and not his or her liability – which is imputed to the employer (the so-called "master's tort" theory); the second, a theory of strict liability, would impute to the employer the wrong which the employee has committed in the course of employment.[106] It is well known that in *Darling Island Stevedoring & Lighterage Co Ltd v Long ('Darling Island')*,[107] while Kitto and Taylor JJ[108] supported the first of these theories, Fullagar J[109]supported the second.

The second theory is now settled law in England[110] and, it is suggested, in Australia. Subsequent to the *Darling Island* case, Windeyer J in *Parker v Commonwealth*[111] said that an employer "is only liable for the acts or omissions of an employee if the employee would himself be liable", a view subsequently followed by State courts.[112] More recently, the High Court, in *Hollis v Vabu Pty Ltd*,[113] acknowledged the correctness of the view expressed by Fullagar J in the *Darling Island* case, that the "modern doctrine respecting the liability of an employer for the torts of an employee was adopted … as a matter of policy.

In that case, if an employee has committed the tort of misfeasance in public office in such circumstances as to merit the plaintiff being awarded exemplary damages, and if, further, that tort was committed in the course of employment, there is no difficulty in saying that since the wrong of the employee merited the award of both compensatory and exemplary damages, that wrong, and the concomitant liability for damages, is transferred to the employer by the operation of the doctrine of vicarious liability. Furthermore, an award of exemplary damages made against an employer would meet many of the purposes of such

an award.[114] It would assuage any feelings on the part of the plaintiff for revenge, it would mark the condemnation of the court for the conduct complained of and, as mentioned above, it would fulfil the deterrent purpose by seeking to ensure that senior officers in an organisation maintain discipline and proper behaviour at all times.

Conclusion

In summary, if an individual (the **tortfeasor**) has committed misfeasance in public office, the Crown:

- will **not** be liable for compensatory damages if:
  - the tortfeasor is not a police officer, and:
    - was exercising an independent function; or
    - was acting outside the course of employment;
  - the tortfeasor is a police officer, and the fact of the commission of the tort (having been in "bad faith") takes him or her out of the protection of the legislation relating to police officers (in SA, Tas, Vic, WA and NT).
- will **not** be liable for exemplary damages if:
  - it is not liable for compensatory damages; or
  - the tortfeasor is a police officer, and the legislation of the Commonwealth, Queensland, Western Australia or the Northern Territory applies.

Endnotes

1 (1995) 185 CLR 307.
2 (1998) 196 CLR 329.
3 [1997] 2 NZLR 332
4 [2007] 1 NZLR 374.
5 [2003] 2 AC 1
6 See the comment of Nourse LJ in *Jones v Swansea City Council* [1989] 3 All ER 162 at 186, quoted with approval by Lord Steyn in *Three Rivers District Council v Bank of England (No 3)* [2003] 2 AC 1 at 190.
7 See *Macksville & District Hospital v Mayze* (1987) 10 NSWLR 708 at 724–5 per Kirby P (CA); *Chan v Minister for Immigration* (1991) 31 FCR 29 at 40–1 per Einfeld J*; R v Knowsley Metropolitan Borough Council, Ex parte Maguire* (1992) 90 LGR 653 at 664–5 per Schiemann J (Eng HC).
8 *Pemberton v A-G* [1978] Tas SR 1 at 29 per Chambers J; *Dunlop v Woollahra Municipal Council* [1982] AC 158 at 172 (PC); see also *Northern Territory v Mengel* (1995) 185 CLR 307 at 346.
9 (2003) 9 VR 432.
10 In *Northern Territory v Mengel* (1995) 185 CLR 307 the issue was accepted without question.
11 *Cornwall v Rowan* (2004) 90 SASR 269 at [257] (FC).
12 *Chan v Minister for Immigration* (1991) 31 FCR 29 at 39 per Einfeld J; see also *Bourgoin SA v Ministry of Agriculture, Fisheries and Food* [1986] QB 716 (CA).
13 *Racz v Home Office* [1994] 2 AC 45.
14 *Hobson v Attorney-General* [2007] 1 NZLR 374 (CA).
15 *Farrington v Thomson* [1959] VR 286; *De Reus v Gray* (2003) 9 VR 432 (CA);.
16 *Garrett v A-G* [1997] 2 NZLR 332 (CA); *Odhavji Estate v Woodhouse* (2003) 233 DLR (4th) 193 (SCC); and see *Kuddus v Chief Constable of Leicestershire Constabulary* [2002] 2 AC 122, where the point was admitted.
17 *Pemberton v A-G* [1978] Tas SR 1 at 14 per Neasey J (FC); cf *Sanders v Snell* (1998) 196 CLR 329 and the passing remark of Lord Bridge in *Calveley v Chief Constable of Merseyside* [1989] AC 1228 at 1240 that a decision to suspend a police officer from duty, if done maliciously, would be capable of constituting this tort.
18 *Cannon v Tahche* (2002) 5 VR 317 (CA) at [61]; and see *Leerdam v Noori* (2009) 255 ALR 553 (NSW CA) at [26] per Spigelman CJ, at [103]-[109] per Macfarlan JA (solicitors for Government Minister not public officers).
19 *Calveley v Chief Constable of Merseyside*, above; see also *Henderson v McCafferty* [2002] 1 Qd R 170 at [33] per Williams J (President of the Queensland Law Society held not to be a public officer for these purposes).

20 *Gimson v Victorian Workcover Authority* [1995] 1 VR 209 at 226 per McDonald J; and see *Three Rivers District Council v Bank of England (No 3)* [2003] 2 AC 1.
21 *Trevorrow v South Australia* (2007) 98 SASR 136 at [978]; but see my subsequent comments on the issue of intention in that case.
22 *Dunlop v Woollahra Municipal Council* [1982] AC 158 at 172; *Murcia Holdings Pty Ltd v City of Nedlands* (1999) 22 WAR 1; *Deepcliffe Pty Ltd v Gold Coast City Council* (2001) 118 LGERA 117 (Qld CA) (although neither the Council nor the individual councillors in the two last mentioned cases were held to have the necessary intent).
23 *Society of Lloyd's v Henderson* [2008] 1 WLR 2255 (CA).
24 *Jones v Swansea City Council* [1990] 3 All ER 737 at 741 per Lord Lowry (HL).
25 *Jones v Swansea City Council* [1989] 3 All ER 162 at 174–5 (CA), aff'd on this point [1990] 3 All ER 737 at 741 per Lord Lowry (HL).
26 *Three Rivers District Council v Bank of England (No 3)* [2003] 2 AC 1 at 191 per Lord Steyn (HL).
27 *Bennett v Metropolitan Police Commissioner* [1995] 2 All ER 1 at 13–14 per Rattee J; *Roncarelli v Duplessis* (1959) 16 DLR (2d) 689 (SCC); *Cornwall v Rowan* (2004) 90 SASR 269 at [251]-[256] (FC).
28 Which in this context may be constituted by a denial of procedural fairness: *Sanders v Snell* (1998) 196 CLR 329 at [45]. There having been no findings of fact by the trial judge on that issue, the matter was remitted for re-trial; the Full Court of the Federal Court, overturning the decision of the Norfolk Island Supreme Court, held that there was no proof that the defendant had known of, or been recklessly indifferent to, the unlawfulness of his actions: see *Sanders v Snell* (2003) 198 ALR 560.
29 *Northern Territory v Mengel* (1995) 185 CLR 307 at 347.
30 See *Farrington v Thomson* [1959] VR 286 at 293 per Smith J, but cf *Tampion v Anderson* [1973] VR 715 at 720 per Smith J (FC); *Little v Law Institute of Victoria (No 3)* [1990] VR 257 at 270 per Kaye and Beach JJ (App Div).
31 *Northern Territory v Mengel* (1995) 185 CLR 307 at 346-7.
32 (1995) 185 CLR 307 at 347.
33 Which may be described as 'objective recklessness'.
34 [1997] 2 NZLR 332 at 349.
35 [2003] 2 AC 1.
36 Which might be described as 'subjective recklessness'.
37 *Odhavji Estate v Woodhouse* (2003) 233 DLR (4th) 193 at [38] per Iacobucci J.
38 (2007) 98 SASR 136.
39 At [978].
40 At [885].
41 *Watkins v Home Office* [2006] 2 AC 395.
42 See *Brasyer v Maclean* (1875) LR 6 PC 398; *Karagozlu v Metropolitan Police Commissioner* [2007] 2 All ER 1055 (CA) (both cases of wrongful loss of liberty).
43 See *Odhavji Estate v Woodhouse* (2003) 233 DLR (4th) 193 at [41] per Iacobucci J (SCC).
44 Eg, *Smith v East Elloe Rural District Council* [1956] AC 736 (compulsory acquisition of land).
45 *Cornwall v Rowan* (2004) 90 SASR 269 at [729]-[734] (FC).
46 *Roncarelli v Duplessis* (1959) 16 DLR (2d) 689 (SCC).
47 *McGillivray v Kimber* (1915) 26 DLR 164 (SCC).
48 *Bourgoin SA v Ministry of Agriculture, Fisheries and Food* [1986] QB 716 (CA).
49 *Partridge v General Medical Council* (1890) 25 QBD 90 (action dismissed for lack of malice); and see *Little v Law Institute of Victoria (No 3)* [1990] VR 257 (App Div), in which the action related to the defendant's attempts to restrain the plaintiff from practising as a solicitor.
50 *Farrington v Thomson* [1959] VR 286.
51 *Longley v Minister for National Revenue* (1999) 176 DLR (4th) 445 at [133]-[135] per Quijano J (BC SC)
52 Cf *Jones v Swansea City Council* [1990] 3 All ER 737 (HL), in which the plaintiff failed to show malice on the part of the Council.
53 See *Enever v R* (1906) 3 CLR 969 at 982-3 per Barton J.
54 In the case of the Crown in right of the Commonwealth, by s 64 Judiciary Act 1903 (Cth).
55 See, eg, Sawer, 'Crown Liability in Tort and the Exercise of Discretions' (1951) 5 *Res Jud* l; Atiyah, *Vicarious Liability in the Law of Torts*, 1967, pp 75–8; Finn, 'Claims Against Government Legislation' in *Essays on Law and Government*, Vol 2, 1996, pp 36–7.
56 Law Reform (Vicarious Liability) Act 1983 (NSW) ss 7,8.
57 The exception was abolished by the Crown Proceedings Act 1972 (SA) s 10(2) (see *South Australia v Kubicki* (1987) 46 SASR 282 (FC); *De Bruyn v South Australia* (1990) 54 SASR 231 at 242 per Legoe J (FC)), and has not been revived by the subsequent repeal of that Act.
58 Crown Proceedings Act 1950 (NZ) s 6(3).
59 Kneebone, 'The Independent Discretionary Function Principle and Public Officers' (1990) 16 *Mon L R* 184 at 203–4.
60 Queensland Law Reform Commission, *Vicarious Liability*, Report No 56, 2001, Recommendation 3.5.
61 Australian Law Reform Commission, *The Judicial Power of the Commonwealth*, Report 92, 2001, Recommendation 25-1.
62 *Thompson v Williams* (1915) 32 WN (NSW) 27.
63 *Field v Nott* (1939) 62 CLR 660.

64 *Grimwade v Victoria* (1997) 90 A Crim R 526 (Vic SC).
65 *Baume v Commonwealth* (1906) 4 CLR 97.
66 *Clyne v Deputy Commr of Taxation (NSW) (No 5)* (1982) 13 ATR 677 at 682–3 per McGregor J.
67 *Cubillo v Commonwealth* (2000) 103 FCR 1 at [1120] per O'Loughlin J, aff'd (2001) 112 FCR 455 at [288]–[293] (FC).
68 *Ramsay v Larsen* (1964) 111 CLR 16.
69 *Thorne v Western Australia* [1964] WAR 147; see also *Cowell v Corrective Services Commn* (1988) 13 NSWLR 714 at 741 per Clarke JA, cf at 724 per McHugh JA (CA).
70 *Bennett v Minister for Community Welfare* (1988) Aust Torts Reports 80-210 at 68,089 per Nicholson J (WA SC); the point was not considered on appeal: (1990) Aust Torts Reports 81-048 (WA FC); (1992) 176 CLR 408.
71 *Unilan Holdings Pty Ltd v Kerin* (1993) 44 FCR 481 at 483–4 (FC); *McKellar v Container Terminal Management Services Ltd* (1999) 165 ALR 409 at [220] per Weinberg J (Fed Ct).
72 *Enever v R* (1906) 3 CLR 969; *Irvin v Whitrod (No 2)* [1978] Qd R 271; *Griffiths v Haines* [1984] 3 NSWLR 653.
73 Australian Federal Police Act 1979 (Cth) s 64B; Law Reform (Vicarious Liability) Act 1983 (NSW) Part 4; Police Service Administration Act 1990 (Qld) s 10.5; Police Act 1998 (SA) s 65; Police Service Act 2003 (Tas) s 84; Police Regulation Act 1958 (Vic) s 123; Police Act 1892 (WA) s 137; Police Administration Act 1978 (NT) Part VIIA.
74 Cth s 64B(1); Qld s 10.5(1A).
75 Tas s 84(1); Vic s 123(1); NT s 148B(2).
76 SA s 65(1).
77 WA s 137(3).
78 (2005) 15 Tas R 127 at [11].
79 Ibid at [20].
80 (2002) 6 VR 326 (CA) at [62].
81 (2003) 9 VR 432 at [5].
82 See, eg, Balkin and Davis, *Law of Torts*, 4th ed, 2009, [26.1].
83 (1995) 185 CLR 307 at 347.
84 (1995) 64 SASR 572 at 587 per Lander J
85 See *McKellar v Container Terminal Management Services Ltd* (1999) 165 ALR 409 at [253] per Weinberg J.
86 [1994] 2 AC 45 at 53.
87 In *Three Rivers* [2003] 2 AC 1 at 191, Lord Steyn took that concession as establishing that "the principles of vicarious liability apply as much to misfeasance in public office as to other torts involving malice, knowledge or intention."
88 (2003) 212 CLR 511.
89 At [40]-[42].
90 At [315]-[320].
91 At [239].
92 (1949) 79 CLR 370 at 381.
93 See, eg, *XL Petroleum (NSW) Pty Ltd v Caltex Oil (Australia) Pty Ltd* (1985) 155 CLR 448 at 471 per Brennan J; *Lamb v Cotongo* (1987) 164 CLR 1 at 8-9; *Taylor v Beere* [1982] 1 NZLR 81 at 89 per Richardson J (CA).
94 Australian Federal Police Act 1979 (Cth) s 64B(3); Police Service Administration Act 1990 (Qld) s 10.5(2).
95 Police Act 1892 (WA) s 137(6).
96 Police Administration Act 1978 (NT) s 148C(3).
97 But see *Holloway v Tasmania* (2005) 15 Tas R 127, in which the police officer's commission of the tort of misfeasance in public office was regarded as taking him out of the protection provided by the legislation.
98 For two recent examples of the award of exemplary damages against a State for the conduct of police officers, see *De Reus v Gray* (2003) 9 VR 432 and *New South Wales v Ibbett* (2006) 229 CLR 638.
99 (2006) 229 CLR 638
100 The State supported the views of Ipp JA in the Court of Appeal, quoted by the High Court at [25].
101 (2000) 49 NSWLR 78 at 87; quoted by the High Court at [51].
102 [1964] AC 1129 at 1223
103 [2002] 2 AC 122 at 149
104 (1993) 108 DLR (4th) 471 at 482.
105 [2007] 1 WLR 1065.
106 Although an argument was raised in *Ibbett* that the second of these theories was relevant to that case, the High Court did not agree: see at [56].
107 (1957) 97 CLR 36.
108 At 58 and 66 respectively.
109 At 57.
110 See *Majrowski v Guy's and St Thomas's NHS Trust* [2007] 1 AC 224 at [15] per Lord Nicholls
111 (1965) 112 CLR 295 at 301.
112 *Commonwealth v Connell* (1986) 5 NSWLR 218 at 223 per Glass JA (CA); *Cowell v Corrective Services Commn of NSW* (1988) 13 NSWLR 714 at 731–2 per Clarke JA (CA); *De Bruyn v South Australia* (1990) 54 SASR 231 at 235 per King CJ (FC); *Bell v Western Australia* (2004) 28 WAR 555.

113 (2001) 207 CLR 21 at [34] per Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ.
114 See, eg, Balkin and Davis, *Law of Torts*, 4th ed, 2009, [27.10].

THE FUTURE ARCHITECTURE OF JUDICIAL REVIEW: COULD WE IMPROVE ACCESSIBILITY AND EFFICIENCY?

Kathy Leigh*

Introduction

Since taking office in late 2007, the Government has been focussed on improving access to justice and promoting transparency and accountability in order to strengthen trust and integrity in government. The Attorney, in a recent speech, noted that "…without an accessible system of justice, the public's confidence in the rule of law is compromised. If justice is accessible only to the very wealthy, it loses relevance for the vast bulk of Australians."[1]

A vast number of people are affected by administrative decisions taken by government, so obviously this must be a major component of any consideration of access to justice.

It is within this framework that I want to discuss some ideas for examining our system of judicial review.

Objectives of judicial review

Judicial review enables a person who is aggrieved by a decision of government to challenge that decision in an independent forum. A fundamental purpose of judicial review is to ensure that executive decisions are made in accordance with the rule of law. It seeks to achieve consistency and certainty in the exercise of government power. It is a means of maintaining the accountability of officials and others exercising decision-making powers.

As Brennan J said in 1982 in *Church of Scientology v Woodward*, "Judicial review is neither more nor less than the enforcement of the rule of law over executive action; it is the means by which executive action is prevented from exceeding the powers and functions assigned to the executive by law and the interests of the individual are protected accordingly."[2]

History of judicial review

To examine whether our system of judicial review could better provide access to justice, we should look briefly at its origins.

Judicial review of administrative action has been a feature of Australia's legal landscape since the inception of the Commonwealth. Section 75(v) of the Constitution gave jurisdiction to the High Court to issue remedies against an officer of the Commonwealth to ensure the legality of government administrative action.

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However, in the period immediately following Federation, there was little significant litigation about administrative law. Prior to the 1970s, while some tribunals had been created, the system was developing in an ad hoc manner and seems to have been poorly understood by the public.

The appointment of the Kerr Committee in 1968 established the first comprehensive review of administrative law mechanisms in Australia. The present Commonwealth system of administrative review, including the *Administrative Decisions (Judicial Review) Act 1977* (Cth) *('ADJR Act')*, was the result of the work of the Kerr, Bland and Ellicott Committees.

The reforms were a major step forward in administrative law. In his second reading speech on the *ADJR Act*, the then Attorney-General, the Hon RJ Ellicott QC noted that, "the law in this area is clearly in need of reform – indeed, it could be said to be medieval…"[3]

The Kerr Committee report, in particular, outlined the major points upon which the current system was founded. The theme underlying the report was the need to develop more coherent and comprehensive review. The report identified that this review must be accessible, inexpensive, not overly procedural and transparent.

Government powers and decision making today

Some of the challenges faced within the current system no doubt stem from the sheer amount of regulation that now exists and the number of decisions made under enactments. A quick look at the bound copies of the Commonwealth laws shows that the 161 Bills introduced in 1977 are contained within one volume of approximately 1200 pages. In 2008, the 159 bills introduced comprised over 6,000 pages printed in 6 volumes!

Even though not all legislation is new legislation, amendments to existing legislation also result in changes to the law and to agency practices and procedures for decision making. Indeed, amendments to existing legislation may result in more complex decision making than new legislation.

To add to this, the power to make decisions is not just found in Acts of Parliament. Regulations and other subordinate instruments can all be sources of decision-making power for agencies.

The reality of the extent and complexity of power held by the Government means that decisions must necessarily be delegated. Powers entrusted to Ministers or Departmental and agency heads must be delegated to staff within agencies for practical reasons.

It is useful to consider some examples.

Department of Immigration and Citizenship

The Department of Immigration and Citizenship deals with issues of migration, refugee and humanitarian entry, border security, settlement, citizenship and multicultural affairs. The subject matter is broad and the legislation governing these issues complex. The people about whom decisions are being made have a lot at stake. With a workforce of just over 8,000, in the 2007-2008 financial year, the Department granted 4,637,259 permanent and temporary visas, settled 13,014 refugees and humanitarian entrants and approved the citizenship of 107,662 people.[4] Absolute consistency would indeed be difficult to achieve given this volume.

The Department's annual report for 2007-08 notes that, each year, thousands of decisions made under the *Migration Act 1958* (Cth) by officers of the Department are reviewed by

tribunals and courts. As noted by the Solicitor-General, Stephen Gageler SC, in an address to the Supreme Court and Federal Court Judges' Conference in January 2009, litigation on the subject of migration law in the 2007-2008 financial year, accounted for approximately 23 per cent of all cases commenced in the Federal Court.[5]

Centrelink

Another agency which deals with vast numbers of decisions is Centrelink. Issues of employment, emergency payments, family assistance and welfare are all covered by this agency. In fact, in 2007-08 Centrelink dealt with over 6.5 million customers and granted 2.4 million new claims.[6] In the same period, Authorised Review Officers within Centrelink heard 55,761 internal merits review applications.[7] The number of internal review matters conducted is low for the number of customers dealt with, but it represents a significant number of decisions being challenged.

Merits review

If a dispute over a decision cannot be resolved internally, it may become the subject of an application to an external tribunal to determine whether the agency decision maker has made the correct and preferable decision according to the facts. In 2007-2008, 6,312 matters were lodged with the Administrative Appeals Tribunal,[8] 13,770 in the Social Security Appeals Tribunal,[9] 6,325 matters in the Migration Review Tribunal and 2,284 in the Refugee Review Tribunal.[10] Under legislation and the Constitution, decisions of tribunals are then subject to judicial review.

Despite the fact that primary (and secondary) decision makers may be well equipped with policy and procedure manuals and apply due care and diligence throughout the decision-making process, challenges to decisions may still be made if a person is unhappy with the outcome of the decision, or does not understand or cannot accept why it was made. Even with appropriate support, training and internal processes in place to ensure consistency and fairness to the greatest possible extent, that there will be some errors in decision making is inevitable.

A challenge for agencies, particularly in these times of budget cuts and increased efficiencies, is how to most effectively ensure both that government power is exercised properly and fairly, and that the business of government is conducted efficiently. The importance of systems to ensure that executive decisions are made in accordance with the rule of law, and of systems of accountability to give the public the confidence that this is the case – becomes even clearer. As I outlined earlier, this is a key role of judicial review.

The future?

Recent commentary identifies a number of issues[11] relevant to improving the system.

One issue is the distinction between merits and judicial review. Under our constitutional separation of powers, it is well accepted that it is the role of the courts, not the executive, to make binding determinations on the meaning and lawfulness of applications of the law and that it is for the executive, not the courts, to assess non-jurisdictional facts and determine what is the correct and preferable decision. A criticism often made of the system is that the distinction between review on the merits and review of an error in law can become blurred. It is quite easy to imagine a scenario where in considering unreasonableness in a judicial review context, one could reach a grey area where the considerations were very similar to those in play in merits review. Similarly, issues of fact that determine the merits of a matter are also relevant considerations that a decision maker could err in law by not properly considering.

Another possible issue is that there are multiple and overlapping routes for seeking judicial review of a decision. The *ADJR Act* sought to codify the principles of judicial review and reform the procedures for commencing an action. It was designed to overcome the complexities of judicial review at common law. The remedies largely replicated those already existing in the common law but made them more accessible. It could not of course reduce the scope of judicial review under s75(v) of the Constitution. A person affected by a decision can thus apply for an order for review under the *ADJR Act*, or they can apply for Constitutional writs. The Federal Court, as well as having jurisdiction under the *ADJR Act*, has jurisdiction under s39B of the *Judiciary Act 1903* in the terms of s75(v) of the Constitution. It is now usual for a person bringing an ADJR action to bring a s39B action cumulatively or in the alternative, just in case the court finds that the s39B grounds are stronger. When one considers that the original objective of the *ADJR Act* was to provide a simplified process, this may be evidence that this particular objective is being undermined in practice.

The restricted scope of the *ADJR Act* has been commented on extensively and, in practice, is the main factor leading to concurrent applications being made under the *ADJR Act* and the *Judiciary Ac*t. The *ADJR Act* requirement for reviewable decisions to be made 'under an enactment' means that it does not give the Federal Court jurisdiction to review the potentially illegal exercise of non-statutory public power. There is also the restricted application to final or operative and determinative decisions as a result of the High Court's interpretation of administrative decisions in the *Bond* decision[12]. These restrictions do not apply if the Federal Court's jurisdiction under s39B is relied upon.

In addition, the grounds for review set down in the *ADJR Act* have of course been the subject of many court cases in the 30 years since the Act was established. This means that inevitably their meaning is now less clear than it appeared to be when the *Act* was first passed.

These points might suggest that we need to look afresh at the codification of the grounds of judicial review – to update them to again provide a clear and simple source for those needing to seek judicial review of government decisions.

You might even question whether the grounds of judicial review were ever clear. As commentators have pointed out, from the beginning, you need a knowledge of the common law in order to understand them.

The Solicitor-General, Stephen Gageler SC, has suggested that there might be a case for some general principles[13] to give direction for the particularised grounds.

Former Justice Kirby looked at the issue of codification from another angle. In *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002,*[14] his Honour suggested that the *ADJR Act's* codification of the grounds of review had, to some extent, "retarded" the development of judicial review through the common law.[15] His Honour suggested that "the effects of the ADJR Act were overwhelmingly beneficial and review of federal administrative action was more commonly pursued under that Act than had been the case under the earlier common law".[16] However, he went on to note developments in the English common law since 1977 and suggested that "the common law in Australia might have developed along similar lines" but "the somewhat arrested development of Australian common law doctrine that followed [enactment of the *ADJR Act*] reflects the large impact of the federal legislation on the direction and content of Australian administrative law more generally."[17]

Others focus their remarks on the matters excluded either from review or from the obligation to provide reasons for decisions under the *ADJR Act*. There has also been debate about whether judicial review should extend to decisions of all bodies exercising public power,

rather than just public bodies. The courts to date have not supported the application of the *ADJR Act* to decisions of bodies outside government even if those bodies are exercising public power.[18] While developments in the UK in extending judicial review to private sector bodies have been noted, they have not at this stage been followed in Australia.

So, a number of issues have been raised by commentators. I note them, not to give any particular support to them, but to acknowledge that, in the 30 years since the Act was passed, its interpretation has inevitably developed and issues have inevitably been raised about its operation.

So far, I have focussed on comments about the content of judicial review. The ability of a person affected by an administrative decision to readily understand the standards applying to the making of the decision, and thus the grounds on which the decision might be challenged, is but one aspect of an accessible system of judicial review.

Should we also be considering enhancements to court processes to improve accessibility and handling of matters? After all, it is our courts in which remedies are actually provided in this area. In June 2009, the Attorney-General introduced the Access to Justice (Civil Litigation Reforms) Amendment Bill into the Parliament. This was intended to send a clear message that the Court, parties and their lawyers are expected to manage litigation efficiently and cost-effectively. It introduced an overarching obligation to 'facilitate the just resolution of disputes as quickly, inexpensively and efficiently as possible'. As part of an increased focus on case management, the Court will also need to consider whether a case should be referred for alternative dispute resolution. Both the Federal Court and the legal profession worked very constructively with the Government in developing these reforms.

The reforms can be expected to improve the experience of litigants in taking a matter to court. But questions remain - are there particular ways we could tailor the process for courts examining judicial review applications? Could we, for example, simplify the procedures for getting a matter before the court, provide for judicial review of certain decisions to be heard by lower level courts, or review fees for some matters or under certain circumstances?

Access to justice is about all the ways in which we can strengthen people's capacity to address legal problems, not just through court proceedings. Indeed the earlier disputes are resolved, the less adverse the impact on the person affected and the less cost there is to the taxpayer. Moving the focus to the beginning of the justice system to prevent disputes developing in the first place, rather than just trying to fix the problems at the end, should be a key aim of any moves to improve access to justice.

The *ADJR Act* took a significant step to assist in quicker resolution of disputes by creating a statutory obligation upon administrative decision makers to provide a written statement of reasons upon request. This assists the person affected to understand the decision and potentially to resolve it more easily.

Judicial review itself also assists in improving primary decision making. Court decisions about the legality of decision making are fed back into the government decision-making processes and thus prevent future disputes.

Are there ways in which we can further assist in the prevention and early resolution of disputes about government decisions?

Information failure is a significant barrier to justice. Information about legal issues that is easy to find and easy to use is of fundamental importance to access to justice. People also need reliable information. We all know from personal experience that there is a wealth of information on the internet, but we also know that not all of it is accurate. Informing people of

their rights and responsibilities can prevent disputes from occurring and escalating. This is particularly important in the area of administrative law, where often people are trying to seek more information about why a particular decision affecting them was made in the manner it was.

For disputes that cannot be prevented, better outcomes will often be achieved if they can be resolved without recourse to courts. Means by which disputes can be prevented include community education and targeted early intervention services, and greater use of ADR processes such as mediation and conciliation. Is there more scope for these mechanisms in relation to government administrative decisions?

Conclusion

In the area of judicial review, it may be time to examine whether there is more that can be done. There may be ways in which our law could be simplified, so as to achieve the desired outcomes of clarity, effectiveness, accountability and accessibility, and also allow the proper process of government to carry on.

Access to justice is not just a fashion of the day. It is about getting to the heart of what people should reasonably be able to expect in a justice system.

Endnotes

1 The Hon. Attorney-General, Second Reading Speech, *Access to Justice (Civil Litigation Reforms) Amendment Bill 2009*, 22 June 2009
2 *Church of Scientology v Woodward* (1982) 154 CLR 24 at p 70
3 Mr Robert J. Ellicott QC, Second Reading Speech, *Administrative Decisions (Judicial Review) Bill 1977*, 28 April 1977
4 Australian Government, Department of Immigration and Citizenship Annual Report 2007-08
5 Mr Stephen Gageler SC, Solicitor-General for the Commonwealth, Address to the 2009 Supreme and Federal Courts Judges Conference, Hobart, 27 January 2009, '*Recent trends in Administrative Law — Have the decisions of the High Court on immigration matters impacted upon traditional and established principles?*'
6 Australian Government, Centrelink Annual Report 2007-08
7 Ibid
8 Australian Government, Administrative Appeals Tribunal Annual Report 2007-08
9 Australian Government, Social Security Appeal Tribunal Annual Report 2007-08
10 Australian Government, Migration Review Tribunal and Refugee Review Tribunal Annual Report 2007-08
11 A particular source drawn on for this presentation has been Aronson M 'Is the ADJR Act hampering the development of Australian administrative law?' (2005) 12 (2) *Australian Journal of Administrative Law* 79
12 *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321; 94 ALR 11
13 Gageler S, *The underpinnings of judicial review of administrative action: common law or Constitution* (2000) 28 Fed L Rev 303
14 (2003) 198 ALR 59; 77 ALJR 1165
15 Ibid, at [166]
16 Ibid, at [157]
17 Ibid, at [166]
18 *Neat Domestic Trading Pty Ltd v AWB Ltd* (2003) 198 ALR 179; 77 ALJR 1263