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TABLE OF CONTENTS

CREATURE OF STATUTE, BEAST OF BURDEN: THE VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL AND THE HEAVY LIFTING OF HUMAN RIGHTS

Maya Narayan*

VCAT in an age of rights

> Competition is a healthy phenomenon. It steels the mind; prompts the individual to maximise performance. It drives the individual to excel, to be the best. Obviously this is recognised at statutory and policy levels in commerce. Yet, it cannot be any different where litigation is concerned. Litigants and their legal advisers will 'vote with their feet'. They will choose the litigation forum that is speedy, economical and effective.[1]

In the late 1980s and early 1990s the Supreme Court of Victoria witnessed a 'seismic shift in jurisdiction'.[2] As new institutions were established and acquired powers in relation to civil litigation, the Supreme Court's primacy as the only superior court of the State, a status enjoyed by virtue of its unique constitutional position, began to erode.[3]

The first challenge came following the establishment of the Federal Court of Australia in 1976.[4] While much of its jurisdiction was devoted to matters of national concern, the Federal Court's jurisdiction in relation to the *Trade Practices Act 1995* (Cth) enabled civil claimants, such as those bringing actions in contract and negligence, to avoid the delays and complexities of Supreme Court litigation by framing their claims in the alternative.[5] So too did the Court's preeminence in the field of personal injury recede, with amendments to the *County Court Act 1958* (Vic) removing the monetary limit on personal injuries claims that could be heard within that jurisdiction.[6] Then came the "phenomenon of tribunalisation" – a rapid proliferation of court substitute tribunals intended to alleviate the pressures on, and enhance the efficiency of, the civil justice system.[7]

Surrounded by reform, the Supreme Court was forced to streamline its internal processes to respond to the efficiency and economic appeal of these new institutional competitors. For the most part the endeavour was successful, with many commentators proclaiming the benefits of institutional competition for the efficiency of the justice system as a whole.[8]

So, when the operative provisions of Victoria's *Charter of Human Rights and Responsibilities Act 2006* (Vic) ('*Charter*') came into effect in January 2008, there was little cause for immediate concern over what appeared to be a second wave of institutional competition. Indeed, while the *Charter* conferred broad powers and duties on courts and tribunals in relation to human rights, the Supreme Court was conferred with special powers that it alone could exercise as Victoria's only court of supervisory jurisdiction.[9] No one expected then, that in the first three years of the *Charter's* operation, it would be the Victorian Civil and Administrative Tribunal ('VCAT'), not the Supreme Court, that would do much of the heavy lifting of human rights, taking the lead in attempts to discern the meaning and implications of the *Charter's* rights protection regime for administrative decision-making in Victoria.

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Transforming VCAT

The Tribunal was, in many ways, better positioned than the Supreme Court to tackle the difficult conceptual and interpretation issues that arose from the *Charter's* broad statutory regime. Firstly, VCAT's processes created a forum that was ripe for test case litigation. Unencumbered by the rules of evidence[10] and rarely subject to an award of costs,[11] parties to VCAT proceedings were free to raise *Charter* arguments without concern for the usual risks of civil litigation. Secondly, and perhaps more critically, the Tribunal was blessed with a rights-amenable leadership in its President, Justice Kevin Bell.

Throughout the *Charter's* initial stages, Justice Bell was vocal about the Tribunal being a rights-respecting institution, and about its Members having an important role to play in the development of human rights jurisprudence.[12] Leading the way, Justice Bell himself handed down a number of decisions addressing key questions concerning the *Charter's* operation. From defining the entities upon which the *Charter* imposes obligations,[13] to setting out the interpretative approach to be taken when construing legislation compatibly with human rights,[14] Justice Bell's decisions carved out a role for VCAT as a central player within Victoria's new system of rights protection. Perhaps the most significant question to arise was the extent to which the Tribunal could consider the lawfulness of a decision-maker's actions in bringing an application to VCAT, when that application was being heard in the Tribunal's original jurisdiction. This question, which came before His Honour in *Director of Housing v Sudi*,[15] highlighted the unique place of VCAT within Victoria's system of judicial review, as well as the uncertain scope of the Tribunal's capacity to engage in review of government action.

Before these questions can be considered in detail, the far-reaching impact of the *Charter* on the processes of VCAT must first be appreciated.

Three provisions of the *Charter* are central to the work of the Tribunal: s 4 prescribes the types of bodies upon which the *Charter* imposes duties in relation to human rights; s 38(1) prescribes the conduct required of those bodies in order to ensure that their decision-making is lawful; and s 32(1) requires that all statutory provisions be interpreted compatibly with human rights, to the extent that this can be achieved consistently with their purpose. Because s 32(1) operates in relation to all statutory provisions, the *Charter's* interpretative mandate applies equally to provisions within the *Charter* as it does to those external to it. Hand in hand with s 32(1), s 7(2) contains the *Charter's* proportionality test, and lists a range of non-exhaustive factors that may be taken into consideration when determining whether a limit imposed on a human right is reasonable and demonstrably justified. Finally, in addition to the operative provisions contained in ss 38(1) and 32, the *Charter* imposes substantive duties on the Tribunal in relation to procedural fairness.[16]

The proportionality test contained in s 7(2) and the new principles of construction engendered by s 32 represent a fundamental change to the way in which tribunals must approach statutory construction. For VCAT in particular, this more complex approach to decision-making is in many ways at odds with the priority placed by the *Victorian Civil and Administrative Tribunal Act 1998* (Vic) ('*VCAT Act*') on ensuring that the institution operates as an efficient, technicality-free jurisdiction**.**

Reconceptualising VCAT

Much of the commentary devoted to assessing the *Charter's* first three years of operation has focused on the complex interpretation issues that arise in relation to the meaning of the *Charter's* operative provisions, as well as on the content of specific rights and their interaction with various regulatory regimes.[17]

This paper does not purport to retrace well-travelled ground but, instead, takes an institutional approach to critically analysing the *Charter's* impact on Victoria's system of administrative justice generally, and on VCAT in particular. The claim implicit in the adoption of this analytical lens is that alongside the fundamental procedural transformations taking place as a consequence of the *Charter's* interpretative and conduct mandates, there are more subtle conceptual transformations.

This discussion will assess these transformations as they relate to three stages of VCAT's decision-making: ascertaining the power exercised by the Tribunal; characterising the Tribunal's jurisdiction to consider *Charter* matters; and determining content of the obligation to which the Tribunal must hold public authorities. Taken together, these stages represent the lifecycle of a VCAT decision.

To this end, the first section of this paper will consider the nature of VCAT's power. This is significant in light of s 4(1)(j) of the *Charter*, which excludes courts and tribunals from the *Charter's* conduct mandate only when these bodies are not acting in an administrative capacity. Determining when and to what extent VCAT will be a public authority for the purposes of s 4(1)(j) requires the Tribunal to delineate those instance in which it exercises judicial power from those in which it acts in an administrative capacity. This is by no means a straight-forward endeavour, as the various instruments that confer powers and functions on the Tribunal rarely signpost when the Tribunal, in exercising its powers, will cross from administrative into judicial terrain.

Another conceptual challenge, considered in the second section, is the extent to which VCAT has jurisdiction to consider the unlawfulness of a public authority's conduct in respect of the *Charter,* when that public authority is a party to a proceeding in the Tribunal's original jurisdiction. The Tribunal, as a creature of statute, may only exercise the powers conferred on it by enabling enactments. The *VCAT Act* and various other enabling enactments confer either powers on the Tribunal in relation to statutory causes of action (that is, original jurisdiction), or powers to review decisions made under various statutory regimes (that is, merits review). The central controversy in respect of the *Charter* is whether consideration of unlawfulness under s 38(1) of the *Charter* impermissibly transforms the nature of the Tribunal's function in its original jurisdiction to one of merits review. That is, does conferral on the Tribunal of a supervisory role in relation to human rights in any way usurp the functioning of the State's Supreme Court?

A third conceptual difficulty, the subject of the final section, is the content of the obligation to give "proper consideration" to human rights. If the Tribunal does have broad powers to consider the human rights compliance of public authorities in bringing applications before it, then what is the standard of decision-making to which these authorities should be held? Of specific concern is the role that departmental policies should be permitted to play in human rights decision-making, and the extent to which the Tribunal may assess these policies within its original jurisdiction.

Ultimately, consideration of these conceptual challenges is both necessary and timely; just as Justice Bell has returned to the Supreme Court (and arguably taken the jurisprudential momentum he brought to VCAT with him), the *Charter* faces a period of statutory review led by a government which is neither responsible for its enactment, nor supportive of its continued existence.[18] Indeed, in such a hostile environment, reform proposals will no doubt seek to clarify the position of the *Charter*, as well as VCAT, within Victoria's system of administrative justice.

The powers of VCAT: reconceptualising the Tribunal as a public authority

The task of defining those entities that are public authorities for the purposes of the *Charter's* conduct mandate is central to the work of VCAT, given that a plethora of government entities ("core public authorities")[19] and entities exercising functions on behalf of government ("functional public authorities")[20] regularly appear in each of the Tribunal's 14 lists.[21]

For the most part, the Tribunal has had little difficulty identifying, as matters are brought before it, those parties that will be public authorities within the meaning of s 4(1)(a), (b) and (c).[22] A more challenging question arises, however, in relation to when the Tribunal itself will be a public authority and thus obliged to act compatibly with, and give proper consideration to, human rights. To this end, s 4 of the *Charter* only excludes courts and tribunals from the *Charter's* conduct mandate where those bodies are not acting in an administrative capacity.

The Tribunal has struggled with the meaning of "acting in an administrative capacity" for the past three years.

The Tribunal's consideration of "acting in an administrative capacity"

There is little doubt that the phrase "acting in an administrative capacity" captures the various procedural and clerical functions undertaken by the Tribunal and its registry staff.[23] A greater degree of uncertainty exists as to when the Tribunal will be a public authority in performing an *adjudicative* function.

In *Kracke v Mental Health Review Board ('Kracke')*, the first VCAT decision to substantively approach the question, Bell J found that the Tribunal was acting in an administrative capacity in conducting merits review of a decision made by an original decision-maker - the Mental Health Review Board. In this sense, both the Tribunal and the Mental Health Review Board were bound by s 38(1).[24] But a question that did not arise for determination was whether the Tribunal could ever be a public authority in hearing a matter in its original jurisdiction where the powers it exercises bear a distinctly "judicial character".[25] This question goes to the very heart of the role played by VCAT within Victoria's system of administrative justice, as it mirrors the distinction between administrative and judicial power found at the centre of the Tribunal's hybrid structure. Indeed, if s 4(1)(j) is to be read as excluding the tribunal when it is "acting in a judicial capacity", then it would appear that the Tribunal could never be bound by s 38(1) when determining proceedings in its original jurisdiction. For reasons shortly to be discussed, however, such a construction of s 4(1)(j) would be inappropriately narrow.

In *Director of Housing v Sudi ('Sudi')*, Bell J finally had an opportunity to consider the operation of s 4(1)(j) in relation to the Tribunal's original jurisdiction. In that matter, an occupant of a property owned by a public authority landlord sought an order under s 233 of the *Residential Tenancies Act 1997* ('*RTA*') compelling the landlord to enter into a tenancy agreement with him. The application was heard in the Residential Tenancies list of VCAT, a list in which the Tribunal, in its original jurisdiction, is required to make a decision at first instance. In determining the proceeding, Bell J considered, as a preliminary question, whether s 233 of the *RTA* conferred "administrative power" on the Tribunal.

In this respect, the *RTA* enabled the Tribunal to make an order under s 233 only if satisfied that:

- The applicant could reasonably be expected to comply with the duties of a tenant: s 233(1)(a);
- The applicant would be likely to suffer severe hardship if compelled to leave the premises: s 233(1)(b); and

- The hardship suffered by the applicant would be greater than any hardship that the landlord would suffer if the order were made: s 233(1)(c).

The preliminary question was ultimately answered in the affirmative; however, Bell J's judgment on this point consists of no more than a declaratory statement concerning the Tribunal's status as a public authority. The judgment fails to elucidate any indicia of administrative power, the presence of which in s 233 were sufficient to bring the Tribunal within the scope of the *Charter's* conduct mandate. As a result, the *Sudi* decision provides little guidance for Tribunal members confronted with the task of determining whether the Tribunal is "acting in an administrative capacity" in other proceedings.

In *BAE Systems Australia Ltd ('BAE')*, while the question ultimately did not arise for determination, Mackenzie DP went marginally further than Bell J, suggesting factors that may be relevant to determining the Tribunal's status as a public authority in the context of an exemption application under s 83 of the *Equal Opportunity Act 1995* (Vic) (a matter also heard in the Tribunal's original jurisdiction).[26]

Deputy President Mackenzie noted:

> An exemption proceeding is a proceeding of an unusual kind. It can commence on application or on the Tribunal's own initiative. Generally, there is no 'dispute' or 'respondent'. An exemption, if granted, has future application and operates by notice published in the Government Gazette. It may relate to a class of people, activities or circumstances. But all these are matters for another day.[27]

This brief obiter and its allusion to the prospective nature of an exemption order, owes a debt to a line of federal public law decisions that deal with the nature and consequences of an act of administrative power.[28] The Tribunal, however, cited no authority to support its conjecture and, like Bell J's judgment in *Sudi*, ultimately leaves undefined the difficult conceptual issues that arise out of the interaction of s 4(1)(j) with the Tribunal's complex multi-jurisdictional structure.

These decisions demonstrate the way in which reconceptualising the nature of the power exercised by the Tribunal in its original jurisdiction can go some way towards enhancing the institution's ability efficiently to identify when it will be obliged to give effect to human rights. Accordingly, the remainder of this discussion will attempt to outline a conceptualisation of VCAT's power that better accords with a traditional constitutional law understanding of the nature of judicial - and, inversely, administrative - function.

Interpreting the phrase "acting in an administrative capacity"

Section 4 (1)(j) of the *Charter* is a provision that, like any other Victorian statutory provision, is subject to the *Charter's* interpretive mandate. Any attempt to construe the phrase "acting in an administrative capacity" must therefore begin with consideration of s 32(1).

In *R v Momcilovic ('Momcilovic'),* a case decided after both *Kracke* and *BAE*, the Court of Appeal held that the correct interpretive approach to be taken under s 32(1) is to explore all possible interpretations of a provision before adopting the one that least infringes human rights.[29] The Court held that the interpretative mandate does not create a new test of statutory construction, but rather requires a decision-maker to apply ordinary principles of interpretation in attempting to arrive at a human rights-compatible construction. Only if such a construction is not possible will s 7(2) (the proportionality test) be relevant.

In respect of s 4(1)(j), the Court's decision in *Momcilovic* supports a broad interpretation of the phrase "acting in an administrative capacity", which equates an action in an administrative capacity with an exercise of administrative power.[30]

Firstly, the ordinary meaning of these words focuses on the nature of a power being exercised by a decision-maker, not on the manner in which this exercise takes place. To this end, the *New Shorter Oxford English Dictionary* defines the word "capacity" as: *"capacity… n & a… **5** An ability, power, or propensity for some specified purpose, activity, or experience…".* The Tribunal, therefore, should not necessarily be excluded from the operation of s 38(1) when it is exercising administrative power in an adjudicative setting.

Secondly, the Note to s 4(1)(j) also supports a broad view of the phrase, focusing on the inherent character of the power being exercised.[31] This is because the Note provides the examples of issuing warrants and hearing committal proceedings as instances in which a court or tribunal will be acting in an administrative capacity. In respect of both of these functions, a decision-maker will be required to exercise administrative power in a judicial manner.[32]

Finally, the purpose and context of s 4 supports a broad construction of the phrase. During the Charter Bill's Second Reading Speech, the Attorney-General remarked:

> the definition of 'public authority' in clause 4 is an important provision that determines the limits of the duty in clause 38. The intention is that the obligation to act compatibly with human rights should apply broadly to government and to bodies exercising functions of a public nature.[33]

As s 39(1) and (2) of the *Charter* indicate that a ground of unlawfulness arising from s 38(1) should be available to supplement a traditional ground of judicial review, adopting a broad construction of "acting in an administrative capacity" would ensure that the meaning of s 4 (1)(j) of the *Charter* accords with the broad definition of "tribunal" contained in s 2 of the *Administrative Law Act 1978*.

The *Momcilovic* approach to interpretation indicates that a broad construction of "acting in an administrative capacity", which focuses on the nature of the power being exercised, is a construction that is both available to the Tribunal and one that least infringes human rights. Once such a construction is adopted, it becomes necessary to consider what precisely it means to exercise "administrative power".

Indicia of administrative power

There is a rich and extensive line of authority in the federal sphere concerning the distinction between judicial and administrative power. While this line of authority is predicated on the separation of powers contained in Chapter III of the Constitution, and the principle that federal tribunals cannot exercise the judicial power of the Commonwealth, these authorities are nevertheless relevant to characterising the powers exercised by a state tribunal.[34]

In *Love v Attorney-General (NSW)*, the High Court noted:

> the decisions of this Court relating to the exercise of judicial power in the particular context of Ch III give expression to the settled principles governing the exercise of judicial power.[35]

Considering the federal line of authority, the Court, in *Precision Data v Wills*[36]*,* noted the difficulty involved in attempting to formulate a precise definition for these concepts, and adopted an approach that looked to the effect of the powers purportedly exercised as a means of identifying the relevant indicia of administrative or judicial power.

In arriving at its decision, the Court surmised:

> [W]here, as here, the function of making orders creating new rights and obligations is reposed in a tribunal which is not a court and considerations of policy have an important role to play in the determination to be made by the tribunal, there is no acceptable foundation for the contention that the tribunal … is entrusted with the exercise of judicial power.[37]

The indicia identified in this passage – the creation of new rights and obligations, the body in question not being a court, and the consideration given to matters such as a policy (that is, matters not specified by Parliament) – were approved by the High Court in *Visnic v Australian Securities and Investment Commission*.[38]

Yet these factors are by no means conclusive, and the High Court in *Attorney General (Cth) v Alinta* cautioned against the application of precise formulas to complex adjudicative functions.[39] While such considerations are not wholly antithetical to an exercise of judicial power,[40] in the words of Kitto J in *Tasmanian Breweries*, an administrative power ultimately "refers the Tribunal … to its own idiosyncratic conceptions and modes of thought".[41] In other words, the Tribunal will inevitably be exercising administrative power where it is empowered by an enabling enactment to make a determination as to what is "right and fair" between parties.[42]

However, for VCAT's purposes, the three indicia of administrative power identified in the federal authorities provide an effective conceptual framework within which to assess the Tribunal's status in relation to s 38(1) of the *Charter*. Indeed, turning back to consider *Sudi* and *BAE*, the findings in both these matters could have been supported by reasoning akin to that of the High Court in the Ch III cases.

To this end, the resolution of a dispute concerning the existing rights and obligations of parties has been held to be an inescapably judicial act.[43] Where, as in *Sudi*, the effect of the Tribunal's order is to *create* a right or a duty, the power exercised may properly be characterised as administrative, despite the fact that the determination may have been made within the Tribunal's original jurisdiction. Moreover, the fact that a power has been conferred on a tribunal and not a court is a strong indicator that the power is of an administrative character.[44] Finally, where a decision-maker is given a broad discretion to act without reference to any objective test or ascertainable criteria, the power so exercised is not judicial in nature.[45] This is because such a power enables the Tribunal to make a determination by reference to matters other than those set out in legislation, such as policy considerations and subjective value judgments.[46]

Ultimately, the taking of this kind of conceptual approach would provide VCAT's members with stronger guidance as to the application of s 4(1)(j) to other matters within the Tribunal's original jurisdiction.

The jurisdiction of VCAT: in search of a conceptual anchor

The previous section sought to reconceptualise the nature of VCAT's power so as to identify when the Tribunal will be exercising administrative power and thus bound to comply with the *Charter's* conduct mandate. This section considers the entirely separate question of whether the Tribunal, in exercising judicial power, has jurisdiction to consider whether a public authority who is a party to a proceeding has complied with s 38(1).

Sudi and the jurisdictional question

The jurisdictional question arises as a consequence of the *Sudi* decision,[47] in which Bell J held that the Tribunal could consider human rights matters in its original jurisdiction.

Certainly, the Tribunal could always consider some *Charter* issues within its original jurisdiction; indeed, this was a natural consequence of s 32(1). But the particular issue arising from *Sudi* was what the Tribunal was to make of proceedings commenced in breach of s 38(1).[48] In essence, Bell J found that the effect of a public authority's non-compliance with s 38(1) in making an application to VCAT was to invalidate the application and deprive the Tribunal of jurisdiction to determine the substantive proceeding.[49] Justice Bell's approach effectively viewed *Charter* compliance as a jurisdictional pre-condition in proceedings to which a public authority is a party.

In relation to the source of the Tribunal's power to express this finding, Bell J stated (at [117]):

> … the tribunal has both the jurisdiction and the obligation to determine whether it has jurisdiction in a proceeding, including the validity of provisions which impact on that jurisdiction. It also has jurisdiction to determine legal issues which legitimately arise in a proceeding within its jurisdiction.

While acknowledging that VCAT has only those powers conferred on it by statute,[50] Bell J's *jurisdictional pre-condition* approach greatly understates the breadth of the Tribunal's jurisdiction and fails to appreciate the nuances of the powers conferred on it by various enabling enactments. Indeed, the second reading of the VCAT Bill expressed Parliament's intention that the Tribunal would be a "one-stop-shop" for administrative justice and that it should have broad powers to enable the institution to perform this role.[51] To this end, several provisions of the *VCAT Act*, when read together, suggest that, if the Tribunal does have the power to consider *Charter* compliance, an assessment of this nature may be more properly characterised as taking place within – not as a pre-condition to – jurisdiction.

Firstly, Part 1 of the *VCAT Act* deals with preliminary matters relevant to jurisdiction, both merits review and original. Within this Part, s 4 provides that the ability of the Tribunal to consider a decision is not affected by the fact that the decision-maker acted outside power in making it. This provision purports to confer on the Tribunal a fulsome jurisdiction to consider the lawfulness of decisions, notwithstanding that the outcome of such consideration may be to declare a decision invalid. Indeed, s 97 is put in almost precisely these terms, conferring on VCAT the power to "consider any matter it sees fit". As to the Tribunal's substantive powers to provide remedies in relation to the unlawful conduct of public authorities, s 75 provides a power to dismiss proceedings that constitute an abuse of process (such as, undoubtedly, making an application that failed to comply with s 38(1)), while ss 123 and 124 embody the statutory equivalents of a court's equitable power to grant injunctions and issue declarations.

In this way, there were broad remedial powers available to Bell J in dealing with the *Sudi* matter, such that a finding of no jurisdiction was not the only – or even most appropriate – means of providing an effective remedy for the public authority's breach of s 38(1). Indeed, the terms of the *VCAT Act* itself, as well as Parliament's intention that VCAT be a "one-stop-shop" for administrative justice, suggest that the powers of the Tribunal should not be construed so narrowly as to deprive it of jurisdiction to consider legal questions that may arise in a proceeding.

Given the deficiencies of the *jurisdictional pre-condition* approach, as well as the fact that an appeal in *Sudi* is currently before the Court of Appeal, consideration of some alternative approaches to conceptualising VCAT's jurisdiction may go some way to providing a more complete picture of the position in which the institution finds itself in relation to s 38(1).

Intra-jurisdictional approaches

Two approaches to conceptualising how the Tribunal may have jurisdiction to consider the *Charter* compliance of a public authority can be referred to as the *collateral attack approach* and the *nullity approach*. While both are predicated on the proposition that *Charter* compliance is an assessment that should properly be characterised as taking place *within* jurisdiction, the former focuses on the ability of a person whose human rights have been affected to raise a *Charter* argument, while the latter focuses on the legal effect of a purported decision that breaches the conduct mandate.

The collateral attack approach

A person whose rights or interests have been affected by an administrative decision purportedly made outside power may assert his/her rights in two ways: by bringing an action in judicial review (as a sword); or by raising the decision-maker's unlawful conduct as a defence in proceedings brought by that decision-maker to enforce the impugned decision (as a shield).[52] In traditional administrative law, the latter approach is referred to as a collateral attack. In considering VCAT's jurisdiction to provide a remedy in respect of a breach of s 38(1), a question arises as to whether collateral attack is permitted by s 39(1) of the *Charter*.

Section 39(1) provides:

> If, otherwise than because of this Charter, a person may seek any relief or remedy in respect of an act or decision of a public authority on the ground that the act or decision was unlawful, that person may seek that relief or remedy on a ground of unlawfulness arising because of this Charter.

The Explanatory Memorandum to the Charter Bill indicates that s 39(1) is designed to preclude a relief or remedy being sought where the only breach that has been committed is one arising under the *Charter*.[53] It is unclear, however, whether a non-*Charter* ground of unlawfulness must be a cause of action, or whether "relief" in s 39(1) could be read broadly as encompassing both causes of actions and defences.[54] In this respect, Bell J's judgment in *Sudi* perhaps understated the relevance of s 39(1) to the jurisdictional question when, at [134], he finds that it is not necessary to rely on this provision in order to find that VCAT has jurisdiction to consider the conduct constituting a breach of s 38(1). The collateral attack approach to conceptualising the source of VCAT's *Charter* jurisdiction would seem to be supported by s 32(1) and a *Momcilovic* approach to interpretation of s 39(1).

In the context of VCAT, however, aside from negotiating the ambiguities of s 39(1), a further question arises as to whether enabling a collateral attack to be mounted on the basis of s 38(1) would effectively amount to conferring a supervisory role on a body that lacks any inherent supervisory jurisdiction.

Recently, the Court of Appeal, in the context of the Magistrates' Court, considered this question in *Maswtyck v DPP ('Mastwyck')*.[55] *Mastwyck* concerned s 55(1) of the *Road Safety Act Act 1986* (Vic) ('*RSA*'), a provision that conferred on police the power to require any individual producing a blood alcohol reading in excess of the legal limit to accompany law enforcement officers to a police station. A refusal to comply with a request by officers under s 55(1) would constitute an offence under the *RSA*. The question in *Mastwyck* was whether a failure to exercise the power in s 55(1) reasonably would invalidate the decision by police, such that it could not be used as a basis for prosecuting an offence under that Act. It is worth restating the Court's discussion in relation to collateral attack in some detail.

At [70] Redlich JA notes:

> As is recognised in Aronson and Dyer, the assertion of legal validity via collateral attack can 'arise in a manner not designed specifically for handling it nor necessarily focusing on that issue… and in a court or tribunal which may not have much administrative law experience'. The summary prosecution of offences under the RSA in the Magistrates' Court is not a jurisdiction readily amenable to such an administrative review of police powers. Questions of 'policy' including arguments about the availability of resources may arise [citation omitted]. The parties' representatives are unlikely to have any particular familiarity with such potentially complex issues, proof or disproof of which may require a significant body of evidentiary material and necessitating multiple hearings.

It is a little conceptual stretch to draw an analogy between the Redlich JA's characterisation of the Magistrates' Court's jurisdiction and the position in which VCAT finds itself in relation to the *Charter*. Despite being the largest administrative tribunal in the state, the Members sitting in VCAT's original jurisdiction have very little practical administrative law experience. Furthermore, the goals of efficiency and expediency enshrined in the *VCAT Act* sit uneasily with the task of adducing evidence relevant to the substance of a collateral challenge.

Indeed, the issues discussed above were used by the majority in *Mastwyck* as justification for taking an alternative approach to finding that the Magistrates' Court had jurisdiction to entertain questions of reasonableness. The majority construed the statutory power conferred by s 55(1) of the RSA as containing an *implicit* requirement that an unreasonable exercise of the power would render the decision invalid. This alternative method of conceptualising jurisdiction is essentially what is at issue in the *nullity approach*.

The nullity approach

This *nullity approach* to conceptualising VCAT's *Charter* jurisdiction focuses on the nature of the power purportedly exercised by an original decision-maker (that is, a public authority) and the statutory terms by which the power is conferred. At the centre of this approach is the proposition that the legal effect of a decision depends not on the nature of the Tribunal's jurisdiction, but on the context and purpose of the public authority's statutory power.[56]

That the legal effect of a decision can be contingent on the nature of the power purportedly exercised, was discussed by the majority in *Project Blue Sky*,[57] where they said:

> An act done in breach of a condition regulating the exercise of a statutory power is not necessarily invalid and of no effect. Whether it is depends upon whether there can be discerned a legislative purpose to invalidate any act that fails to comply with the condition. The existence of the purpose is ascertained by reference to the language of the statute, its subject matter and objects, and the consequences for the parties of holding void every act done in breach of the condition.

The question for the tribunal therefore, is whether a statutory limitation imposed on a decision-maker's power is '*inviolable'*, such that breaching it will render a decision purportedly made within that power a nullity that is incapable of affecting legal rights.[58] The process is one of statutory construction to ascertain whether Parliament has, by the terms, context and purpose of the statute, prescribed conditions on a power that are essential to its valid exercise.[59]

In this way, the validity of a decision is closely tied to the notion of jurisdictional error. In *Craig v South Australia*[60] the court stated that an administrative decision-maker (as all public authorities will be) makes a decision attended by jurisdictional error when it:

> … falls into an error of law which causes it to identify a wrong issue, to ask itself a wrong question, to ignore relevant material, to rely on irrelevant material or, at least in some circumstances, to make an erroneous finding or to reach a mistaken conclusion, and the tribunal's exercise or purported exercise of power is thereby affected, it exceeds its authority or powers.

Where jurisdictional error occurs, it is incumbent upon a court that becomes aware of such an error to take action to prevent an *ultra vires* decision affecting the legal rights of the parties, provided that the institution has some power to do so.

Where the institution reviewing the purported decision is a tribunal lacking supervisory jurisdiction, a broader policy question exists as to whether permitting that body to undertake such an inquiry undermines the "institutional integrity" of the Supreme Court by enabling a litigant to circumvent statutory appeal and judicial review processes.[61] This concept was discussed in *Forge*, in which the joint judgment refers to "the defining characteristics of a state Supreme Court" as requiring protection from erosion.[62]

But is it really apt to say that the Supreme Court's institutional integrity is undermined by VCAT having jurisdiction to consider *Charter* matters? Certainly, the authorities dealing with the need to protect the supervisory role of the state Supreme Courts are ultimately concerned with attempts to limit the Supreme Court's own supervisory role, not with attempts to enable other bodies to perform a similar function.[63] Moreover, the Victorian Parliament is not precluded from conferring supervisory jurisdiction on a non-court entity such as VCAT, as the Federal Parliament would be under Ch III of the Constitution.

Whether a decision attended by jurisdictional error can be set aside even where it has not been appealed to a superior court was considered by the High Court in *Minister for Immigration and Multicultural Affairs v Bhardwaj*.[64] In that case, the High Court, by majority, determined that the Immigration Review Tribunal had authority to determine that a jurisdictional error had been made and to revoke a decision attended by the error, notwithstanding that the decision had not been appealed to a court.

At [51], Gaudron and Gummow JJ stated:

> There is, in our view, no reason in principle why the general law should treat administrative decisions involving jurisdictional error as binding or having legal effect unless and until set aside. A decision that involves jurisdictional error is a decision that lacks legal foundation and is properly regarded, in law, as no decision at all … there is a certain illogicality in the notion that, although a decision involves jurisdictional error, the law requires that, until the decision is set aside, the rights of the individual to whom the decision relates are or, perhaps, are deemed to be other than as recognised by the law that will be applied if and when the decision is challenged.[65]

Justice Bell considered the *Bhardwaj* line of authority at [135]-[137] of *Sudi*, but ultimately stopped short of considering the legal consequences of jurisdictional error, for the same reasons that he felt it unnecessary to consider s 39(1).[66] If, however, the Court of Appeal determines that the *jurisdictional pre-condition* approach is insufficient to ground Bell J's findings in relation to s 38(1), then the authorities concerning collateral attack, nullity and jurisdictional error may provide apt alternative bases for conceptualising VCAT's *Charter* jurisdiction.

Towards a new role for the Tribunal in its original jurisdiction

As the early decisions of the Tribunal in relation to the jurisdictional question demonstrate, the *Charter's* operative provisions demand that the Tribunal engage with a broader body of administrative and constitutional law principles, the complexity of which is in many ways antithetical to its traditional technicality-free, expedient mode of decision-making. Nevertheless, answering the jurisdictional question with a high degree of conceptual clarity would assist the Tribunal's Members to readily ascertain what precisely is required of the Tribunal in relation to s 38(1), and to gradually clarify the nature of VCAT's new role within Victoria's administrative law system.

The decision-making of VCAT: considerations and policy in giving effect to human rights

If *Sudi* survives appeal, VCAT will be charged with performing a function different to those with which it is currently familiar. In proceedings to which a public authority is a party, the Tribunal will be required to undertake something akin to judicial review in assessing the lawfulness and legal effect of a decision that purports to limit human rights. In proceedings in which the Tribunal itself is a public authority in hearing the matter, the Tribunal will be required to hold itself to the same standard in relation to the obligation contained in s 38(1).

Certainly, there would be similarities between this new function, and some aspects of the Tribunal's role upon merits review. However, in conducting a *Sudi*-type analysis, the Tribunal would have a much broader capacity to consider those matters that inform administrative decision-making but which have traditionally been considered matters for the assessment of the executive alone.

In continuing to appraise the institutional significance of the *Charter*, this final section considers the substantive stage of the decision-making process and purports to situate the Tribunal's new role within two bodies of authority found in traditional administrative law: the cases concerning considerations in administrative decision-making; and the cases concerning departmental policy and the fettering of discretions.

Considerations in administrative decision-making

In assessing the standard of conduct required by s 38(1), the Tribunal has grappled with the task of appreciating the difference between the obligation to take account of "relevant considerations", and the heightened requirement of "proper consideration" found in s 38(1) of the *Charter*. [67]

The Tribunal recently considered this tension in *Director of Housing v Turcan ('Turcan')*,[68] a matter in which a public authority landlord sought to justify evicting a tenant from public housing (a decision that prima facie infringed the respondent's right to a home) by reference to a departmental policy that required human rights to be take into account in deciding whether to carry out an eviction. The questions for the Tribunal in that matter were: firstly, whether merely turning one's mind to the existence of human rights issues was sufficient to satisfy the public authority's obligation to give "proper consideration"; and, secondly, whether a policy - in the absence of any other evidence - could itself be evidence of the process of justification embarked upon by a public authority in relation to s 7(2) of the *Charter*. While both questions were decided in the public authority's favour, this and other decisions that have considered the obligation contained in s 38(1) have done little to elucidate fully the role of considerations in administrative decision-making.[69]

At a minimum, s 38(1) requires a public authority to "give real and genuine consideration to human rights".[70] As Emerton J explained in *Castles v Secretary to the Department of Justice*:[71]

> Proper consideration need not involve formally identifying the 'correct' rights or explaining their content by reference to legal principles or jurisprudence. Rather, proper consideration will involve understanding in general terms which of the rights of the person affected by the decision may be relevant and whether, and if so how, those rights will be interfered with by the decision that is made ... there is no formula for such an exercise, and it should not be scrutinised over-zealously by the courts.

While there may be no formula for the Tribunal to adopt in assessing whether a public authority has complied with s 38(1), [72] there is a line of authority arising out of traditional administrative law that may guide the Tribunal in arriving at an understanding of the degree of consideration required by the second limb of the conduct mandate.

In *Weal*,[73] *Khan*[74] *and Hindi*, [75] courts have found that the content of the obligation to consider is that "proper, genuine and realistic consideration" be given to the merits of a particular case, and that a decision-maker be ready, in an appropriate case, to depart from any applicable policy.[76]

As to the minimum level of consideration required, in *Weal*, a matter concerning review of a development project, Giles JA noted at [80]:

> Taking relevant matters into consideration called for more than simply adverting to them. There had to be an understanding of the matters and the significance to the decision to be made about them, and a process of evaluation, sufficient to warrant the description of the matters being taken into consideration.

While courts undertaking judicial review have since departed from the "proper, genuine and realistic consideration" test in relation to the relevant considerations ground,[77] the *Charter's* specific use of the term "proper consideration" in s 38(1) arguably provides scope for this line of authority to be revived.

Certainly, the "proper consideration" test would only require that consideration be given to the human rights engaged by a particular case, not to the merits of the case as a whole, but the test would nevertheless greatly expand the Tribunal's role in the oversight of public sector decision-making.

At a minimum, the Tribunal would be required to ensure that a public authority do more than merely "invoke the Charter like a mantra".[78] However, the extent to which the tendering of a departmental policy, as in *Turcan*, would be capable of satisfying this minimum threshold, is also an issue with which traditional administrative law can assist.

Departmental policy and the fettering of discretions

As *Turcan* highlights, the application of departmental policies has the potential to prevent a public authority from giving substantive consideration to human rights. While the tension between departmental policy and the s 38(1) obligation has not yet been properly confronted by the Tribunal, the role that departmental policies should be permitted to play in administrative decision-making has been extensively dealt with by courts in the context of judicial review.

To this end, an administrative decision-maker applying a policy may fall short of fulfilling the "proper consideration" obligation, where a policy that regulates the exercise of power is either inconsistent with the legislation that confers the power[79], or where the policy is inflexibly applied so as to cause the decision-maker to shut his/her eyes to the merits of a particular case.[80]

Decisions of the Administrative Appeals Tribunal ('AAT') that have considered the application of policy in an administrative decision-making setting have resoundingly noted that a decision-maker should never allow departmental policy to displace the pre-eminence of legislation.

As the AAT noted in *Re MT, KM, NT and JT and Secretary, Department of Social Security*:

> It is obvious that … guidelines are necessary in the administration of a large Department with widespread responsibilities, even if sometimes there might be a danger of the guidelines supplanting the legislation itself. The Tribunal itself must, however, adopt a guarded approach to such guidelines. In a discretionary area, as here, it is equally true that the Tribunal should not exercise that discretion in a vacuum, ignoring the nature and extent of any problem dealt with in administrative guidelines if it is plain that the problem goes beyond the particular case or cases in hand.[81]

Where, as in *Turcan*, a departmental policy purports to prescribe a *process*, the result of which is a decision that meets the minimum requirement of s 38(1) of the *Charter*, the Tribunal will be required to critically assess whether that policy sufficiently outlines the factors relevant to substantive consideration of the merits of each case.

This would be an unfamiliar assessment for Tribunal Members sitting within VCAT's original jurisdiction. Nevertheless, a more nuanced appreciation of the areas of administrative law dealing with considerations and policy will enable VCAT to better receive evidence from public authorities as to their *Charter* compliance, as well as ultimately to better assess the adequacy of their decision-making in accordance with s 38(1).

Conclusion: the uncertain future of the *Charter* at VCAT

At the beginning of the *Charter's* fourth year, great uncertainty remains as to the extent to which the transformations taking place within VCAT will have a lasting effect on the institution. Not only is the *Momcilovic* approach to interpretation in many ways antithetical to VCAT's traditional *modus operandi*, but many of the most significant *Charter* decisions to affect the Tribunal to date – *Momcilovic*, *Sudi* and *Turcan* among them - are currently on appeal.

Compounding this problem, the meaning of s 39(1) is still unsettled and no significant VCAT or superior court authority has sought properly to consider this provision. Depending on the outcome in the *Sudi* appeal, the only effective solution may be law reform. Amendments to s 39(1) of the *Charter* modelled on s 40C of the *Human Rights Act 2004* (ACT), for example, could clarify the *Charter's* uses as both a shield and a sword in legal proceedings.

The need for VCAT to remain active as a rights-respecting institution in the wake of Justice Bell's departure is significant.

As Bell J himself noted in *Kracke*:

> It is very important for all courts and tribunals to consider human rights arguments as part of the case if that is at all possible. It is the responsibility of courts and tribunals to do so, for thereby they uphold the rule of law and carry out their functions under the Charter. People should be able to raise all issues in the one institution at the one time. Splitting cases costs time and money and puts justice beyond the reach of many people.[82]

Ultimately, until the key conceptual issues arising out of the *Charter's* operation are resolved, the highly unsettled nature of these principles will provide a strong disincentive for members to develop the law within VCAT, and for tribunal users to bring *Charter* claims. While the Tribunal has done an admirable job in seeking to carve out a new role for itself under the *Charter*, it will continue to be held back in this endeavour if its new role is not built on solid administrative law foundations.

Endnotes

1 The Hon. Chief Justice Marilyn Warren A.C, 'The Growth in Tribunal Power' (speech to the Supreme Court of Victoria and the Council of Administrative Tribunals, 7 June 2004).
2 Ibid.
3 *Australian Constitution* s 77; *Judiciary Act 1903* (Cth) ss 38 and 39.
4 *Federal Court of Australia Act 1976* (Cth).
5 Hon. the Chief Justice Marilyn Warren AC, "The Growth in Tribunal Power", above n 1.
6 Section 3, *County Court Act* 1958 (Vic), definition of 'jurisdictional limit', inserted by No. 16/1986.
7 Neil Rees, 'Procedure and Evidence in "Court Substitute" Tribunals' (2006) 28 *Australian Bar Review* 41, 43-44; The Hon. Justice Murray Kellam, 'Developments in Administrative Tribunals In the Last Two Years'

(2001) *Federal Law Review* 427; Hazel Genn, 'Tribunals and Informal Justice' (1993) 56 Modern Law Review 393.

8 The Hon. Chief Justice Marilyn Warren A.C, 'The Growth in Tribunal Power', above n 1.

9 Under s 36 of the *Charter*, only the Supreme Court can declare that a statutory provision cannot be interpreted consistently with human rights.

10 *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 98 ('*VCAT Act*') empowers the Tribunal to consider any matter it sees fit, unencumbered by the rules of evidences, and obliges its members to conduct each proceeding with as little formality and technicality as possible.

11 *VCAT Act* s 109(1) establishes the general rule that parties to a Tribunal proceeding are to pay their own costs.

12 Justice Bell, "The Role of VCAT in a Changing World" (VCAT) [2008] VicJSchol 13, 17.

13 See the extensive discussion in *Metro West v Sudi* [2009] VCAT 2025 as to when a private entity will be a "functional public authority"; and *Director of Housing v Sudi* [2010] VCAT 328 (in relation to the occupant's application – R2009/3264) in which it was held that the Tribunal itself was a public authority when hearing an application in its Residential Tenancies List.

14 *Kracke v Mental Health Review Board* [2009] VCAT 646 (the approach expounded by Bell J in this case was eventually overruled by the Court of Appeal in *R v Momcilovic* [2010] VSCA 50).

15 *Director of Housing v Sudi* [2010] VCAT 328 ('*Sudi*') (in relation to the landlord's application – R2009/1177 and R2009/33454).

16 *Charter* ss 6(2)(b), 8, 24.

17 See for example Jeremy Gans, 'The Charter's Irremediable Remedies Provision' [2009] MULR 4; Alistair Pound and Kylie Evans, *An Annotated Guide to the Victorian Charter of Human Rights and Responsibilities* (Thomson/Lawbook Co, 2008); Kristina Stern, 'The Victorian Charter of Human Rights: What is Left Unsaid?' (Paper to Australian Institute of Administrative Law, 3 May 2007); Simon Beckett, 'Interpreting Legislation Consistently with Human Rights' (Paper to the National Administrative Law Forum, 14-15 June 2007); Simon Evans and Carolyn Evans, 'Legal redress under the Victorian Charter of Human Rights and Responsibilities' (2006) 17 PLR 264.

18 Inquiry into the Charter of Rights and Responsibilities Act 2006, *Terms of Reference* (2011) http://premier.vic.gov.au/2011/04/inquiry-into-charter-of-human-rights-and-responsibilities-act-2006/.

19 *Metro West v Sudi* (Residential Tenancies) [2009] VCAT 2025 at [88]; Charter s 4(1)(a) and (b); see also Explanatory Memorandum, Charter of Human Rights and Responsibilities Bill 2006 (Vic), 2824.

20 *Charter* s 4(1)(c).

21 *Metro West v Sudi* (Residential Tenancies) [2009] VCAT 2025at [88]; *Charter* s 4(1)(a) and (b); see also Explanatory Memorandum, Charter of Human Rights and Responsibilities Bill 2006 (Vic), 2824.

22 *Metro West v Sudi* ; *BAE Systems Australia Ltd* (Anti-Discrimination) [2008] VCAT 1799 at [71]; *Hobsons Bay City Council & Anor* (Anti-Discrimination Exemption) [2009] VCAT 1198; *Homeground Services v Mohamed* (Residential Tenancies) [2009] VCAT 1131; *McAdam v Victoria University & Ors* (Anti-Discrimination) [2010] VCAT 1429.

23 The note to s 4(1)(j) gives the example of various internal procedures, while the Explanatory Memorandum (at 4) indicates that hiring staff will also be an administrative function.

24 *Kracke v Mental Health Review Board*, above n 14, at [232]; see also *Rogers v Chief Commissioner of Police* (General) [2009] VCAT 2526; and *XYZ v Victoria Police* (General) [2010] VCAT 255.

25 Justice Bell's obiter at [332] of *Kracke.*

26 [2008] VCAT 1799.

27 *BAE Systems Australia Ltd* at [71]; see also *Hobsons Bay City Council & Anor* at [35].

28 *Thomas v Mowbray* (2007) 233 CLR 307 at 464 per Hayne J; *Precision Data Holdings* at 173; *Waterside Workers Federation of Australia v JW Alexander Ltd* (1918) 25 CLR 434 per Isaacs and Rich JJ at 462-3; *Re Ranger Uranium Mines Pty Ltd; Ex parte Federated Miscellaneous Worker's Union of Australia* (1987) 163 CLR 656 at 666; *Re Dingjan; Ex parte Wagner* (1995) 183 CLR 323 at 360; *Huddart Parker & Co Pty Ltd v Moorehead* (1908) 8 CLR 330 at 357 per Griffiths CJ.

29 [2010] VSCA 50.

30 This was the construction preferred by Hollingworth J in *Sabet v Medical Practitioners Board of Victoria* [2008] VSC 346, relying on *Albarran v Members of the Companies Auditors and Liquidators Disciplinary Board* (2007) 231 CLR 50. However, ultimately the parties were in agreement on this point.

31 A Note at the foot of a provision forms part of the Act: *Interpretation of Legislation Act 1984* (Vic), s36 (3A) and see *One Tel Ltd (in liq) v Rich* (2005) 53 ACSR 623 at 635-638 in relation to s 13 of the *Acts Interpretation Act 1901* (Cth).

32 In respect of the issuing of warrants see *Love v Attorney-General (NSW)* (1990) 169 CLR 307 per Mason CJ, Brennan, Dawson, Toohey and Gaudron JJ at 321; *Grollo v Palmer* (1995) 184 CLR 348 per Brennan CJ, Deane, Dawson and Toohey JJ at 359-360; *Ousley v The Queen* (1997) 197 CLR 69 per McHugh J at 100; and *Lamb v Moss* (1983) 49 ALR 533 at 558-559. In respect of committal proceedings see *Amman v Wegener* (1972) 129 CLR 415 per Gibbs J at 435-436; *Grassby v The Queen* (1989) 168 CLR 1 per Dawson J at 15; and *Potter v Tural* (2000) 2 VR 612 per Batt JA at 617.

33 Victoria, Legislative Assembly, *Debates*, 4 May 2006, p 1293.

34 see *Barbcraft Pty Ltd v Goebel Pty Ltd* [2003] VCAT 1700 at [80]-[85]; and *Sabet* at [125].

35 at 319.

36 (1991) 173 CLR 167.

37 Ibid, at 190-191.
38 (2007) 231 CLR 381.
39 *Attorney-General (Cth) v Alinta Ltd* (2008) 242 ALR 1.
40 *Thomas v Mowbray* at 350 per Gummow and Crennan JJ; *R v Spicer* at 317 per Dixon CJ, Williams, Kitto and Taylor JJ.
41 *Tasmanian Breweries* at 376.
42 *Re Cram; Ex parte Newcastle Wallsend Coal Co Pty* Ltd (1987) 163 CLR 140 at 154 per Mason CJ, Brennan, Deane, Dawson and Toohey JJ.
43 *Thomas v Mowbray* at 464 per Hayne J; *Precision Data Holdings* at 173; *Waterside Workers Federation of Australia v JW Alexander Ltd* at 462-3 per Isaacs and Rich JJ; *Re Ranger Uranium Mines Pty Ltd; Ex parte Federated Miscellaneous Worker's Union of Australia* at 666; *Re Dingjan; Ex parte Wagner* at 360; *Huddart Parker & Co Pty Ltd v Moorehead* at 357 per Griffiths CJ.
44 *Re Dingjan* at 360.
45 *R v Spicer; Ex parte Waterside Workers' Federation of Australia* (1957) 100 CLR 312 at 317.
46 *Tasmanian Breweries* (1970) 123 CLR 361; *Alinta* at 553-554 per Crennan and Kiefel JJ and at 598 per Gleeson CJ; and *Precision Data* at 191.
47 The earlier matters of *Director of Housing v IF* [2008] VCAT 2413 and *Homeground Services v Mohamed* [2009] VCAT 1131 both considered the question, although not in great depth. In *IF*, Member Nihill found that s 39(1) precluded the Tribunal from hearing Charter arguments as a defence to an application by a public authority, while in *Mohamed*, Member Perlman found that this kind of collateral attack could be permitted.
48 *Sudi* has been followed by other non-judicial members in *Director of Housing v Turcan* [2010] VCAT Ref No R201011922 (Unpublished, 4 May 2010) and *Director of Housing v TK* [2010] VCAT Application 201011921 (Unreported, 22 July 2010).
49 *Sudi* at [121].
50 *Sudi* at [121]; see also *R v Perkins* [2002] VSCA 132 at [16]; *Herald and Weekly Times Pty Ltd v VCAT* [2006] VSCA 7 at [27]; and *Roads Corporation v Maclaw No 469 Pty Ltd* (2001) 19 VAR 169.
51 VCAT Act Second Reading Speech, *Parliamentary Debates* (LA): 1998 Autumn Session [250].
52 *Craig v South Australia* (1995 184 CLR 163, 176–180; M Aronson, B Dyer and M Groves, *Judicial Review of Administrative Action* (4th ed, 2009) [1.90].
53 Explanatory Memorandum, Charter of Human Rights and Responsibilities Bill 2006 (Vic) 28.
54 See generally Jeremy Gans 'The Charter's Irremediable Remedies Provisions', above n 17.
55 *Mastwyck v Department of Public Prosecutions* [2010] VSCA 111.
56 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 389, *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597, *Jadwan v Department of Health* (2003) 204 ALR 55 at [42] and [64]; *Ma v Minister for Immigration and Citizenship* [2007] FCAFC 69, and *Garde-Wilson v Legal Services Board* [2008] VSCA 43.
57 (1998) 194 CLR 355 at 390.
58 *Plaintiff S157/2002 v Commonwealth* at [26].
59 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at [390]; *Re Refugee Tribunal; Ex parte Aala* (2000) 204 CLR 82 at 142 [166] per Hayne J; *Plaintiff S157/2002 v Commonwealth* (2002) 211 CLR 476 at 490 [25]; *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597, 604-605, [11]-[14]; *Garde-Wilson.*
60 (1995) 184 CLR 163 at 179.
61 For a discussion of the concept of "institutional integrity" see *Forge v Australian Securities & Investments Commission* (2006) 228 CLR 45.
62 Ibid at [63]; also discussed in *Kirk* [2010] HCA 1.
63 See generally *Kirk.*
64 *Bhardwaj*, above n 56.
65 See also *Plaintiff S157/2002 v Commonwealth* [2003] 211 CLR 476.
66 *Sudi* at [135]-[137].
67 Pound and Evans, *An Annotated Guide to the Victorian Charter of Human Rights and Responsibilities*, above n 17.
68 *Turcan*, above n 48.
69 *Rogers v Chief Commissioner of Police* (General) [2009] VCAT 2526; *Kracke*, above n 14; *Homeground Services v Mohamed*, above n 22; *Director of Housing v TK* [2010] VCAT Application 2010/11921 (Unreported, 22 July 2010); *Smith v Hobsons Bay CC* [2010] VCAT 668; *Dawson v Transport Accident Commission* (General) [2010] VCAT 644; *Magee v Boroondara CC & Anor* [2010] VCAT 1323.
70 *R (Daly) v Home Secretary* [2001] 2 AC 532; cited in *Rogers v Chief Commissioner of Police* (General) [2009] VCAT 2526
71 [2010] VSC 310 at [185]-[186].
72 Ibid.
73 *Weal v Bathurst City Council* [2000] NSWCA 88.
74 *Khan v Minister for Immigration and Ethnic Affairs* (1987) 14 ALD 291.
75 *Hindi v Minister for Immigration and Ethnic Affairs* (1988) 91 ALR 586 at 599; see also *Surinokova v Minister for Immigration, Local Government and Ethnic Affairs* (1991) 33 FCR 87 at 96, per Hill J; *Pattanasri v Minister for Immigration, Local Government and Ethnic Affairs* (1993) 34 ALD 169 at 178-179, per Burchett J.

76 *Khan*, above n 73.
77 *Minister for Immigration and Multicultural Affairs v Anthonypillai* (2001) 106 FCR 426 at [36]-[66]; cf *Hendy v Repatriation Commission* [2002] FCA 602 at [61]-[62] in which Madgwick J held that *Anthonypillai* was only relevant to immigration decisions, given the limited means of review under the *Migration Act 1958* (Cth).
78 *Castles* at [185]*;* see also *Perez v Minister for Immigration and Multicultural Affairs* (2002) 119 FCR 454 at 486.
79 *Re Becker and Minister for Immigration and Ethnic Affairs* (1977) 15 ALR 696 at 700.
80 *British Oxygen Co Limited v Minister of Technology* [1971] AC 610 per Lord Reid at 625.
81 (1986) 9 ALD 146 at 150; see also *Re Kandasamy and Secretary*, *Department of Social Security* (1987) 11 ALD 440 at 445.
82 *Kracke* , above n 14, at [857].

ADMINISTRATIVE JUSTICE IN AUSTRALIAN ADMINISTRATIVE LAW

Matthew Groves*

Administrative justice was the theme of the 1999 AIAL annual conference. The speakers at that conference adopted a novel approach to the different possible definitions or conceptions of administrative justice. They side stepped them. No speaker offered a detailed or perhaps even working definition of administrative justice.[1] With that in mind, this paper begins by providing a brief history of administrative justice in Australian administrative law. The paper also considers the values of administrative law with particular reference to judicial review and attempts to explain some of the difficulties that Australian administrative law faces in any attempt to foster normative values. It will be argued that constitutional considerations appear to deny a role for normative and other concepts such as administrative justice in judicial review but a closer inspection reveals that judges tacitly support some concepts that shed light on how they conceive administrative justice.

Early writings on administrative justice

The precise meaning or content of administrative justice are arguably not yet settled. This may be partly because the normative and other values which must surely lie at the heart of any form of justice will inevitably be contested to some extent. If so, there may never be a well settled or widely agreed definition of administrative justice, but the uncertainty is also due to the evolution of the concept. The early conceptions of administrative justice can be conveniently divided into two camps – the practical and the theoretical.

The most influential Australian expression of the practical approach to administrative justice was the Kerr Committee, whose report led to the establishment of much of the current federal administrative law system and which also exerted great influence on the reforms to State and Territory administrative law which followed reforms at the federal level. The Kerr Committee explained that its recommendations to reform federal administrative law were intended to „ensure the establishment and encouragement of modern administrative institutions able to reconcile the requirements of efficiency and administration and justice to the citizen."[2] This explanation of the ultimate rationale of the Kerr reforms edged towards a notion of administrative justice but, notably, did not either use that specific term or explain a conception of justice more generally.[3] The Kerr Committee similarly avoided any explanation of how issues of administrative efficiency and administrative justice might be balanced, even though it clearly identified a tension between the two through its suggestion that the two should be reconciled. Creyke has noted that this apparent tension has remained unresolved and suggested most scholars of Australian administrative law adhere to one of the two approaches to administrative justice favoured by the Kerr Committee, namely a focus on „balancing the distributive justice focus of public administration against individual interests" or a focus on delivering a form of justice to individuals (and also, presumably, wider society) who are affected by the administrative process.[4]

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The most influential exponent of the early theoretical conception of administrative justice was Jerry Mashaw. His analysis of American disability welfare insurance decision making defined administrative justice as „the qualities of a decision process that provide arguments for the acceptability of its decisions."[5] Mashaw used his own research and the wider body of literature on social security research to devise three categories or models for administrative justice for the work of the particular welfare agencies he examined and public agencies more generally.[6] Mashaw's models, which foreshadowed much of the subsequent writing about public administration, were: bureaucratic rationality, a model that was essentially anchored upon efficiency, particularly cost effectiveness but also correct or accurate decision making; professional treatment, which emphasised what is now commonly known as service delivery standards; and moral judgment which, despite its title, was more a legal than moral category because it drew upon established principles of decision making used in the courts to determine issues, especially ones in dispute. This model essentially conceived a claimant for welfare, or indeed any other benefit that might be granted by government, as a party to a claim or dispute about entitlement. Mashaw explained that „the "justice" in this model inheres in its promise of a full and equal opportunity to obtain one's entitlements."[7]

Although these three models are not necessarily inconsistent, Mashaw argued that one would normally operate to exclude or marginalise the others because „the internal logic of any one of them tends to drive out the characteristics of the others from the field as it works itself out in concrete situations."[8] An interesting feature of this approach is the implication that bureaucratic rationality and its emphasis on efficiency, which one could broadly equate with the public sector managerialism that rose in the late 1980s, would essentially operate to the exclusion of other models. One can draw a longer bow and suggest that managerialism might also operate to exclude or marginalise approaches that place more focus on values, as any conception of administrative justice must do.

Mashaw's seminal work is not easy to summarise but it had three important related features. The first was a focus on process, particularly processes that generated decisions.[9] Secondly, it examined what Mashaw called the administrative adjudication of agencies, social security being his case study, and how this adjudication was carried out on behalf of the modern welfare state. In other words, Mashaw focussed on one narrow aspect of the wider administrative process – the adjudication of issues – which excluded what we would now term the accountability or integrity agencies of government. Thirdly, Mashaw's work was an exercise in „bottom up" rather than „top down" thinking.[10] Robert Thomas explained this distinction in the following terms:

> a top down perspective...focuses on the external accountability mechanisms by which individuals dissatisfied with initial administrative decisions may challenge them. From this perspective, the role of the courts and judicial review in particular often take centre stage as the principal means of articulating general standards of legality that apply across the disparate range of individual administrative processes. A contrasting approach is labelled as a bottom-up conception of administrative justice. From this perspective, administrative justice concerns the justice inherent in administrative-legal decision-making and the focus is, therefore, the mass of front-line initial decisions and the processes necessary to ensure quality within such processes.[11]

Mashaw provided the classic example of the bottom up approach. He drew on his decades of empirical work in disability welfare decision making, which meant that his theories were largely informed by what happened in the offices of bureaucrats rather than in the courtrooms where judicial review applications were determined and also, to a large extent, the tribunal hearing rooms where administrative review applications were determined. Mashaw's raw material was gathered by observations of bureaucrats which grounded his theory in findings made at the typical site of most administrative activity, namely the office of bureaucrats where the vast majority of non-controversial applications are decided, rather than the relatively small numbers of disputed cases that find their way to the courts or tribunals.[12] A leading English scholar of administrative justice has suggested that the great strength of Mashaw's focus on ground level

administrative activity was its „focus on the myriad of first-instance decisions rather than the much smaller number of decisions that are the subject of an appeal or complaint and that it analyses them directly rather than at one remove and through a "legal prism"".[13]

Mashaw's focus on decisions made at the ground level of administrative activity was echoed during the 1990s when scholarship on administrative justice assumed a greater focus on providing justice to individuals. In their introduction to the volume of papers from the 1999 AIAL conference, Creyke and McMillan suggested that administrative justice was a „philosophy" which required that „in administrative decision-making, the rights and interests of individuals should be properly safeguarded."[14] This approach echoed many other administrative law scholars of that time. Galligan, for example, suggested that the „main concern" of administrative justice was:

> to treat each person fairly by upholding the standards of fair treatment expressed in the statutory scheme, together with standards derived from other sources ... and proper application of authoritative standards ... [with] emphasis ... on accuracy and propriety in each case, not just in the aggregate.[15]

Some commentators suggested that a right of administrative justice may constitute a new and distinct human right. An influential early proponent of this was Bradley, who suggested that the right to administrative justice was composed of a number of elements of administrative law, particularly the right of an individual to seek review of an administrative decision before an independent forum. Bradley suggested that other aspects of this right included the existence of some form of appeal from a decision of first instance (to a tribunal or a judicial body), and the availability of some form of judicial scrutiny of the merits and legality of particularly important decisions.[16] Bradley's approach was almost one for lawyers to reclaim administrative justice from the bureaucrats who Mashaw considered were its authors and rightful owners because it implies that the full import of administrative justice lies in the role of agencies outside the bureaucracy, such as courts and tribunals. The human right identified by Bradley was, therefore, arguably a very legal one.

Around the same time that administrative justice was drawn closer to the idea of delivering justice to individuals, scholars of judicial review sought to align administrative law with administrative justice. Sir William Wade was an early proponent of this view, though not in any great detail. During the 1990s Wade described the constituent elements of administrative law as the „machinery of administrative justice" which „drives" the quest for good administration.[17] More recently, Wade's co-author Forsyth suggested that „the quest for administrative justice" was the „connecting thread which runs throughout" administrative law.[18] Forsyth offered no more detail than Wade had on his conception of administrative justice, though the explanation that follows the remarks just quoted indicates that Forsyth sees the pursuit of administrative justice as a co-operative exercise by which the law might „contribute to the improvement of the technique of government."[19] It is not clear whether the improvement Forsyth aspires to is the efficient operation of government, the capacity of government to deliver fairness to individuals or both.

On one view, any attempt to identify and align the values of administrative law with administrative justice may be doomed. The reason, which was recently offered by an American scholar, is that administrative law is a body of doctrine „built around a series of open-ended standards or adjustable parameters".[20] In other words, the central principles of administrative law, particularly those of judicial review, are so protean that they might be incapable of yielding a cohesive statement of principles or values. There is something to that argument. Most of the core values or aims of administrative law which appear to have gained wide acceptance, particularly those of judicial review, are quite vague. These values include transparency, participation and accountability, which Harlow argues have gained wide acceptance as goals or guiding principles of administrative law.[21] The Administrative Review Council adopted a similar but slightly larger set of „public law values", which are fairness, lawfulness, rationality,

openness (or transparency) and efficiency.[22] More recently, the Chief Justice of New Zealand suggested that another value of administrative law might be „human rights, and in so far is as it is not a separate human right, the notion of equality before the law.„[23] The list of administrative law values to which I am a party includes transparency (in the sense that the processes of government are open to external scrutiny), accountability, consistency, rationality, impartiality, participation, procedural fairness and reasonable access to judicial and non-judicial grievance mechanisms.[24]

These and other expressions of the values or purposes of administrative law might seem removed from the concept of administrative justice but they are not unlike the definition of administrative justice offered by Creyke and McMillan because they seek to provide a philosophy about the nature and purpose of administrative decision making. The key difference with the various formulae of administrative law values is that they express what their authors want from the administrative process as a whole, which may be different to what the administrative process should deliver to the people who encounter it.

The values of Australian judicial review as an example

The role that values play in administrative law must take account of the primary vehicle by which the courts can express or transmit values, which is through judicial review. For Australians, however, this presents a paradox because judicial review of administrative action has long proceeded without clear recourse to values. More particularly, Australian judicial review has largely evolved without reference to a grand or overarching theory.[25] While it is now clear that constitutional principles provide the ultimate explanation for judicial review of administrative action, they have assumed this role fairly late in the day. There is arguably therefore an obvious gap in judicial review which precludes it from guiding or fortifying an understanding of administrative justice. A closer inspection suggests that constitutional doctrines are not the only obstacles that prevent judicial review principles from informing our understanding of administrative justice.

The values of the Administrative Decisions (Judicial Review) Act 1977 (Cth) ('ADJR Act')

One little noticed feature of the *ADJR Act* and its subsequent copies in the States and Territories is the absence of a statutory statement of objectives or some form of guiding principle. Aronson has suggested that this apparent gap in the *ADJR Act* reflects the absence of any wider philosophy in the Act itself.[26] He noted that both the *ADJR Act* and its many grounds of review:

> say nothing about the rule of law, the separation of powers, fundamental rights and freedoms, principles of good government or (if it be different) good administration, transparency of government, fairness, participation, accountability, consistency of administrative standards, rationality, legality, 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.[27]

Aronson did not believe the *ADJR Act* should be amended to include a guiding or overarching principle. He also doubted whether such principles were possible or desirable, largely because of the difficulty of devising guiding principles that are coherent, workable and also of significant value.[28] Even if such guiding 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 face an uncertain fate in the courts. The history of Australia"s migration legislation in recent years indicates that legislation designed to limit or control judicial review will rarely have its desired effect and may even achieve the opposite of its intended result.[29] A legislative statement of principle to guide the *ADJR Act* could easily meet the same fate if it was perceived by the

courts as an attempt to limit or control judicial review. If so, the important question would not be what the judicial response to a legislative attempt to introduce a guiding principle to statutory judicial review might be, but rather how quickly that legislation might be judicially eviscerated as has been done by the High Court with successive privative clauses of recent times.[30]

Aronson doubted whether the courts might do any better if they sought to openly fashion overarching principles to guide judicial review.[31] This problem is a specific instance of the more general one of whether judges can or should articulate moral values.[32] The more obvious problem with any attempt by the courts to engage in devising or answering significant moral questions is the suitability of the judicial model of decision making for such an exercise.[33] In the context of judicial review of administrative action, Aronson questioned whether judges can and should explore this „much deeper level of public law theory" and also whether the results of such an exploration might properly be regarded as conclusions of law. 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 in the *Constitution*".[34] That possibility assumes a level of certainty in the constitutional principles that attend judicial review of administrative action which is yet to appear.

One might also question the extent to which the development of guiding principles for the *ADJR Act* might enhance administrative justice more generally. This possibility arises from the arguments of Thomas about how we might assess quality within administrative systems. Thomas notes that the various parts of the administrative system are „comprised of many different individual decision processes each of which operates within their own particular political and administrative context. What works in one system may not necessarily work elsewhere."[35] The same point can be made about values. Why should we think that any values devised for a judicial review statute can and should guide other parts of the administrative system? Even if values in a judicial review statute could „work", what is there to suggest that those values should colonise other parts of the administrative process? Perhaps it is more likely that any explicit values devised in judicial review would be useful for that limited area only.

What of amending the ADJR Act to take account of human rights considerations?

The final report of the recent national consultation on human rights at the federal level („the Brennan Report") recommended that the *ADJR Act* be amended „in such a way as to make the definitive list of Australia's international human rights obligations a relevant consideration in government decision making."[36] When the government announced that it would not enact a Bill or Charter of Rights and would instead introduce a limited set of reforms to promote greater compliance with human rights, the proposal to amend the *ADJR Act* was not adopted. Although the government gave no clear reason for its rejection of this proposal, the contradictions in the proposal are easy to identify.

The main benefit of amendment to the *ADJR Act* is that it would provide a clear legislative basis for human rights obligations to be considered as part of the administrative process. On close inspection, such an amendment would not necessarily reach that goal because it would, at best, enable the failure to take proper account of human rights considerations to be a ground of review under the *ADJR Act*. This extension of human rights obligations would be limited in several ways. It would not cover the wide range of decisions that fall outside the *ADJR Act*, which includes those decisions included in the first schedule of the Act and also those decisions which for some reason do not meet the ADJR jurisdictional formula of „decisions" or „conduct" that is „of an administrative character" and is „made under an enactment." Both forms of exclusions are important. The class of decisions excluded in the first schedule of the *ADJR Act* includes many migration decisions. A useful example of a

decision that would fall outside the jurisdictional formula of the *ADJR Act* is the *Tampa case*,[37] the key decisions of which were held to be made under prerogative rather than statutory powers.[38] These limitations highlight an important problem with the amendment proposed by the Brennan Report – its incomplete application. It would not touch the increasing number of decisions that fall outside the scope of the *ADJR Act*. A separate but closely related point is that an amendment of this nature to the *ADJR Act* would create a gap between judicial review under the *ADJR Act* and under the constitutional writs and the *Judiciary Act 1901* (Cth). In theory, the obligations of administrative officials would vary according to the avenue of review they might face challenge under. That sort of disparity lends no credit to either enhance human rights or public administration.

The proposed amendment to the *ADJR Act* is also in conflict with key elements of *Teoh's* case. The supporters of *Teoh's* case have noted that it was not actually overruled in *Lam*.[39] If that is true, why is an amendment to the *ADJR Act* that would essentially replicate the effect of *Teoh* required? A deeper contradiction with the proposed amendment to the *ADJR Act* is that it continues and arguably amplifies a key flaw in *Teoh's* case, namely that the legitimate expectation constructed by the High Court in *Teoh* had a limited application. The members of the majority in *Teoh's* case accepted that it would apply to certain treaties, which they felt no need to enumerate, that dealt with fundamental rights.[40] This aspect of *Teoh* arguably undercuts the moral legitimacy of the case that its many supporters have suggested lies underneath the reasoning of the High Court. How are we supposed to know what is and is not fundamental for these purposes? What makes a treaty or parts of a treaty worthy of such judicial protection? Upon what basis can the High Court claim the expertise and authority to decide which treaties, or parts of treaties, should and should not support a legitimate expectation?[41]

An amendment to the *ADJR Act* would transfer those questions to the legislature but in turn would raise the difficult question of what to include and exclude. The debate could be divisive. It would also raise the awkward question of the status of human rights obligations not included in any statutory list for the purposes of review under the *ADJR Act*. Those human rights obligations would not be relevant considerations and could presumably be disregarded by administrators. The alternative is to amend the *ADJR Act* to require the consideration of every possible human rights obligation Australia might have. That large ambit claim was not expressly advanced by the Brennan Report and one can understand why.

Perhaps the most important reason to hesitate over the recommendation of the Brennan Report to amend the *ADJR Act* is the *ADJR Act* itself. It was explained above that the *ADJR Ac*t lacks any clear or guiding philosophy. Perhaps that is intentional but it is more likely to be an oversight. Whatever the reason for this gap in the *ADJR Act* it seems odd to undertake a major reform such as shoe horning human rights issues into the administrative process via statutory judicial review without a wider consideration of the shape and purpose of the vehicle by which that is to be achieved. That in turn requires some analysis of purpose of judicial review itself, whether under the *Constitution* or the *ADJR Act*. The current approach of the High Court suggests that the main roles of this aspect of the administrative law system are to keep administrative officials within the statutory authority they are given by parliaments. That relatively narrow aim does not appear to easily lend itself to the promotion of either human rights or administrative justice.

The values of the constitutional writs

The constitutional writs emerged with vigour from the litigation caused by strong privative clauses in migration legislation,[42] but the potential problems any judicial recognition of broad based or normative concepts such as administrative justice were foreshadowed much earlier in *Quin's* case.[43] *Quin* was a State case commenced under the common law but the principles

expounded by Brennan J were moulded with close attention to the separation of powers doctrine embodied in the Constitution and the consequential limits that doctrine places on judicial power. Brennan J proceeded from the principle of *Marbury v Madison*,[44] where the United States Supreme Court famously ruled that it was „the province and duty of the judicial" branch to declare the law. Brennan J reasoned that this principle simultaneously defined and confined judicial power because it protected a core of judicial power but also imposed a barrier beyond that terrain which prevented the courts from assuming control over the merits of administrative action. Brennan J explained:

> The duty and jurisdiction of the court to review administrative action do not go beyond the declaration and enforcing of the law which determines the limits and governs the exercise of the repository's power. If, in doing so, the court avoids administrative injustice or error, so be it; but the court has no jurisdiction simply to cure administrative injustice error. The merits of administrative action, to the extent that they can be distinguished from legality, are for the repository of the relevant power and, subject to political control, for the repository alone.[45]

This conception of judicial power led Brennan J to identify an important limit on the scope of judicial review, which he explained should be directed to the „protection of individual interests but in terms of the extent of power and the legality of its exercise."[46] Brennan J acknowledged that the judicial role adopted in *Marbury v Madison* left the court to determine the law but cautioned against any judicial assumption of other expertise. His Honour reasoned that the courts should be mindful 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."[47] It followed, according to this view, that the evaluation of „policy considerations" would also present an obstacle to „the doing of administrative justice" in the courts. [48]

The concern Brennan J held about the ability of courts to navigate policy issues does not lend itself to the rights based conception of administrative justice favoured by Bradley. It also reflects the „limited conception of the content of judicial power" that Sir Anthony Mason has traced to Owen Dixon.[49] That conception of judicial power sought to remove the courts from controversial issues which had a strong „policy" or „political" content.[50] This vision of judicial power limits the judicial function ostensibly as a consequence of the separation of powers doctrine but like many doctrines of constitutional law a closer inspection provokes further questions. It may, for example, be accepted that the adversarial proceedings in the courts cannot and should not descend into wide ranging investigations of public policy but does it follow that courts are inherently unsuited to take a more holistic approach to justice in a case before them? Judicial suggestions that courts should or cannot consider questions of policy or justice beg the question of exactly what those concepts entail in administrative law. Brennan J did not clearly define that which he was so sure lay beyond his judicial reach.

Any criticism that could be made of the central propositions expounded by Brennan J did not preclude their adoption by a majority of the High Court in the *Enfield* case.[51] In that case the Court held that the American principle that grants considerable deference to administrators in the adjudication of jurisdictional facts was incompatible with the limited role that Australia's constitutional arrangements impose upon the functions of the executive.[52] The High Court reasoned that administrators could not determine authoritatively legal questions such as jurisdictional facts because such matters were the constitutional province of the courts. The High Court also affirmed that corresponding restrictions applied to the power of the courts to undertake judicial review of administrative action. More particularly, the judicial function did not and could not extend to issues which formed part of the merits of a decision.[53] The stark possibility is that the principles upon which the High Court has secured the constitutionally entrenched power of the courts to undertake judicial review are ones that also keep the courts firmly away from the merits or justness of a case.

That reasoning reached a predictable conclusion in *Lam's* case,[54] where the High Court strongly doubted whether Australia"s constitutional framework could permit the acceptance of the English doctrine of substantive unfairness.[55] Gleeson CJ reasoned that substantive unfairness raised „large questions as to the relations between the executive and judicial branches of government". His Honour did not decide those questions but signalled his likely view when he explained that the jurisdiction vested in the High Court by s 75(v) of the Constitution „does not exist for the purpose of enabling the judicial branch of government to impose upon the executive branch its ideas of good administration".[56] McHugh and Gummow JJ, with whom Callinan J agreed on this issue,[57] reached a similar conclusion. Their Honours did, however, concede that the normative values devised in recent English cases on abuse of power, which substantive unfairness is commonly invoked to prevent, bore some similarity to the „values concerned in general terms with abuse of power by the executive and legislative branches of government" in Australian constitutional law. However, they concluded „it would be going much further to give those values an immediate normative operation in applying the Constitution".[58] This reasoning suggests that the current Australian conception of the separation of powers precludes judges from giving effect to the normative values that have been favoured in recent English cases, such as the notion of good administration or the concept of abuse of power.

McHugh and Gummow JJ also reasoned that the constitutional frameworks of Australia and England meant that Australian developments in judicial review required careful attention to s 75(v) of the Constitution.[59] They explained:

> Considerations of the nature and scope of judicial review, whether by this Court under s 75 of the Constitution or otherwise, inevitably involves 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.[60]

Lam gave rise to three obstacles to the location of the broad normative concepts associated with administrative justice within the language of judicial review. The first was its strong disapproval of the procedural legitimate expectation, which was used in *Teoh's* case to found a legitimate expectation that the principles of an incorporated treaty would be given weight in administrative decision making unless a decision maker provided notice to the contrary and a chance to argue against this course. While that possibility was, like *Teoh* itself, not formally overruled in *Lam*, it was so strongly doubted that it has naturally begun to fall into disuse in Australian law.[61] A separate but related point is that the doctrine of substantive unfairness appears foreclosed in Australian law. This is not simply an example of the „tectonic shifts in English public law" of recent decades,[62] which has opened a rift between Australian and English public law. Instead it confirms that Australian and English judicial review are often informed by quite different values.[63] For the time being at least, Australian public law must look inward rather than outward for doctrinal inspiration. That does not necessarily mean that *Lam* signals a conclusive divorce from normative concepts which have gained currency in English law in recent years, but it does mean that they must be approached with great care. It also means that such normative concepts must also be expressed in a manner compatible with Australia"s constitutional arrangements if they stand any hope of adoption in Australian law.

These constitutional issues would surely preclude adoption of the tentative views of Kirby J in *S20* which might have been intended to offer some sort of holistic approach that might bridge the divide between judicial review and administrative justice erected by Brennan J in *Quin*. Kirby J acknowledged this conceptual divide but suggested a court „should not shut its eyes and compound the potential for serious administrative injustice ... It should always take into account the potential impact of the decision upon the life, liberty and means of the person affected.[64] This reasoning echoes English cases which have granted relief in judicial review by reference to a requirement of „good administration"[65] or to overcome „conspicuous unfairness".[66] According to the reasoning in *Lam* these concepts could be disclaimed as

doomed attempts to import normative principles into a constitutional framework that is unable to support them. The equally serious and non-constitutional obstacle to such general concepts is their absence of clear meaning. Principles such as good administration or conspicuous unfairness arguably do little more than convey serious or conspicuous judicial disagreement with the result of the case at hand. They may show „that the law's heart is in the right place"[67] but they do not provide theoretical coherence.

The choice between these competing alternatives appears stark. On the one hand, the approach in *Lam* seems to preclude the use of normative concepts which would surely include any substantive notion of administrative justice. That possibility seems to sanction judicial review without a moral anchor. On the other hand, judicial attempts to articulate those wider normative concepts appear so vague and subjective that one might question whether they could provide a useful and workable way to understand or apply a notion of administrative justice. Neither option is attractive. The better solution may be to decipher some of the underlying concepts of judicial review.

Does jurisdictional error contain values that might lead to administrative justice?

The importance of jurisdictional error in Australian administrative law has risen in tandem with the constitutional writs.[68] Jurisdictional error now occupies a central place in Australian law by virtue of cases such as *Plaintiff S157/2002 v Commonwealth*[69] and more recently *Kirk v Industrial Relations Commission of NSW*.[70] Those and other cases have made clear that jurisdictional error provides the touchstone to determine those errors of law which a legislature may and may not enact legislation to limit or exclude supervisory review by the courts. It is now clear that no Australian parliament has the power to legislate to exclude judicial review for jurisdictional error. Although the High Court has given primacy to jurisdictional error, it has given much less attention to providing a coherent explanation of the doctrine. It remains difficult to understand the doctrine, let alone divine what drives it. While it is clear jurisdictional error may encompass errors that fall within many of the traditional grounds of judicial review, such as a denial of natural justice or acting in bad faith,[71] other forms of conduct that may or may not give rise to a jurisdictional error are much less clear.[72] Examples include a decision-maker failing to discharge an imperative duty or observe an inviolable limitation or restraint upon a statutory power,[73] misapprehending or disregarding the nature or limits of their functions or powers,[74] or a constructive failure to exercise jurisdiction.[75]

One common theme in these expressions of the conduct which the High Court has to date accepted may give rise to jurisdictional error is obscurity. Judges have acknowledged this problem by variously conceding that the concept of jurisdictional error is conclusory,[76] circular,[77] or simply one with which reasonably minded judges may easily reach different results.[78] The irony that judges simultaneously champion jurisdictional error and complain of its difficulties at least provides a tacit admission that the concept, as it is currently applied, typically gives little or no real guidance on when and why a statutory provision may be interpreted as one that will give rise to jurisdictional error if breached.[79] The mantra of jurisdictional error is not unlike the legalism of Owen Dixon in its heyday. Both are, or was in the case of legalism, accepted without much question. Jurisdictional error can be charged with the same crime of which legalism is now widely accepted to be guilty, namely that the concept is inherently vague and its use „conceals rather than reveals judicial reasoning."[80]

Why such a shield is thought necessary is a complex question. The important point for present purposes is that even the most obscure legal doctrines can provide a convenient shield for judicial values. Gageler has acknowledged that the uncertainty of jurisdictional error makes it a malleable concept, though he does not see it as a necessarily empty one.[81] He called for more explicit reference to the values that surely underpin jurisdictional error and its invocation in particular cases. An example can be drawn from the decision of French J, as his Honour then

was, in the Full Court of the Federal Court in *Minister for Immigration and Citizenship v SZFDE*.[82] His Honour explained that:

> Procedural fairness lies at the heart of administrative justice. It is a long standing requirement of the common law and reflects, in this country as in other common law jurisdictions, ordinary concepts of justice.[83]

While there is some attractiveness in the suggestion that administrative justice may be broadly equated with natural justice, the enormous volume of case law and scholarship on natural justice makes it clear that natural justice is neither simple nor settled. It is also curious that his Honour equated natural justice with administrative and ordinary justice when the particularly Australian procedural conception of natural justice imbues it with a quite different quality than those other forms of justice.

After the passage just quoted, French J then drew the role of procedural fairness within that of jurisdictional error when his Honour added that procedural fairness

> ..is often regarded as an implication, albeit judge-made, in the grant of statutory power to make decisions affecting the interests of individuals, unless excluded expressly or by contrary implication. Where the requirement applies its breach can amount to jurisdictional error. A decision affected by such error is liable to be quashed by a writ of certiorari.[84]

This connection between jurisdictional error and the preceding equation drawn between various forms of justice is a revealing one because it provides a relatively open admission of interrelated concepts, namely that the requirement to observe procedural fairness is judicially imposed and, once imposed, can provide the basis for jurisdictional error if breached. Basic notions of fairness may, therefore, be one driver of jurisdictional error.

Another example can be drawn from *Minister for Immigration and Multicultural and Indigenous Affairs v SCAR ('SCAR')*.[85] In that case the Full Court of the Federal Court drew a novel principle from the statutory obligation imposed upon the Refugee Review Tribunal („RRT") by s 425 to „invite" applicants to appear before it „to give evidence and present arguments relating" to their applications.[86] The Court accepted that this statutory obligation did not require the RRT to „actively assist" applicants in putting their case but that it did require the RRT to provide a „real and meaningful" hearing.[87] While this reasoning is consistent with the more general rule requiring that a hearing or similar chance to put a claim must be real or genuine,[88] the judicial creation of an implied obligation to provide a real and meaningful hearing places a gloss upon the obligations of the RRT for which the text of s 425 provides no obvious support.[89] Another difficulty with *SCAR* is determining what exactly "real and meaningful" means. The concept is inherently vague and may simply be a local variant of the equally nebulous terms offered in recent English cases.

The *SCAR* principle has attracted mixed views in the Federal Court itself. It has been applied without difficulty in some cases.[90] It was described by Graham J as „plainly wrong" in *SZFDE*,[91] to the obvious disagreement of French J.[92] The Full Court of the Federal Court recently acknowledged the uncertainty of the *SCAR* principle but gave no indication how it might be resolved.[93] This judicial quibbling over the correctness of *SCAR* has not led to useful discussion of why the „real and meaningful" requirement was devised. The reason may be that some judges believe observance of procedural detail is not itself enough to satisfy the requirements of fairness. Perhaps they believe that natural justice has a holistic element that cannot be impliedly excluded by the enactment of procedural detail. Perhaps it is because the sum of natural justice is greater than its individual parts. Perhaps there is a judicial belief that those affected by government action are entitled to a basic level of fairness and fair treatment that is hard to define. Importantly, the benefit of this possibility is that that which is difficult to define is even more difficult to exclude by legislation. If so, *SCAR* may signal a basic right to a „fair go" which is beyond easy judicial definition or legislative reach.

Is there a way forward for judicial review?

The analysis so far suggests that the values of judicial review are vague, ad hoc and often not stated clearly. Gageler has suggested that we should consider drawing out the values that appear to underpin jurisdictional error. He also suggested that a good starting point was the factors that Gleeson CJ marshalled in *Plaintiff S157/2002*[94] as principles for statutory construction to guide the process of „reconciliation" that privative clauses would often require. Those principles were that: where legislation is enacted pursuant to or in contemplation of international obligations and an ambiguity arises in that legislation, courts should favour an interpretation that accords with Australia"s international obligations; an intention to abrogate or limit fundamental rights or freedoms should not be imputed unless manifested in clear and unmistakable language; the Constitution is framed upon an assumption of the rule of law;[95] privative clauses should be construed in accordance with the presumption that parliaments did not intend to deprive citizens of their right of access to the courts unless this was done in clear terms; and the whole of an Act should be examined in order to reach a reconciliation between a privative clause and the wider scheme in which a clause was located.[96] In the wake of *Saeed*, this list must now surely include a strong presumption that any exercise of statutory power is intended to be governed by common law principles of natural justice unless there is legislation of „irresistible clearness" stating otherwise.[97]

Although these various principles have proved useful in the interpretation of privative clauses, they provide little concrete guidance beyond that. They are tailored to maintaining the right of access to the courts in the face of legislation that might suggest otherwise, so that people aggrieved by administrative behaviour can seek redress in the courts, but they say very little about what people can expect from administrative officials outside the court system. Gleeson CJ"s principles are in effect designed by a judge for the benefit of other judges. Gageler also queried whether parliament should take the lead by providing guidance to administrative officials, and one might also hope tribunals, in the form of a „code or charter of administrative rights and responsibilities, or appropriate additions to the *Acts Interpretation Act 1901* (Cth)."[98] A code of administrative procedure or values might simply transpose the seemingly endless interpretive problems that have arisen with successive attempts at procedural codification in migration legislation to a wider sphere. It should therefore be approached with great caution. This is broadly similar to many of the recommendations of the Brennan Report.

In my view, the next steps in fashioning standards for administrative action should be fashioned in the classic incremental fashion of the common law. One reason to leave the task to the courts, at least in the short term, is the dismal precedent successive legislatures have set in the procedural codes for the Refugee and Migration Review tribunals. The flaws in those codes are too numerous and well known to recount, though their relevant features for present purposes are the narrow and exclusionary nature of those codes. Their exclusionary quality arises from the painstaking attempts to introduce nominated procedures to the exclusion of all others. These codes are narrow because they rarely, if ever, confer discretion to manage unexpected situations or provide a normative framework that might equip tribunal members to identify and manage such problems. Legislative prescription of administrative standards seems unlikely given the unwillingness of legislatures to take even small steps in this direction. If legislatures are unwilling to take small steps, such as enacting a modest duty to inquire into tribunal proceedings or expand the grounds of judicial review that were first codified in the *ADJR Act* over thirty years ago, they are unlikely for the time being to take larger steps to enact more malleable concepts, such as a code of administrative rights and responsibilities. It is at this juncture that the courts may take an instructive lead. If the courts can take modest steps which set sensible standards for decision making that might, in the longer term, encourage legislatures to consider wider reaching codes for administrative conduct that, in turn, would enable us to reach a better understanding of what administrative justice is and should be.

Endnotes

1 The keynote speaker and the editors of the conference papers all conceded the existence of divergent views on the concept: Robin Creyke and John McMillan, „Introduction: Administrative Justice – the Concept Emerges", p3 and Paul Craig, „Three Perspectives on the Relationship Between Administrative Justice and Administrative Law", p28. Both papers are published in Robin Creyke and John McMillan (eds), *Administrative Justice – The Core and the Fringe* (2000).
2 Commonwealth Administrative Review Committee, *Report* (1971) para 389.
3 Robin Creyke has noted that the silence of the Kerr Report on what administrative justice might be and how it could be measured left it as an obvious one for commentators to explore: Robin Creyke, „Administrative Justice – Towards Integrity in Government" (2007) 31 *Melbourne University Law Review* 705, 708.
4 Ibid, 708-9.
5 Jerry Mashaw, *Bureaucratic Justice: Managing Social Security Disability Claims* (1983) 16.
6 Ibid 22-6.
7 Ibid 31.
8 Ibid 23.
9 Adherence to process remains a prime concern of judicial review: Greg Weeks, „The Expanding Role of Process in Judicial Review" (2008) 15 *Australian Journal of Administrative Law* 100.
10 Top down reasoning refers to theories devised by reference to grand or overarching principles. Bottom up reasoning refers to theories devised by reference to experience. On the use of this distinction in Australian public law, see Keith Mason, „What is Wrong With Top-Down Reasoning?" (2004) 78 *Australian Law Journal* 574 and Stephen Gageler, „The Underpinnings of Judicial Review of Administrative Action: Common Law or Constitution?" (2000) 28 *Federal Law Review* 303.
11 Robert Thomas, *Administrative Justice and Asylum Appeals* (2011) 3.
12 A point made in Michael Adler, „Fairness in Context" (2006) 33 *Journal of Law and Society* 615, 635-6.
13 Ibid 619.
14 Creyke and McMillan, above n1, 3-4.
15 D Galligan, *Due Process and Fair Procedures* (Clarendon Press, 1996) 237.
16 AW Bradley, „Administrative Justice: A Developing Human Right?" (1995) 1 *European Public Law* 347. Bradley places the greatest emphasis on the first of the factors mentioned in the text. An Australian assessment of Bradley's views is given in John McMillan & Neil Williams, „Administrative Law and Human Rights" in David Kinley (ed), *Human Rights in Australian Law* (1998) 63, at 64-9.
17 William Wade and Christopher Forsyth, *Administrative Law* (7th ed, 1994) 7.
18 William Wade and Christopher Forsyth, *Administrative Law* (10th ed, 2009) 7.
19 Ibid.
20 Adrian Vermeule, „Our Schmittian Administrative Law" (2009) 122 *Harvard Law Review* 1096, 1097.
21 Carol Harlow, „Global Administrative Law: The Quest for Values" (2006) 17 *European Journal of International Law* 187.
22 Administrative Review Council, *The Scope of Judicial Review* (Report No 47, 2006) 30 (fn76).
23 Sian Elias, „Administrative Law for "Living People"" (2009) 68 *Cambridge Law Journal* 47, 59.
24 Mark Aronson, Bruce Dyer and Matthew Groves, *Judicial Review of Administrative Action* (4th ed, 2009) 1.
25 The current Commonwealth Solicitor-General has long argued that judicial review in Australia developed without reference to a clear guiding theory, at least until the recent rise of the Constitution as the dominant influence. See Stephen Gageler, „The Underpinnings of Judicial Review of Administrative Action: Common Law or Constitution?" (2000) 28 *Federal Law Review* 303 and „Impact of Migration Law on the Development of Australian Administrative Law" (2010) 17 *Australian Journal of Administrative Law* 92.
26 If Gageler's argument that Australian judicial review of administrative action is largely an example of „bottom up" reasoning is accepted, the lack of a guiding principle in the *ADJR Act* is an example of a wider problem.
27 Mark Aronson, „Is the ADJR Act Hampering the Development of Australian Administrative Law?" (2005) 12 *Australian Journal of Administrative Law* 79, 94.
28 Ibid. Aronson does not state whether he believes this problem is due to the particular constitutional framework or the nature of judicial review more generally, though the scope of his analysis suggests he favours the latter.
29 The High Court has made clear that the legislature cannot predict the precise meaning and effect of its legislation, however much it may try to do so by the invocation of previous decisions of the Court: *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 [60] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).
30 The description of the High Court's interpretation of privative clauses is taken from David Dyzenhaus, *Constitution of Law – Legality in a Time of Emergency* (2006) 113.
31 Aronson, above n27, 95-6. If English experience is any guide, this caution is well justified. Recent English cases which have tried to articulate normative or overarching principles to guide judicial review have been strongly criticised by some commentators. See, e.g. Matthew Groves, The Surrogacy Principle and Motherhood Statements in Administrative Law" in Linda Pearson, Carole Harlow and Michael Taggart, *Administrative Law in a Changing State* (2008) 90-93; Tom Hickman, „The Substance and Structure of Proportionality" [2008] *Public Law* 694, 701-14. The so-called common law constitutionalism that underpins many English cases is examined by Thomas Poole: „Back to the Future? Unearthing the Theory of Common Law Constitutionalism" (2003) 23 *Oxford Journal of Legal Studies* 453; „Questioning Common Law Constitutionalism" (2005) 25 *Legal Studies* 142; „Legitimacy, Rights and Judicial Review" (2005) 25 *Oxford Journal of Legal Studies* 697.

32 These questions are far less problematic if moral or normative values are accepted as being objective rather than subjective, though that possibility itself is a difficult one. An argument to this effect is made in Michael Moore, „Law as a Functional Kind" in Robert George (ed), *Natural Law Theory: Contemporary Essays* (1992). A useful response is given in Jeremy Waldron, „Moral Truth and Judicial Review" (1998) 43 *American Journal of Jurisprudence* 75, 83-4.
33 Jeremy Waldron, „Judges as Moral Reasoners" (2009) 7 *International Journal of Constitutional Law* 2. Waldron argues that the legislative model of decision making may provide a more suitable forum for considering moral issues than the judicial model.
34 Aronson, above n27, 96.
35 Thomas, above n11, 12.
36 National Human Rights Consultation, *Report* (2010) recommendation 11.
37 *Ruddock v Vadarlis* (2001) 110 FCR 491.
38 It is useful to note that a somewhat similar argument, based upon the supposed use of the executive power, was rejected in *Plaintiff M61/2010E v Commonwealth* (2010) 85 ALJR 133.
39 A point made in Alison Duxbury, „The Impact and Significance of *Teoh* and *Lam*" in Matthew Groves & HP Lee (eds), *Australian Administrative Law – Fundamentals, Principles and Doctrines* (2007) 312-5.
40 *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 291 (Mason CJ and Deane J).
41 The separate question of whether treaties dealing with fundamental rights enjoy a special status, particularly in domestic law, is cogently criticised in Philip Sales and J Clement, „International Law in Domestic Courts" (2008) 124 *Law Quarterly Review* 388, 388-9.
42 The turning point in High Court jurisprudence on the constitutional writs came in *Abebe v Commonwealth* (1999) 197 CLR 510; *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611; *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82.
43 *Attorney-General (NSW) v Quin* (1990) 170 CLR 1.
44 (1803) 1 Cranch 137, 177; 5 US 87, 111 (Marshall CJ).
45 (1990) 170 CLR 1, 35-6. A similar statement was made by Gleeson CJ in *NEAT Domestic Trading Pty Ltd v AWB Ltd* (2003) 216 CLR 277, 288 [20] where the Chief Justice explained that „[J]udicial review is not an invitation to judges to decide what they would consider fair or reasonable if they were given the function" that is subject to judicial review.
46 Ibid, 36.
47 (1990) 170 CLR 1, 37. This reasoning echoes that of Marshall CJ in *Marbury v Madison* (1803) 1 Cranch 137, 170; 5 US 87, 107.
48 Ibid, 37.
49 Anthony Mason, „Procedural Fairness: Its Development and Continuing Role of the Legitimate Expectation" (2005) 12 *Australian Journal of Administrative Law* 103, 109.
50 Though courts rarely accept that the political content of a decision itself provides a reason for them to refrain from review. They are more likely to accept that decisions with a strong political content raise issues outside their particular expertise. See, e.g. *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* (2006) 154 FCR 425, 430 (Black CJ and Finkelstein J).
51 *Corporation of the City of Enfield v Development Assessment Commission* (2000) 199 CLR 135.
52 This is the so-called „Chevron doctrine", taken from *Chevron USA Inc v Natural Resources Council Inc* 467 US 837 (1984). The doctrine is explained in Richard Pierce, *Administrative Law Treatise* (4th ed, 2004) 139-191.
53 *Corporation of the City of Enfield v Development Assessment Commission* (2000) 199 CLR 135, 152-4 (Gleeson CJ, Gummow, Kirby and Hayne JJ), citing *Attorney-General (NSW) v Quin* (1990) 170 CLR 1, 35-6 (Brennan J).
54 *Minister for Immigration and Multicultural Affairs; Ex parte Lam* (2003) 214 CLR 1.
55 The leading English case on the issue remains *R v North and East Devon Health Authority; Ex parte Coughlan* [2001] QB 213. The doctrine of substantive unfairness and its likely reception in Australia are discussed in Matthew Groves, „Substantive Legitimate Expectations in Australian Administrative Law" (2008) 32 *Melbourne University Law Review* 470.
56 (2003) 214 CLR 1, 10 [28].
57 Callinan J accepted that the legitimate expectation could „on no view…give rise to substantive rights rather than procedural rights": (2003) 214 CLR 1, 48 [148].
58 Ibid, 23 [72].
59 Their Honours also suggested that much of the reasoning in *Coughlan* appeared directed to the English assimilation of European public law values: ibid 23-4 [73]-[75]. There is some irony in the situation that English public law has finally shaken off its longstanding scepticism of European concepts but that scepticism is now deeply embedded in some of the colonies.
60 Ibid, 24-5 [76].
61 On the standing of *Teoh's* case, see Matthew Groves, „Unincorporated Treaties and Expectations: The Rise and Fall of *Teoh* in Australia" (2010) 12 *Judicial Review* 323.
62 A phrase used by Gummow ACJ and Keifel J in *Minister for Immigration and Citizenship v SZMDS* (2010) 240 CLR 611, 620 [21].
63 *Teoh* was recently cited with approval by the United Kingdom Supreme Court: *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4, [26]. It is important to note, however, that the broader propositions adopted by the majority in *Teoh* were not discussed by the Supreme Court.
64 *Re Minister for Immigration and Multicultural Affairs; Ex parte S/20* (2003) 198 ALR 59, [170].

65 *R (on the application of Nadarajah & Abdi) v Secretary of State for the Home Department* [2005] EWCA Civ 1363, [68] (Laws LJ, Thomas LJ and Nelson J agreeing).
66 The first such English case was *R v Inland Revenue Commissioners; Ex parte Unilever plc* [1996] STC 681, 695. The best known recent case is *R (Rashid) v Secretary of State for the Home Department* [2005] EWCA Civ 744.
67 This explanation is taken from *R (Bhatt Murphy) v Independent Costs Assessor* [2008] EWCA Civ 755, [28] (Laws LJ).
68 The nomenclature of jurisdictional error is not exclusive to the constitutional writs. Gageler has noted that the concept is implicit in cases where its terminology is not openly used: Stephen Gageler, „Impact of Migration Law on the Development of Australian Administrative Law" (2010) 17 *Australian Journal of Administrative Law* 92, 97.
69 (2003) 211 CLR 476.
70 (2010) 239 CLR 531.
71 Aronson has catalogued eight different forms of error that have been recognised as jurisdictional to date: „Jurisdictional Error Without the Tears" in Matthew Groves and HP Lee (eds), *Australian Administrative Law; Fundamentals, Principles and Doctrines* (2007) 330, 335-6. This assessment was cited with apparent approval in *Kirk v Industrial Relations Commission of NSW* (2010) 239 CLR 531, 573 [71] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).
72 A point the High Court recently acknowledged when it stated that the „metes and boundaries" of jurisdictional error were unsettled: *Kirk v Industrial Relations Commission (NSW)* (2010) 239 CLR 531, 573 [71].
73 Examples mentioned in *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 503-4 [76]-[77] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).
74 An instance given in *Craig v South Australia* (1995) 184 CLR 163, 177 (Brennan, Deane, Toohey, Gaudron and McHugh JJ).
75 An instance given in *SZIAI v Minister for Immigration and Citizenship* (2009) 83 ALJR 1123, [25] (French CJ, Gummow, Hayne, Crennan, Keifel and Bell JJ).
76 *SDAV v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 197 ALR 43, [27] (Hill, Branson, and Stone JJ).
77 *WAJZ (No 2) v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 84 ALD 655, [70] (French J).
78 JJ Spigelman, „The Centrality of Jurisdictional Error" (2010) 21 *Public Law Review* 77, 85.
79 The problem is compounded by the fact that many of the limitations or imperative duties which may give rise to jurisdictional error are implied by a process of judicial interpretation that usually raises as many questions as it answers.
80 Anthony Mason, „The Centenary of the High Court of Australia" (2003) 5 *Constitutional Law and Policy Review* 41, 45. Legalism has defenders. See, e.g. Kenneth Hayne, „"Concerning Judicial Method" – Fifty Years On" (2006) 32 *Melbourne University Law Review* 223; Dyson Heydon, „Judicial Activism and the Death of the Rule of Law" (2003) 23 *Australian Bar Review* 110.
81 Stephen Gageler, „Impact of Migration Law on the Development of Australian Administrative Law" (2010) 17 *Australian Journal of Administrative Law* 92, 104.
82 (2006) 154 FCR 364.
83 Ibid [76]. His Honour made exactly the same statement in *NAAV v Minister for Immigration and Multicultural and Indigenous Affairs v NAAV* (2002) 123 FCR 447 [535], though this earlier case was not cited when his Honour repeated the statement in *SAFDE*.
84 Ibid. This approach was broadly endorsed in *Saeed v Minister for Immigration and Citizenship* (2010) 214 CLR 252 , [11]-[15] where French CJ, Gummow, Hayne, Crennan, and Kiefel JJ confirmed that the observance of the requirements of natural justice was a precondition to the valid exercise of a statutory power.
85 (2003) 128 FCR 553.
86 *Migration Act 1958* (Cth) s 425(1).
87 (2003) 128 FCR 533, [37] (Gray, Cooper and Selway JJ).
88 See, e.g. *Minster for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597, [40] (Gaudron and Gummow JJ).
89 A point made forcefully by Graham J in *SZFDE* (2006) 154 FCR 365, [212]. It should also be noted that this judicial gloss on the text of s 425 of the *Migration Act 1958* (Cth) is at odds with repeated emphasis of the High Court upon the text of legislation in many recent migration cases.
90 See, e.g. *P119/2002 v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCAFC 130, [16] (Mansfield and Selway JJ) and *NALQ v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCAFC 121; *SZHKA v Minister for Immigration and Citizenship* [2008] FCAFC 138, [5] (Gray J).
91 (2006) 154 FCR 365, 417 [212].
92 (2006) 154 FCR 365, 389 [93]-[94].
93 *SZNVW v Minister for Immigration and Citizenship* [2010] FCAFC 41, [31]-[33] (Keane CJ), [47]-[48] (Emmett J), [73]-[78] (Perram J). An application for special leave to appeal to the High Court was dismissed: *SZNVW v Minister for Immigration and Citizenship* [2011] HCASL 26. The standing of *SCAR* will remain uncertain until placed squarely before the High Court. *SCAR* was cited with apparent approval for a separate point by the High Court in *SZFDE v Minister for Immigration and Multicultural Affairs* (2007) 232 CLR 189 [35]. It was mentioned in the hearing of *Minister for Immigration and Citizenship v SZGUR* [2010] HCA Trans 250 but not in the subsequent decision. The standing of *SCAR* has been complicated by subsequent amendments to

migration legislation which pull in different directions. Section 425, upon which *SCAR* is based, is in a division subject to a provision that states it is taken to be an exhaustive statement of the requirements of the hearing rule „in relation to the matters it deals with": *Migration Act* 1958 (Cth) s 422B(1). A separate amendment obliges the RRT to „… act in a way that is fair and just": *Migration Act* 1958 (Cth) s 422B(3). There is a clear tension in these provisions. The former implies a limited and specific approach to procedural requirements, while the latter implies a holistic one that invites reference to principles of fairness that are contained outside the legislation. The solution may lie in a process of statutory reconciliation, which I leave aside for present purposes.

94 *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476.

95 A point for which Gleeson CJ drew a connection to the remarks of Brennan J in *Quin's* which were discussed above.

96 *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 491-3 [27]-[32].

97 The quoted phrase is taken from *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252, [15] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ) citing *Potter v Minahan* (1908) 98 CLR 383, 396.

98 Gageler, above n68, 104-5.

THE EFFECT OF MINISTERIAL DIRECTIONS ON TRIBUNAL INDEPENDENCE

Chantal Bostock*

The Administrative Appeals Tribunal ('the Tribunal') may review a decision to cancel a person"s visa made under section 501 of the *Migration Act 1958*[1]. Because it is easier to remove non citizens under section 501 than under the criminal deportation provisions, which protect long term permanent residents from deportation[2], it has become the principal mechanism used to remove people from Australia[3]. All non citizens are potentially subject to section 501, regardless of length of residence in Australia and level of absorption into the Australian community. The consequences of the decision are serious, including removal and permanent exclusion from Australia. The decision to cancel is a two stage process. First, the Minister or his or her delegate must decide whether the person fails the character test, which includes having been sentenced to a term of imprisonment of 12 months or more[4]. Second, if the person fails the character test, the decision maker must decide whether to cancel the person"s visa. The Migration Act itself provides little guidance about the circumstances in which a person"s visa should be cancelled. Instead, section 499 of the Migration Act empowers the Minister to give written directions relating to the exercise of powers under the Migration Act. A direction is effectively "an order or command which must be obeyed"[5]. Three have been made under the present form of section 499 relating to section 501.

An irresponsible Tribunal?

The Tribunal was established in the 1970s as part of a wider administrative law package intended to provide individuals with access to faster and cheaper justice. The Tribunal was set up as an independent, merits review body, with wide powers to affirm, vary, set aside, remit or substitute decisions[6]. When introducing the Bill establishing the Tribunal into Parliament, the Attorney-General explained that the intention was "to establish a single independent tribunal with the purpose of dealing with appeals against administrative decisions on as wide a basis as possible..."[7]:

> It will be called upon to review decisions by Ministers and of the most senior officials of government. In the words of the Franks Committee on Tribunals and Inquiries, the Tribunal is not to be an appendage of Government departments. The Tribunal is to be regarded as machinery provided by Parliament for adjudication rather than as part of the machinery of departmental administration[8].

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Independence comprises two concepts, namely structural independence and independence of thought. Structural independence refers, amongst other things, to "the allocation of financial resources and accountabilities for those resources to the [relevant] Department[9]" and the lack of "formal and informal monitoring of tribunal outcomes in individual cases and classes of cases[10]" by the relevant government departments. Independent thought "encompasses matters such as non-interference, non-delegation and the exercise of unbiased, individual judgement"[11].

Without independence, the Tribunal cannot be an "effective check on executive power[12]" in practice and in appearance:

> Applicants and the broader community must have reason to be confident that the members of review tribunals both have the skills required to provide merits review and will consider the merits of their cases in an impartial way, and make a different decision to that of the relevant government agency where they consider that appropriate. In other words, it is crucial to ensure that there is no perception (let alone any reality) that tribunals are in any way subject to undue influence either in reaching decisions in particular cases or more generally[13].

O'Connor J, a former President of the Tribunal, argued that "there has never been any doubt as to the AAT's independence", which she attributed to its "judicial mould", "the absence of any statutory restriction on its capacity to review policy" and the separation of the Tribunal's administration from the Attorney-General's Department[14]. This may be the case, but the Tribunal has, perhaps, a more serious problem. In the closely-related section 501 and criminal deportation jurisdictions, there is a longstanding view that the Tribunal acts too independently because it fails to follow government policies relating to the removal of non citizens.

Since its inception, the Tribunal has reviewed deportation decisions; although, until 1992, the Tribunal only had the power to make recommendations[15]. The otherwise "harmonious"[16] relationship between the government and the Tribunal was disturbed when the Tribunal began to "reach a different conclusion" from the Department or the Minister[17]. In 1988, for example, Senator Ray, the then Minister for Immigration, issued a statement criticising the Tribunal's decision making on the basis that the Tribunal gave insufficient weight to people's criminal history and too much weight to their potential difficulties upon return to the country of origin[18]. Senator Ray was not the only Immigration Minister concerned about the Tribunal's decision-making. Mr Ruddock was so troubled by the Tribunal's decisions, particularly following the cases of *Jia*[19] and *Ram*[20], that he launched a parliamentary inquiry into criminal deportation[21], criticised the Tribunal in the media[22] and personally wrote to the then President of the Tribunal to express his dissatisfaction with the small but significant "number of recent decisions made by the AAT, which allowed convicted offenders to remain in Australia[23]". The Minister periodically exercised his personal powers to overcome the effect of a Tribunal decision[24].

Dissatisfaction with the Tribunal's track record in this jurisdiction is not limited to the Minister and the Department of Immigration. Victims, families of victims, and organisations such as the Police Force Association have also expressed strong views about Tribunal decisions allowing convicted criminals to remain in Australia. Recently, for example, in the case of *Taufahema v Minister for Immigration and Citizenship*[25], in which the Tribunal set aside the decision to cancel the applicant's visa, the NSW Police Commissioner and the Police Association of NSW wrote to the Minister. The NSW Police Commissioner said:

> On behalf of all police officers in NSW we would ask [the Federal Government] to do everything within their power to make sure that this guy does not become or remain an Australian citizen. He's not a good character. He doesn't deserve to stay here[26].

Community concerns relate to two particular issues: first, the contention that the Tribunal acts irresponsibly by setting aside the Department's decision and allowing the person to remain. In *Pemberton v Minister for Immigration and Citizenship*, for example, Amanda Pemberton, a 17 year old New Zealander, participated in the torture and murder of a school girl[27]. The Tribunal's decision to allow her to remain created a backlash. The victim's mother said:

> I think she should be sent back to where she came from. Anyone who commits murder, doesn't matter where they come from, should never be allowed back into Australia[28].

Secondly, the Tribunal is criticised when, having set aside the decision, the person re-offends. For example, in the case of *JSFD v Minister for Immigration and Citizenship*[29], the Herald Sun noted that "there was widespread public outrage" when it revealed that the applicant had re-offended "just weeks after the federal Administrative Appeals Tribunal ruled he [could] not be deported[30]". In relation to the same case, the Herald Sun editorial observed:

> This young man has an appalling history of violence and disrespect for Australian law. We can well and truly do without him. A Federal Government agency, the AAT is supposed to provide fair and just reviews of administrative decisions. This one seems quite wrong[31].

Given this context, it is not surprising that Ministers have turned to directions to influence Tribunal decision making.

Directions under section 499

Directions are a flexible mechanism by which the government can shape policy, to reflect its broader social objectives[32]. The development of directions is essentially "a political function, to be performed by the Minister who is responsible to the parliament ..."[33] As Rares J noted:

> The constitutional scheme of responsible government would be defeated if departmental decision makers were entirely free to arrive at their own idiosyncratic views, unfettered by the control of the Minister who, by s 64 of the Constitution, is the person who administers a department of State and answers for that administration in the Parliament[34].

The process of laying directions before Parliament also enables public scrutiny of the directions and "political comment and debate"[35], for which the Minister is again accountable[36].

Like policy, directions encourage internal consistency within the Tribunal but also between the Department and the Tribunal, by acting as a "constant reference point"[37]. Furthermore, directions bolster "the integrity" of the decision making process by "diminishing inconsistencies" and enhancing "the sense of satisfaction with the fairness and continuity of the administrative process..."[38]

In 1999, section 499 was amended to strengthen the Minister's power to "specify more precisely how a discretion should be exercised"[39]. Section 499 of the Migration Act now provides as follows:

> (1) The Minister may give written directions to a person or body having functions or powers under this Act if the directions are about:
>
> (a) The performance of those functions; or
>
> (b) The exercise of those powers.
>
> ...
>
> (2A) A person or body must comply with a direction under subsection (1).

Three directions have been issued under the amended section 499 in relation to section 501, namely Direction No 17, No 21 and No 41. They are legally binding on departmental decision makers and the Tribunal[40]. The three directions have adopted the same structure, namely two principal parts: the first part deals with the application of the character test, the second part deals with the exercise of the discretion. Under the second part, the focus of this paper, decision makers are obliged to weigh primary and secondary, known as "other", considerations.

Applying the directions

In order to ensure independence, directions cannot force decision makers, including the Tribunal, to arrive at a particular conclusion in individual cases. The Tribunal must take into account the considerations and their weight as set out in the directions. However, the Tribunal is not bound to consider only the factors stipulated in the direction[41], nor is it bound by the weight the government gives to each of these factors[42].

In sum, in order to comply with the directions, the Tribunal is required to consider all relevant factors and weigh the factors as it sees fit. It cannot simply apply "some ritualistic formula[43]"; it must make the correct or preferable decision, according to the merits of the case and "independently of any instruction, advice or wish of the executive government, including in cases where government policy is a relevant factor for consideration..."[44]

An unlawful direction

Part 2 of Direction No 17 was held to have been imperfectly formulated as it operated as a fetter on the Tribunal"s discretion, conferred by section 501[45]. Direction No 17 set out three primary considerations; namely, the protection of the Australian community, the expectations of the Australian community and the best interests of the child. The relevant paragraph of Direction No 17 provided that "no individual considerations can be more important than a primary consideration, but that a primary consideration cannot be conclusive in itself in deciding whether to exercise the discretion to refuse or to cancel a visa"[46]. In *Aksu v Minister for Immigration and Multicultural Affairs ('Aksu'),* Dowsett J held that Direction No 17 overstepped its legal limits for the following reasons:

> Two primary considerations, protection and expectations will be present in almost all cases, militating in favour of refusal or cancellation of the visa. Where there are two primary considerations, and no other consideration can have more weight than either of them standing alone, an almost mathematical logic compels a decision which upholds those primary considerations. Further, as the primary considerations are really direct outcomes of the person"s bad character, the effect is that once he or she fails the character test, there is virtually a prescription in favour of refusal or revocation of the visa. This is inconsistent with the unfettered discretion conferred by s 501[47].

A number of not always consistent Federal court cases followed[48]. The Tribunal acknowledged the invalidity of part two but took it into account as it represented the government"s policy[49]. The issue was put to rest with the Full Federal Court decision in *Howells v Minister for Immigration and Multicultural and Indigenous Affairs,* which upheld *Aksu*[50]. By the time *Howells* was decided, however, the Minister had revoked Direction No 17, replacing it with Direction No 21.

An unjust direction

Direction No 21 was lawful[51]. It was, however, condemned for being unjust. Direction No 21 required decision makers to take into account the same three primary considerations as Direction No 17, when exercising the discretion to cancel a visa; first, the protection of the Australian community; second, the expectations of the Australian community; and third, the best interests of children. It stipulated other considerations such as the extent of the

disruption to the person's family, a genuine marriage to an Australian citizen or permanent resident, family composition, evidence of rehabilitation and previous Departmental warnings. Decision makers were also required to consider Australia's international obligations under various treaties.

The Direction conspicuously omitted what were considered to be highly relevant factors, such as whether the person had arrived in Australia as a minor, had been absorbed into the Australian community and had familial, linguistic, cultural and educational ties in the country of citizenship[52].

The effect of the directions on Tribunal independence

Direction No 21

On review of all section 501 cases heard and determined by the Tribunal over a five year period[53], the Direction clearly channelled Tribunal decision making. Although the Tribunal is required to consider all relevant considerations, the file review indicates a correlation between the considerations specified in the Direction and the factors considered by the Tribunal. Furthermore, factors which were not specified in the Direction were generally omitted from the decisions. During the relevant time period, 38% of cases were set aside, although no conclusion can be drawn from the set aside rate. The fact that the Tribunal sets aside cases supports the conclusion that it acts independently. Alternatively, were it not for the Direction, perhaps the set aside rate would be much higher.

The Direction appeared to strongly influence Tribunal decision making in one particular group of cases, those in which the crime was particularly violent or reprehensible. Crimes falling into this category include murder and attempted murder, particularly of vulnerable people, incest and child abuse. The general community would consider these crimes "vilely, inexcusably wrong"[54]. Direction No 21 commanded the Tribunal to consider the crime in two of the three primary considerations. In considering the protection of the Australian community, the first primary consideration, the Tribunal was required to consider the seriousness and nature of the crime. In the Direction's hierarchy of crimes, "murder, manslaughter, assault or any other form of violence against persons" were considered "very serious". Sexual assaults in general, and specifically against children, were "particularly repugnant". In relation to the expectations of the community, the second primary consideration, the Direction stated as follows:

> Visa refusal or cancellation and removal of the non citizen may be appropriate simply because the nature of the character concerns or offences are such that that (sic) the Australian community would expect that the person would not be granted a visa or should be removed from Australia[55].

In these types of cases, the decision was almost always affirmed by the Tribunal[56]. In *Tumanako v Minister for Immigration and Multicultural Affairs* ('*Tumanako*'), for example, the applicant went to meet his former de facto wife at their daughter's kindergarten[57]. When he saw that she was accompanied by another man, he stabbed her to death, in front of their daughter. In considering the protection of the community, the Tribunal found that the crime was "very serious", the applicant's risk of re-offending was low to moderate and that general deterrence weighed "against disturbing the reviewable decision". The community expectations also favoured visa cancellation, given the nature of the crime and the risk of recidivism. The Tribunal affirmed the decision on the basis that the protection and expectations of the community outweighed all other factors, which included fourteen years of lawful residence in Australia prior to the commission of the crime and his extensive and remaining family in Australia.

One of the rare cases to go against the trend was *Holland v Minister for Immigration and Citizenship* ('*Holland*'), which involved a man who had persistently sexually assaulted his daughter and grandchildren, crimes described by the Tribunal as "revolting" and "wicked"[58]. The applicant, a 74 year old UK national, was married to a 73 year old Australian citizen. The applicant had type 2 insulin-dependent diabetes, emphysema, ischaemic heart disease and stabilised angina, while his wife was in remission from cancer and had had a heart attack. Despite the nature of the crimes, the Tribunal set aside the decision. In an oral decision, the Tribunal explained the reasons for its decision as follows:

> Your relationship with your wife over a 54-year period; the fact that three of your children support you staying in Australia and are prepared to provide you with financial support to have ongoing treatment; your own attitude that you would not go to your children"s houses unless invited; your and your wife"s health problems, your likely foreshortened life expectancy; the terms of your parole which should ensure you will not have contact with any of the victims or any under age child without the consent of your parole officer being first obtained; the fact that you have little or no family support if you are returned to the United Kingdom; the uncertainty of what, if any, official support you would receive if returned as against the guaranteed support you will receive if you remain in Australia. What I conclude is the reduced risk of recidivism; all combine to leave me satisfied that the decision under review should be set aside and the case remitted to the respondent with a direction to reinstate your cancelled visa[59].

It is not surprising that the Tribunal rarely sets aside these types of decisions, given the importance, as expressed in the Direction, that the Government places on the nature of the crime. It is not, however, possible to state that the Direction produced this effect as it is not known whether the Tribunal would have affirmed the decision in any event, particularly in light of the nature of the crimes.

Although shaped by the Direction, the decision making process retains sufficient flexibility to enable the Tribunal to reach the preferable decision. Firstly, as noted earlier, the Direction cannot force the Tribunal to reach a particular conclusion in individual cases. As in all highly discretionary areas of decision making, the Tribunal must "search for the preferable view of the law"[60] and "choose" the preferable decision. In *Holland*, for example, the Tribunal would have been justified in affirming the decision, given the Direction"s emphasis on the nature of the crime. Instead, it justifiably chose to set aside the decision, on the basis of the applicant"s limited life expectancy and other factors. Ironically, in searching for the preferable decision, the Tribunal gains little guidance from the Direction, as its language is general, requiring the Tribunal to import its own "connotation"[61] of the considerations. The concept of the expectations of the community, for example, is vague, "necessarily evaluative and conclusionary in character...[62]". It can mean "different things to different people"[63].

Secondly, the range of factual circumstances in individual cases is extensive and includes the applicant"s age, family ties in Australia, education, employment, criminal history, mental and physical health problems. The range of facts allows the Tribunal to "shape" its findings of fact to enable it to apply the Direction in a particular way[64]. *Tumanako* exemplifies this phenomenon: the applicant gave evidence indicating that he was genuinely remorseful, was a model prisoner, had performed part time jobs well on weekend release, had been offered full time employment and was able to live with his twin brother and his wife, with whom he would attend church. The Tribunal, however, observed as follows:

> ...some might question whether any combination of remorse, rehabilitation courses, religious renewal, family support and good works could atone for a crime so atrocious as stabbing a young mother to death in front of her four year old daughter[65].

The Tribunal found that the nature of the crime, in combination with his low to moderate risk of reoffending, favoured visa cancellation. However it could be argued that the material was there for the Tribunal to set aside the decision. His length of residence in Australia alone would have protected him from removal under the criminal deportation provisions.

Thirdly, the language of the decisions is not always transparent[66]. As Kirby J notes, the willingness of Tribunal members to affirm or set aside decisions may ultimately depend on "their own value system"[67]. In such a "vexed area of administration"[68], Tribunal members may well have their own views relating to the outcome of the case, which are not fully articulated in the decision. Under the umbrella of the Direction, these three elements – the generality of the Direction, the flexibility of fact finding and the opaqueness of the reasoning - secure the Tribunal"s independence of thought and allow it to make what it considers to be the just decision.

Direction No 41

On 15 June 2009, the current Government revoked Direction No 21 and issued Direction No 41 in its stead. The new Direction addressed the concerns relating to Direction No 21: in addition to the protection of the Australian community, there are three new primary considerations, namely, whether the person arrived as a minor, the length of residence and relevant international obligations[69]. The expectations of the Australian community are no longer explicitly mentioned as a consideration. The "other considerations" include numerous new considerations, such as the applicant"s age, health and level of education, links to the country to which he or she would be removed and hardship to members of the applicant"s family in Australia[70].

In a similar fashion to Direction No 21, Direction No 41 seems to be influencing Tribunal decision making, as evidenced by the decisions themselves, which take into account the new considerations, and by the increase in the number of decisions set aside[71]. The number of Ministerial appeals, however, has also increased[72]. Despite the deliberate shift in policy, as in the past, the Tribunal is still perceived as being too independent. Again, the issue is the Tribunal"s approach to the exercise of discretion.

In *Taufahema*[73], for example, a decision reviewed under Direction No 41, the Minister cancelled the applicant"s visa under section 501, following numerous convictions, including the manslaughter of a police officer. The Tribunal found that although the applicant had lived in Australia since the age of 11, had close ties to the Australian community and had taken steps towards rehabilitation, the protection of the Australian community was more important. However, the Tribunal set aside the Minister"s decision on the basis of the best interests of the applicant"s daughter as well as the interests of his partner. The Minister sought judicial review on the basis that the Tribunal failed to take into account primary and other considerations. Buchanan J found the Tribunal"s discussion of the competing primary and other considerations to be "lucid and balanced"[74]. The Tribunal had not committed a jurisdictional error: "the Minister"s criticism amounts to a complaint ... that the AAT did not reach a conclusion that the risk to the Australian community outweighed all other, countervailing, considerations"[75]. The Minister has since used his personal power under the Migration Act to cancel the applicant"s visa[76].

Conclusion

In the criminal deportation and section 501 jurisdiction, the Tribunal is considered to be far too independent, far too willing to allow non citizens to remain in Australia. In response to this perception, the government has made legally binding directions, designed to influence the Tribunal"s decision making process. Direction No 17, the first relevant direction issued under an amended section 499, overstepped its legal limits and was held to improperly fetter the Tribunal"s discretion, conferred by section 501. Direction No 21 was criticised for a different reason, namely that it treated non citizens unjustly. Despite its controversial nature, the file review indicates that Direction No 21 clearly influenced Tribunal decision making. The decisions adopted the structure of primary and, where relevant, other considerations and assessed their weight in accordance with the Direction. The Tribunal rarely considered

factors outside the Direction. Furthermore, the Direction appeared to strongly influence cases involving violent crimes. However, although the Direction had force, there was sufficient scope within the decision making process to enable the Tribunal to exercise independent thought and to reach what it considered to be the just decision.

Direction No 41 has now replaced Direction No 21. It represents a significant shift in government policy, seeking to redress the previous imbalance by creating three new primary considerations; namely, whether the person was a minor when he or she began living in Australia, the length of residence in Australia and relevant international obligations. With such a clear and markedly different approach, it is unsurprising that Direction No 41 has influenced Tribunal decision making and led to an increase in decisions being set aside. There is, however, renewed criticism of the Tribunal. Given the high level of emotion and the lack of understanding of the role of the Tribunal, the response of victims, their families and law enforcement bodies is comprehensible. Of much greater concern is the overturning of Tribunal decisions by the Minister personally, particularly when the Tribunal decision has been upheld on judicial review. The comments of Wilcox J, noted in the context of the review of criminal deportation cases, are equally applicable to section 501 cases:

> The making of an application to the Tribunal, in a deportation case, involves the applicant, and usually members of the applicant's family, in a distressing recapitulation of events for which the applicant has already undergone punishment. It involves the applicant, or members of the applicant's family, in a considerable burden of costs at a time when financial resources are likely to be low. And, of course, it involves expenditure by the taxpayer, both in the presentation of the Department's case and in connection with the Administrative Appeals Tribunal. Unless the decisions of the Tribunal are customarily accepted, all of this effort and expense is wasted. The decisions of the Tribunal fall into disrepute[77].

The Tribunal has been given a challenging and unpopular task. In order to retain public confidence in the Tribunal‟s independence, however, it is critical that the Government sees the interests at stake when it does not abide by the Tribunal‟s decisions, regardless of the outcome. Where a decision is considered legally wrong, the appropriate forum to challenge this is the judicial system. Overturning the Tribunal‟s decision, particularly after it has been affirmed on judicial review, will only damage the Tribunal‟s standing and bring into question the Tribunal‟s role in our system of administrative justice.

Endnotes

1 The Tribunal may review the decision of a delegate of the Minister under section 501 where the applicant would otherwise have had a right of review: *Migration Act 1958*, s 500(3).
2 *Migration Act 1958*, ss 200, 201.
3 See the Senate Legal and Constitutional References Committee: *Administration and operation of the Migration Act 1958* (Canberra, 2 March 2006), para 9.30.
4 *Migration Act 1958* s 501(7).
5 *Laker Airways Ltd v Department of Trade* [1977] QB 643 at 699.
6 *Administrative Appeals Tribunal Act 1975*, s 43.
7 Michael Kirby, ‘Administrative Review: Beyond the Frontiers Marked Policy - Lawyers Keep Out‟ (Paper presented to the Australian National University Administrative Law Seminar, Canberra, 19 July 1981), 10.
8 Ibid.
9 Gabriel Fleming, „The Proof of the Pudding is in the Eating: Questions about the Independence of Administrative Tribunals‟ (1999) 7 *Australian Journal of Administrative Law* 33, 40.
10 Ibid.
11 Gabriel Fleming, „Tribunals in Australia: How to Achieve Independence‟ in Robin Creyke (ed), *Tribunals in the Common World*, 2008, 8.
12 Ibid.
13 Ibid.
14 Deirdre O‟Connor, „Effective Administrative Review: An Analysis of Two-tier Review‟ (1993) 1 *Australian Journal of Administrative Law* 4, 8.

15 Joint Standing Committee on Migration Deportation of Non-Citizen Criminals Parliament of the Commonwealth of Australia, June 1998, para 3.1.
16 Mary Crock, *Immigration and Refugee Law in Australia* (1998), 235.
17 Joint Standing Committee on Migration, above n 17, para 3.1.
18 Margaret Allars, „Human Rights, UKASES and Merits Review Tribunals: The Impact of *Teoh's* Case on the Administrative Appeals Tribunal in Australia" in Michael Harris and Martin Partington (eds), *Administrative Justice in the 21st Century* (1999), 344.
19 *Minister for Immigration and Multicultural Affairs v Jia Legeng* (2001) 205 CLR 507 („*Jia*").
20 *Department of Immigration and Ethnic Affairs v Ram* (1996) 69 FCR 431(„*Ram*").
21 Joint Standing Committee on Migration, above n 17.
22 See *Minister for Immigration and Multicultural Affairs v Jia Legeng*, above n 21, para 215: the Minister's comments on the radio included the following: "I'm very unhappy about the way in which the Administrative Appeals Tribunal has been dealing with numbers of matters involving the Immigration Department, in the way in which these discretions have been exercised by members of the Tribunal."
23 *Minister for Immigration and Multicultural Affairs v Jia Legeng*, above n 21, para 217.
24 *Minister for Immigration and Multicultural Affairs v Gunner* (1998) 84 FCR 400.
25 *Taufahema v Minister for Immigration and Citizenship* [2009] AATA 898.
26 „Police Want Cop Killer Motekiai Taufahema Deported from Australia", *The Herald Sun*, (Sydney) 9 April 2010, < http://www.news.com.au/breaking-news/police-want-cop-killer-motekiai-taufahema-deported-from-australia/story-e6frfku0-1225851848721>
27 *Pemberton v Minister for Immigration and Citizenship* (2009) 111 ALD 483.
28 S Hewitt, Renato Castello, „Teen Killer Allowed to Stay", *Sunday Mail* (Brisbane) 27 September 2009, <http://www.adelaidenow.com.au/news/south-australia/teen-killer-allowed-to-stay/story-e6frea83-1225779993722>
29 *JSFD v Minister for Immigration and Citizenship* (2009) 111 ALD 685.
30 M Buttler, „Teenage Thug on the Loose", *Herald Sun* (Melbourne), 1 February 2010 <http://www.heraldsun.com.au/news/victoria/teenage-thug-on-loose/story-e6frf7kx-1225825263970>
31 The Editorial, *Herald Sun* (Melbourne) 23 November 2009, 24.
32 *Toro Martinez v Minister for Immigration and Citizenship* (2009) 177 FCR 337, 356.
33 *Re Drake and Minister for Immigration and Ethnic Affairs (No 2)* (1979) 2 ALD 634, 644.
34 *Toro Martinez v Minister for Immigration and Citizenship* (2009) 177 FCR 337, 356.
35 *Aboriginal Legal Service Ltd v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 69 FCR 565, 578.
36 *Migration Act 1958* s 499(3): The Minister shall cause a copy of any direction given under subsection (1) to be laid before each House of the Parliament within 15 sitting days of that House after that direction was given.
37 *Re Drake and Minister for Immigration and Ethnic Affairs (No 2)* (1979) 2 ALD 634, 644.
38 *Re Drake and Minister for Immigration and Ethnic Affairs (No 2) (1979)* 2 ALD 634, 640.
39 Explanatory Memorandum to *Migration Legislation Amendment (Strengthening of Provisions relating to Character and Conduct) Bill 1998* Item 30. Previously the government could only issue general directions, such as Direction No 5, which related to refusals to grant a visa under section 501.
40 *Migration Act 1958* s 499(2A); *Rokobatini v Minister for Immigration & Multicultural Affairs* (1999) 90 FCR 583.
41 *SAAC v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 85 ALD 202, 220.
42 *Milne v Minister for Immigration and Citizenship* [2010] FCA 495, para 45.
43 *Howells v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 139 FCR 580, 598.
44 *Toro Martinez v Minister for Immigration and Citizenship* (2009) 177 FCR 337, 346.
45 *Aksu v Minister for Immigration and Multicultural Affairs* (2001) 65 ALD 667.
46 Direction – Visa Refusal and Cancellation under Section 501 – No 17, para 2.2.
47 *Aksu v Minister for Immigration and Multicultural Affairs,* (2001) 65 ALD 667, 674.
48 See *Ruhl v Minister for Immigration and Multicultural Affairs* (2001) 184 ALR 401; *Javinollar v Minister for Immigration and Multicultural Affairs* [2001] FCA 854; *Jahnke v Minister for Immigration and Multicultural Affairs* [2001] FCA 897; *Andary v Minister for Immigration and Multicultural Affairs* [2001] FCA 1544. *Aksu* was not followed in *Turini v Minister for Immigration and Multicultural Affairs* [2001] FCA 822.

49 *Shvarts v Minister for Immigration and Multicultural Affairs* [2001] AATA 840, para 54: "to the extent that Part 2 represents the Government"s policy with respect to the refusal or cancellation of visas, the Tribunal"s view is that it should take into account such policy without fettering its discretion by giving pre-eminent weight to particular considerations". See also *Policarpio v Minister for Immigration and Multicultural Affairs* [2001] AATA 658.
50 *Howells v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 139 FCR 580: The Full Federal Court held at page 598 as follows: "Insofar as Direction No 17 requires the decision-makers to give greater weight to the primary considerations, Direction No 17 fetters the discretion given to that decision maker."
51 *Toro Martinez v Minister for Immigration and Citizenship* (2009) 177 FCR 337, 357 -358.
52 Australian Human Rights Commission, *Background Paper: Immigration detention and visa cancellation under section 501 of the Migration Act* (Sydney, January 2009).
53 I reviewed all section 501 cases heard and determined by the Tribunal between July 2003 and July 2008, there were 146 such cases.
54 Elizabeth Farelly, „Something Rotten in our Sterile World", *Sydney Morning Herald* (Spectrum) 29-30 May 2010, 12.
55 Direction – Visa Refusal and Cancellation under section 501 - No 21, para 2.12.
56 Oral decisions: *Middleton v Minister for Immigration and Multicultural and Indigenous Affairs* (W2004/61)12 May 2004 (murdered his wife); *Norman Hogermeer v Minister for Immigration and Multicultural Affairs* (W2006/27) 24 April 2006 (incest); *Rocky Hogermeer v Minister for Immigration and Multicultural Affairs* (W2004/477) 2 March 2005 (incest); *Iordanishvili v Minister for Immigration and Multicultural and Indigenous Affairs* (V2004/1106) 9 December 2004 (attempted murder of his wife); *Anderson v Minister for Immigration and Citizenship* (N2008/2300) 15 July 2008 (murdered his wife).
57 *Tumanako v Minister for Immigration and Multicultural Affairs* [2006] AATA 848.
58 *Holland v Minister for Immigration and Citizenship* [2008] AATA 340: see also *Baskin and Minister for Immigration and Citizenship* [2008] AATA 420, where the Tribunal set aside the decision to cancel following the applicant"s conviction for murder.
59 The Department did not seek judicial review of the Tribunal"s decision.
60 Michael Kirby, Review on the Merits - the Right or Preferable Decision (Seminar on Review of Administrative Action Mechanisms of Accountability Canberra, 14 November 1979), 15.
61 Kirby, above n 9, 27.
62 *Preston v Minister for Immigration and Multicultural Affairs and Indigenous Affairs (No 2)* [2004] FCA 107, para 23.
63 *Re Afoa and Minister for Immigration and Citizenship* [1999] AATA 82.
64 Peter Bayne, „The Proposed Administrative Review Tribunal – Is there a Silver Lining in the Dark Cloud?" (2000) 7 *Australian Journal of Administrative Law* 86, 98.
65 *Tumanako v Minister for Immigration and Multicultural Affairs*, above n 59, 77.
66 Fiona McKenzie, „The Immigration Review Tribunal and Government Policy: To follow or not to follow?" (1997) 4 *Australian Journal of Administrative Law* 117, 128.
67 Kirby, above n 9, 27.
68 Joint Standing Committee on Migration, above n 17, para 3.4.
69 Direction [No 41] - Visa refusal and cancellation under s 501 (3 June 2009), para 10: Relevant international considerations include the best interests of the child, a primary consideration under the previous directions, as well as *non-refoulement* obligations under treaties such as the Convention and the Protocol Relating to the Status of Refugees.
70 Ibid, para 11.
71 Since Direction No 41 came into force, the Tribunal has heard and determined 31 cases, 15 of which were set aside and 16 affirmed. In the year prior to Direction No 41 coming into force, 40 cases were heard and determined, of which 15 were set aside and 25 affirmed. The numbers are small and there may be a range of factors affecting the set aside rate.
72 In the year prior to Direction No 41 coming into force, excluding discontinued appeals, 13 appeals were lodged by applicants. No appeals were lodged by the Minister. In the year following Direction No 41 coming into force, excluding discontinued appeals, 11 appeals were lodged by applicants and four lodged by the Minister.
73 *Taufahema v Minister for Immigration and Multicultural Affairs* [2009] AATA 898.
74 *Minister for Immigration and Citizenship v Taufahema* [2010] FCA 330, para 38.
75 *Minister for Immigration and Citizenship v Taufahema* [2010] FCA 330, para 30.
76 Yuko Narushima, „Police Killer will be deported", *Sydney Morning Herald*, 30 April 2010. 4.
77 *Nikac v Minister for Immigration and Ethnic Affairs*, above n 7, 84.

AUSTRALIAN OMBUDSMEN AND HUMAN RIGHTS

Anita Stuhmcke*

On 1 January 2007, the Victorian Ombudsman was granted the power to enquire into whether an administrative action of a public authority is incompatible with a human right. This express human rights mandate transforms the Victorian Ombudsman from a classical ombudsman into a human rights ombudsman. It is the first time that any Australian government has given a classical ombudsman a legislative mandate to perform an oversight role with respect to human rights protection. This paper explores this development. It notes that all Australian ombudsmen currently address human rights violations.

Internationally, the role of the ombudsman is increasingly being applied to the protection and promotion of human rights, with around 50 per cent of national level ombudsman offices around the world today having an express human rights protection mandate.[1]

The development of the modern ombudsman office in Australia is unique. Until recently the development of a specific and explicit human rights mandate for Australian public law ombudsmen had not occurred in any Australian jurisdiction. This changed on 1 January 2007, when the Victorian Government conferred an express human rights mandate upon the Victorian Ombudsman, creating the first sub-national human rights or hybrid ombudsman (Reif 2004, 2-11, 393) in Australia.

The Victorian Ombudsman thus joins the 50 per cent of world ombudsman institutions which may be categorised as human rights ombudsmen. A human rights ombudsman is one who protects and promotes the human rights of individuals and also performs the traditional classical ombudsman role of monitoring the administrative decision-making of government agencies to ensure it is reasonable and fair. Human rights ombudsmen are thereby essentially different from classical ombudsmen even though such ombudsmen may deal with human rights in their role of promoting administrative fairness (Reif, 2004, 87). Human rights ombudsmen span a spectrum with some being closer to the classical ombudsman at one end and the others being more akin to pure human rights commissions at the other (Reif, 2004, 8, 11).

Currently, the implementation of the human rights mandate by the Victorian Ombudsman positions that Office at the classical ombudsman end of the spectrum. This addition of an express human rights mandate to a pre-existing Australian classical ombudsman marks a new focus for government with respect to ensuring that administrative decision-making with respect to the delivery of government services is carried out in accordance with human rights principles. This paper suggests that the Victorian Ombudsman human rights model demonstrates that express human rights protections by ombudsmen may be embraced without compromising the ability to act independently to redress defective government decision-making.

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The Victorian Ombudsman

Until 1 January 2007 the Victorian Ombudsman was a classical ombudsman. The *Victorian Charter of Human Rights and Responsibilities Act 2006* ('*the Charter*') transforms the Victorian Ombudsman into a hybrid ombudsman institution or perhaps, more accurately, into a sub-national human rights institution. The *Charter* is legislation which protects the human rights of all people in Victoria and aims to 'ensure that when the government makes laws and delivers services, it does so with civil and political rights in mind' (Victorian Ombudsman Fact Sheet 16). Public authorities are obliged to act in a way which is compatible with human rights set out in the *Charter* and must give relevant human rights due consideration during their decision making.

Under the *Charter* the Victorian Ombudsman has the power to enquire into whether an administrative action is incompatible with a human right. As a public authority the Office of the Ombudsman itself is also required (after 1 January 2008) to act compatibly with the *Charter*. The *Charter* protects 20 selected human rights of a civil and political nature (and therefore does not include important economic, social and cultural rights such as education, health and housing), which can be grouped under four key principles: Freedom, Respect, Equality and Dignity. In the 2009 Annual Report the Ombudsman observed that key specific rights at issue under the *Charter* for complainants to its office were: section 8, recognition and equality before the law; section 17, protection of families and children; and section 21, the right to liberty and security of the person (Annual Report, 2009, 51).

The specific mandate given by the *Charter* allows the Office to investigate whether an 'administrative action' (as defined in section 2 of the *Ombudsman Act 1973* (Vic)) is incompatible with human rights with respect to matters that the Ombudsman may conduct on his or her own motion as well as inquiries or investigations initiated as the result of a complaint (*Ombudsman Act 1973* s 13(1A)). In practice, the application of the *Charter* may loosely be characterised as a second stage inquiry - as the Victorian Ombudsman receives a complaint against an 'administrative action' (such as a decision or act of a government authority) and then assesses that act against the *Charter* (Carden, 2008, 13). The assessment against the *Charter* includes considering 'any reasonable limitation on applying the rights as part of the administrative action' (Fact Sheet 16).

Examples of human rights case studies in the 2009 Victorian Ombudsman Annual Report[2] confirm this process of first receiving a complaint concerning an 'administrative action' and secondly assessing the administrative action against the rights as set out in the *Charter*. This approach indicates that the Victorian Ombudsman's Office is proceeding cautiously with the implementation of its human rights mandate, as the practical application of the *Charter* is one which draws heavily upon the Victorian Ombudsman's experience as a classical ombudsman. Reliance is upon the rubric of assessing the correctness of the administrative action.

In this sense the approach of the Victorian Ombudsman to human rights is to apply the *Charter* within a framework of administrative norms. The Office does not currently give priority to either domestic human rights norms or international human rights norms in addressing the issue of compliance with the *Charter*. The *Charter* is based on fundamental human rights protected in international human rights law and is modelled on the International Covenant on Civil and Political Rights ('ICCPR') (Explanatory Memorandum, 2006 p1). Australia is a signatory of this treaty. As yet the Victorian Ombudsman has not publicly referred to international human rights norms in the domestic monitoring of the *Charter*. In the Australian context, where the signing and ratification of international treaties does not translate into domestic law unless explicitly referred to by legislation, the approach of the Victorian Ombudsman is appropriate and in keeping with its roots as a classical ombudsman.

It is undeniable that the *Charter* imposes new obligations and a new way of working with government upon the Victorian Ombudsman. The expectation is that the involvement of the Victorian Ombudsman in the promotion and protection of the 20 rights identified in the *Charter* will shift the planning and delivery of government services to a decision-making culture which will include the consideration of human rights (Carden, 2008). The *Charter* principles transform the nature of investigation into an 'administrative action' which the Victorian Ombudsman undertakes – allowing the Office to apply not only norms of what may be reasonable in an administrative law context to improve government decision-making but also to potentially incorporate human rights principles to promote fairness and justice. The additional step of testing the administrative action of the government decision maker against the *Charter* should promote a culture of valuing human rights across government.

The other Australian classical ombudsmen and human rights

The Victorian Ombudsman's Office was one of eight classical ombudsman offices created by successive Australian governments throughout the 1970s.[3] Express reference to the protection and promotion of human rights has never constituted part of the role of the other seven. Despite the structural limitations of the role of the classical ombudsman, there is forceful international commentary to the effect that along with human rights commissions and specialized institutions, both classical and human rights (or hybrid) ombudsmen may be categorised as national human rights institutions (Reif, 2004, 81).

This, of course, is not how we normally view the ombudsman, as classical Australian ombudsmen are creatures of administrative law and the function of administrative law is not one of protecting civil, political, social, economic or cultural human rights, but rather administrative law actions more commonly related to traditional rights such as the right to quiet enjoyment of property, to access to the courts and, more commonly, to rights established by statute – pensions, licences and income support, and process rights such as the right to an unbiased hearing (Creyke 2006, 104).

Support for the argument that classical ombudsmen do address human rights violations is reinforced by the observation that Australian ombudsmen deal with complaints concerning government decision-making in areas which are frequently the subject of human rights debate and analysis. Such areas include: immigration policing, social security and the impact of government policy and decision-making upon the most vulnerable in society.[4]

Annual Reports of each Australian ombudsman[5] confirm that the highest volume of individual complaints concern government departments which are more likely to engage in human rights breaches, such as prisons, social services, child welfare, mental health institutions, immigration services and the military (Reif 2000, 20).[6] Case studies in Annual Reports of Australian classical ombudsmen confirm that each office deals with human rights breaches such as: denial of education subsidies (Northern Territory Ombudsman 2008-2009, 30); denial of housing (Northern Territory Ombudsman 2008-2009, 32); denial of payment of reimbursement for medical treatment (Northern Territory Ombudsman 2008-2009, 33); access to education (Victorian Ombudsman 2008-2009, 16; Queensland 2008-2009, 24; Tasmania 2008-2009, 54-55); denial of access to information concerning children (South Australia Ombudsman 2008-2009, 14); access to medical services in prison (Tasmania 2008-2009, 40; Western Australia 2008-2009, 31; Tasmania 2008-2009, 46); child abuse (NSW 2008-2009, 39) and incorrect allegation of debt for public housing (ACT 2008-2009, 16).

Such case studies show that ombudsmen deal with civil, economic, cultural and social human rights breaches by government decision-makers. It follows that the jurisdiction of classical ombudsmen must, at least to a modest degree, protect and promote human rights. Indeed these snapshots of human rights infringements highlight the fact that the provision by

government of fundamental financial health and infrastructure support means that if error is made or a decision is unreasonable the consequences for the individual may be 'profound' (Creyke 2006, 105).

Complaints to an Australian classical ombudsman may also be within jurisdiction and be about human rights but cannot be referred to a human rights institution - as one may not exist - or the human rights issue may be intertwined with a maladministration complaint (Reif 2000, 20). Thus, despite the absence of an express human rights mandate, protection of human rights eventuates from the obligation classical ombudsmen may have to deal with human rights issues as part of their investigation into maladministration.

For example, one case from the Commonwealth Ombudsman involved Mr A, an Iranian citizen who was detained with his daughter in Baxter Immigration Detention Centre ('IDC'). Mr A had been deceived into allowing Department of Immigration and Citizenship ('DIAC') staff to take his daughter from the IDC. The Ombudsman determined that DIAC had proceeded with the removal contrary to its own legal advice; that the removal had wrongly been recorded as taking place with the custodial parent's consent and that DIAC had ignored advice that Mr A and his daughter should be transferred from the IDC due to previous allegations of assault. The Ombudsman recommended that DIAC assist with the daughter's migration to Australia to be reunited with her father and that an apology be given to Mr A who had been granted a permanent protection visa in April 2008. The Ombudsman recommended DIAC undergo internal review. The Ombudsman's report was accepted by the Minister who remarked that 'the report was most disturbing and highlighted the adverse impact of long term detention on both the physical and mental health of detainees like Mr A and his child'. The Minister noted that the policy of government is not to hold children in IDCs (Commonwealth Ombudsman 2008-2009, 91).

This case study reveals the impact a classical ombudsman may have upon a human rights issue. It also illustrates how the Commonwealth Ombudsman may be categorised as a 'human rights institution'. In the above case study of the Department of Immigration and the Commonwealth Ombudsman it is the jurisdiction over maladministration which gives the Office authority to deal with the complaint. The case study shows that both the Australian Human Rights Commission and the Commonwealth Ombudsman have a human rights intersection. Across all levels of government in Australia the jurisdiction of each human rights institution and each ombudsman is clearly articulated in its legislation. In addition there are operational understandings amongst the institutions which result in case referral between institutions.

In terms of jurisdiction, there are instances where a classical ombudsman is required to take human rights into account in investigating a complaint due to the legislative framework of the government department. For example, the New South Wales Ombudsman has the role of promoting improvements in the delivery of community services. In 2004 the Office reported an investigation into homeless people and the provision of a safety net through the Supported Accommodation Assistance Program ('SAAP') agencies. As the inquiry was conducted under the *Community Services (Complaints, Reviews and Monitoring) Act 1993* (NSW) *('CS CRAMA')*, the Ombudsman inquiry had regard to the principles set out in that Act including under s 11(3)(2)(c) that a 'service provider is to promote and respect the legal and human rights of a person who receives a community service…'. SAAP agency standards encompass principles which include 'upholding legal and human rights' (NSW Ombudsman 2004, 27), meaning that the Ombudsman must necessarily examine such issues in determining whether administrative behaviour is reasonable. Similarly, in 2009, the NSW Ombudsman reported that needs of individuals in Department of Ageing, Disability and Home Care ('DADHC') residential centres were not identified or met. As this report was carried out under the same legislation, the findings of the ombudsman had reference to the 'important human rights that underpin disability services legislation and standards and

DADHC policies' (see: 'Review of individual planning in DADHC large residential centres: Summary report June 2009').

In addition to individual complaints, Australian classical ombudsmen may use their own motion power to advance human rights protection,[7] to suggest systemic change and policy improvement which aims to prevent recurring indignity and unfairness.[8]

Professor John McMillan, the former Commonwealth Ombudsman, isolated this function in a recent speech on the role of Australian ombudsmen in human rights (McMillan 2009):

> [Human] Rights are better protected when the culture of government agencies is sensitised to this need. Ombudsman's offices can work towards that objective in three ways.
>
> The first is by promoting systemic change in agencies when problems are identified. Individual case investigation, backed up by own motion reports on selected topics, is an effective means of stimulating systemic change. The individual cases provide an example of what has gone wrong and must be improved. They shine a light on worrying defects in the administration of an agency. The own motion reports are a way of highlighting recurring problems and making recommendations for change.

The Victorian Ombudsman's Office views its pre-*Charter* and post-*Charter* own motion major public reports as being relevant to human rights protection (Carden 2008 14). Indeed the express human rights mandate granted by the *Charter* is retrospectively utilised to confirm human rights outcomes on the implementation of the Office's recommendations by government authorities (Victoria Ombudsman, 2010).

Such comparison as to the use of own motion powers between Australian human rights and classical ombudsmen also reveals differences. The Victorian Ombudsman acknowledges that the *Charter* brings additional obligations. For example, in relation to the *Conditions for Persons in Custody* report (July 2006) which predates the *Charter,* Mr Brouwer notes that '[S]ince this report was released the *Charter of Human Rights and Responsibilities Act 2006* (the Charter) came into force in January 2007. The Charter provides an additional challenge to ensure that conditions in custody meet proper standards, by requiring that persons in custody are protected from torture and cruel, inhumane or degrading treatment' (Victorian Ombudsman, 2010, 14). Clearly, an express human rights mandate will allow for more specific articulation of such policy considerations than what can be seen at the level of the classical ombudsmen.

Conclusion

Given the recent creation of the Victorian Ombudsman as Australia's first sub-national human rights ombudsman, it is timely to note that the Australian ombudsman institution, generally a creation of the executive arm of government, deserves much closer scrutiny with respect to the role it does and may play in the protection and promotion of human rights.

It is not suggested that ombudsmen be viewed as a panacea for all human rights ills. Indeed, the institution has been criticised for its capacity to handle some areas of complaint and is hindered by the legislative requirements under which it operates (Walton & Kennedy 2006, 6-8). Two significant criticisms of the institution performing a human rights role should be noted. The first is the warning that human rights may be diminished when democratic deficiencies are cured by anti-democratic devices (Campbell, 2006, 320). This observation includes the possibility that ombudsmen will disempower the individual as the most that an administrative body may do is establish that a procedural right has been breached (Bailey 1999, 6). This administrative function disempowers the individual as it fails to establish a right – such as an economic right to a pension. The second significant criticism is the assumption referred to earlier that ombudsmen offer an alternative to courts in that they serve the most vulnerable members of society. Empirical studies, both in Australia and

internationally, have shown that the demographic of ombudsmen clients tend to include both middle-class and advantaged clients (Roosbroek & Waller 2008).

Such criticism is outweighed by the benefits ombudsmen offer to the promotion and protection of human rights. In their practical operation ombudsmen will, in comparison with the court system, be relatively uninhibited by issues which restrict access to justice, such as time and expense. Ombudsmen are also flexible and adaptive, meaning that they are able to adapt as required to human rights services (Commonwealth Ombudsman, Annual Report 2004-2005) and are responsive to the changing government provision of services. McMillan gives the example of the ability of the ombudsman model to investigate private firms which increasingly administer government programs, citing prisons, the postal service, assistance to job seekers, and detention centres as examples of where this occurs (2009, 8). The ombudsman can therefore hold the private service provider accountable to the same standards as government.

There are also community wide advantages to a non-litigious supplement to litigation based human rights protection. The existence of the ombudsman institution diffuses an individualistic and litigation focused culture. Ombudsmen embed a right to complain about government within Australia culture. Together Australian ombudsmen offices receive over 500,000 complaints each year about national and state government agencies and large businesses (McMillan, 2009, 7). More narrowly, the advantage for the individual is that courts may not always provide the optimal solution for their protection. Often the right human rights response may need to be practical and enable small issues to be resolved. For example, issues such as access to women's hygiene products while in immigration detention may not be suitable for courts but are fundamental for dignity and equality and can be addressed by ombudsmen.

There are therefore distinct advantages in reforming the classical ombudsman institution so as to further use ombudsmen to promote and protect human rights. The ombudsman institution straddles both legal and moral concepts and takes into account wider values, rights, and questions of law and administrative practice which render the institution much more than simply a complaints office. It is generally accepted that Australian ombudsmen are closely associated with safeguarding the rule of law and democracy.

Australian ombudsmen are in the unique position of, over three decades, having successfully facilitated the protection of administrative law rights and having acted to ensure that Australians will be treated with dignity by government agencies. While interest should increase with respect to exploring and expanding the capacity of Australian ombudsmen with respect to the protection and promotion of human rights, there is a need for caution. Greater protection of human rights must not undermine the current ability Australian classical ombudsmen have to provide redress for administrative deficiency. Resourcing an extended human rights role and the extent to which it will influence the efficacy of the maladministration/complaint-handling focus of an ombudsman's office are therefore critical issues going forward.

BIBLIOGRAPHY

Peter Bailey, 'Implementing human rights – the way forward' (1999) 5(2) *Australian Journal of Human Rights* 31 Available: austlii.edu.au [2009, November 19]

Bruce Barbour, 'Actions speak louder than words: An Ombudsman's office and children', IOI World Conference Stockholm Sweden, Workshop 4: Protecting the Particularly Vulnerable', Thursday June 11, 2009

Tom Campbell, 'Human Rights Strategies: An Australian Alternative' Tom Campbell, Jeffrey Goldsworthy & Adrienne Stone (eds), Ashgate Publishing 2006

Jo Carden, 'The Charter and Government: A New Approach to Serving the Public' February 2007

Jo Carden, 'Ready for Rights: Human rights and the role of the Victorian Ombudsman' APOR Conference, March 2008

Commonwealth Ombudsman, *Lessons for Public Administration: Ombudsman Investigation of Referred Immigration Cases*, August 2007, Report 11/2007

Robin Creyke, 'The Performance of Administrative Law in protecting Rights' in *Protecting Rights Without a Bill of Rights: Institutional Performance and Reform in Australia*, Tom Campbell, Jeffrey Goldsworthy & Adrienne Stone (eds), Ashgate Publishing 2006

John McMillan, 'The Role of the Ombudsman in Protecting Human Rights' Address by Prof John McMillan, Commonwealth Ombudsman, to conference on 'Legislatures and the Protection of Human Rights' University of Melbourne, Faculty of Law, 21 July 2006

John McMillan, 'The Ombudsman's Role in Human Rights Protection – An Australian Perspective' Paper to the 11th Asian Ombudsman Association Conference, Thailand, 2-5 November 2009

Dennis Pearce, 'The Jurisdiction of Australian Government Ombudsmen' in Matthew Groves (ed) *Law and Government in Australia*, The Federation Press, 2005

Anna-Elina Pohjolainen, *The Evolution of National Human Rights Institutions – The Role of the United Nations,* Danish Institute for Human Rights, 2006

Linda C Reif, *The Ombudsman, Good Governance and the International Human Rights System*, Martinus Nijhoff Publishers, 2004

Michael Walton and Dr Michael Kennedy, Submission of the New South Wales Council for Civil Liberties to the ten year review by the 'Ombudsman and Police Integrity Commission Committee of the NSW Parliament of the Police Oversight System in NSW', 15 May 2006

NSW Ombudsman, Media Release, 26 October 2003

NSW Ombudsman, *Assisting homeless people – the need to improve their access to accommodation and support services*, Final report arising from an inquiry into access to, and exiting from, the Supported Accommodation Assistance Program, May 2004

Parliamentary Commissioner of Administrative Investigations, 30 August 2006

Victorian Government, Explanatory Memorandum, Charter of Human Rights and Responsibilities Bill 2006 (Vic) p1

Victorian Government Submission to the National Human Rights Consultation dated 9 June 2009

Victorian Ombudsman Fact Sheet 16

Victorian Ombudsman, *Ombudsman's recommendations – Report on their implementation*, February 2010, Victorian Government

Western Australian Ombudsman, *Report on Deaths in Prisons*, 15 December 2000

Western Australian Ombudsman, *Disability Access and Inclusion Plan* (DAIP) 2007-2010, 20 June 2008

Endnotes

1 The proliferation of human rights ombudsman institutions is detailed in Linda C Reif, *The Ombudsman, Good Governance and the International Human Rights System* 2004).

2 The three case studies provided concern: a prisoner who was moved naked through custodial facilities (2009, 52-53); a complaint by a blind woman concerning a taxi driver who had refused to carry her guide dog unless it was wearing a muzzle (2009, 51); and a prisoner who complained about lack of access to bail application forms while in custody (2009, 53).

3 All of the state ombudsmen were established in the 1970s: Western Australia - 1971; South Australia - 1972; Victoria - 1973; Queensland - 1974; New South Wales - 1974; Northern Territory – 1977; Tasmania – 1978; and the Australian Capital Territory – 1983. The relevant legislation is: *Ombudsman Act 1989* (ACT); *Ombudsman Act* 1974 (NSW); *Ombudsman Act 2009* (NT); *Ombudsman Act 2001* (Qld); *Ombudsman Act* 1972 (SA); *Ombudsman Act* 1978 (Tas); *Ombudsman Act 1973* (Vic); *Parliamentary Commissioner Act 1971* (WA). The Office of the Commonwealth Ombudsman was established in 1977 by the *Ombudsman Act 1976* (Cth).

4 By way of example, the Commonwealth Ombudsman is also the Immigration Ombudsman and the New South Wales Ombudsman's brief covers caring for the vulnerable through reviewing deaths of certain children, overseeing investigations into employment related child protection, dealing with complaints about the care and protection of children by community services (Barbour 2009, 3).

5 There are jurisdictional variations, for example, in Queensland the Ombudsman cannot investigate a member of the police service if the action is operational and the South Australian Ombudsman has no jurisdiction over police. The government decision making areas excluded from ombudsman investigation are limited, for example, judges and members of parliament are excluded.

6 The 2008-2009 Annual Report of the South Australian Ombudsman records most complaints made were about the Department of Correctional Services (41.2% of all complaints); in the same period, those made to the Victorian Ombudsman were in the area of Justice (26% of all complaints); the NT Ombudsman received the most complaints against police (63%); the Tasmanian Ombudsman against Justice (33% of all complaints); the Western Australian Ombudsman against Corrective Services (22%); the Queensland Ombudsman received almost double the number of complaints about Corrective Services as it recorded against Child Safety (the state agency most complained about excluding Corrective Services); the NSW Ombudsman received most complaints with respect to the NSW Police Force; the Australian Capital Territory Ombudsman received the highest complaint numbers with respect to Housing; and the Commonwealth Ombudsman received the largest number of complaints with respect to Human Services, which incorporates Centrelink and Child Support.

7 For example section 15 of the *Ombudsman Act 1976* (Cth) provides that an own motion report can be prepared if the Ombudsman is of the opinion that the administrative action under investigation was unlawful, unreasonable, unjust, oppressive, improperly discriminatory, or otherwise wrong or unsupported by the facts; was not properly explained by an agency; or was based on a law that was unreasonable, unjust, oppressive or improperly discriminatory.

8 For example, in 2008-2009, the Queensland Ombudsman examined the handling of prisoners by Queensland Corrective Services and recommended that prisoners be made aware of their rights with respect to prison transfers (Queensland Ombudsman 2008-2009, 50-51).

INFORMATION LAW AND POLICY – THE REFORM AGENDA

John McMillan*

Government and information

Control of information is one of the great powers of government.

Used wisely, government information supports sound policy that stimulates economic growth, alleviates inequality and disadvantage, and points to emerging environmental challenges. Managed effectively, information provides government with a reliable record of its communication with the public and transactions with other governments, and builds an enduring record of a nation's history. Shared freely, government information can educate the public, facilitate informed public participation in government, and stimulate business and social innovation.

The converse is also true. When mishandled, government information can cause great damage to government clients who are misidentified, who become lost in the system, or who are wrongly suspected of acting in a way that invites government coercion. If guarded too vigorously, information can harbour secret and unaccountable government, and breed mistrust and cynicism in the community. If managed ineffectively, information can shield corruption and abuse of power and allow them to flourish.

The power of information is well understood. A traditional and resilient chord in political and legal theory is that transparency and democracy go hand in hand, just as secrecy and dictatorship are intertwined. We have long had laws that control government information practices, requiring government to collect information of various kinds and to preserve or destroy information. Other laws penalise unauthorised or inappropriate disclosure.

That legislative framework has been strengthened in the last three decades by new laws that guarantee public access to government information, control how personal information is handled by government agencies, regulate archival preservation of government records, and police government collection of information using electronic surveillance and interception. Standards and protocols have been developed that provide guidance on information management and embody information policy settings. We have also adopted international treaties that take up those themes.

Only in recent years, however, has government made a concerted attempt to bring those information initiatives together. This has been done at both a policy level and a legislative level. At the policy level, the Australian Government has commissioned numerous inquiries and reports that have examined information policy. Among the better known reports was the Gov 2.0 Taskforce report in 2009.[1] Common themes in recent reports are the need for

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greater coordination in government information management, more strategic use of government information through publication of public sector information, and greater reliance by government on Web 2.0 tools to facilitate community engagement.

At the legislative level, a new independent agency – the Office of the Australian Information Commissioner ('OAIC') – has been established,[2] with a broad responsibility covering freedom of information, privacy and information policy. This has been accompanied by reform of the *Freedom of Information Act 1982* (Cth) ('*FOI Act'*) and a government commitment to reform the *Privacy Act 1988* (Cth).

Freedom of information developments

When enacted in 1982, the *FOI Act* was a small but vital part of a revolution in government. The backdrop to the Act was a century long tradition of government secrecy, anchored in the unreviewable discretionary power of government to decide what information to release. The *FOI Act* fundamentally changed that tradition, with a new set of principles: all members of the public enjoy an equal right of access to government documents; this right is a legal right that can be enforced in an independent tribunal; and the onus is upon government to justify non-disclosure by reference to settled exemption criteria.

The Act changed government by engineering the disclosure of far more information, including the routine disclosure of personal and case files to members of the public. Even so, a series of reports from the Australian Law Reform Commission, the Administrative Review Council, the Commonwealth Ombudsman and the non-government Right to Know Coalition pointed to serious problems that undermined the effectiveness of FOI laws. Problems exposed included the high cost of obtaining information, delay in being granted access, impediments to the exercise of appeal rights, uneven commitment to openness across government, and lack of leadership in promoting open government.

Those problems have been squarely addressed in the legislative reforms that commenced in 2010.

Improved FOI request process

It is now far easier for a person to make an FOI request. A request can be made by email; there is no application fee; the charge for decision making time has been reduced; agencies face greater pressure to handle requests within 30 days, or to discuss an extension with the applicant or the OAIC; agencies are required to spell out how public interest factors are balanced in denying access; and applicants can choose whether to seek internal review of an access denial or proceed directly to external review by the OAIC.

The early evidence is that more FOI requests are being made and far more is being disclosed. Most agencies have informally reported an increase in requests – quantified, in the instance of the Australian Taxation Office, as a 67% increase in requests since 1 November 2010 compared to the same period last year. FOI stories are appearing more commonly in the media, usually on a daily basis. Recent stories in national daily newspapers concern documents obtained under FOI relating to small business debt levels, secondary school student performance, parliamentary allowances, projected mining tax revenue, traffic infringement notices, international student subsidies, regional population movements, indigenous debt, Australian War Memorial funding, Reserve Bank fit-out costs, Paul Hogan's tax fights, Tony Abbott interviews, and – a perennial favourite – the Governor-General's flower bill. Many of those stories, as the descriptions indicate, reflect a different style of FOI media reporting. The stories are less about 'what government tried to hide', and more about 'this is government's response to a particular problem'.

New Office of the Australian Information Commissioner

The second key reform is the creation of the OAIC, headed by three Commissioners with statutory independence. The OAIC has a broad range of functions and powers that include complaint handling, merit review of access denials, publication of guidelines, monitoring, training and advice, legislative reviews, and promotion of open government.

This creation of a new agency to oversight FOI has made a difference. The number of inquiries, complaints and review applications to the OAIC is already at a higher rate than would have been received in the same period by the Ombudsman or the Administrative Appeals Tribunal. By May 2011 the OAIC had received 71 complaints, 140 review applications and 917 extension of time notifications and applications. The FOI guidelines published by the office run to over 160 pages; fact sheets have been prepared for the public on most aspects of FOI; discussion papers have been published on information policy, the information publication scheme and the disclosure log; and a guideline has been published for agencies on website design.[3]

The new website guideline recommended that all agencies adopt a common template for placing information on their website about FOI rights, the Information Publication Scheme ('IPS'), the disclosure log, and privacy protection. The importance of FOI in Australian government will be substantially enhanced if members of the public visiting agency websites can see on the homepage an FOI icon that links to standard FOI advice that is comprehensive, reliable and uniformly presented. To promote uniformity across government, the OAIC has designed an IPS icon and a Disclosure Log icon for agency adoption.

A great strength of the new oversight model is that it enables flexibility in how we go about the task of enhancing open government. This is a marked departure from the traditional FOI oversight model that relied principally upon tribunal adjudication of access disputes to decide what must be disclosed and what can be withheld. Decisions of the Administrative Appeals Tribunal have played a significant role in developing FOI jurisprudence and advancing open government, yet what is ultimately more important is that government agencies are philosophically or culturally disposed to greater openness.

The OAIC has addressed that challenge by the three Commissioners offering to address the leadership group of the large departments and agencies on the open government reform agenda. Most departments, I am pleased to say, took up that offer. It was probably the first time in the history of most agencies that a statutory officer had been invited to a senior executive meeting to convey the message that a change towards greater disclosure is both inevitable and irresistible.

Proactive disclosure and publication

The third key reform is to FOI architecture. The traditional reactive or pull model that rests on FOI requests to ensure information disclosure is being supplemented by a proactive or push model of publication and disclosure by government agencies.

A key element is the IPS, which commenced on 1 May 2011. It requires publication by agencies of a greater volume and range of government information. The interim guidance that was circulated to agencies late in 2010 explained that more detail and structure will be required than agencies were accustomed to publishing under existing FOI publication requirements. One significant legislative change is the new IPS category of 'operational information', which replaces the awkwardly worded requirement in the existing *FOI Act* to publish the guideline documents used by agency officers in administering legislation or schemes that confer rights, benefits, penalties or detriment on the public.

The IPS requirements have prompted many agencies to undertake considerable work reviewing their document holdings to decide what should be published. Agencies report that they have identified tens of thousands of pages – one agency estimate is of 100,000 pages – that will be published under the IPS.

As noted earlier, the IPS guidance from the OAIC promotes the need for a common structure across agency websites. This assists members of the public to know what is available and how to find it. It is a 'whole of government' approach that directly benefits the public, rather than focussing on the needs of government. A key failure in past FOI practice was inconsistency in the approach taken by agencies in dealing with public access requests.

Another proactive publication feature is the Disclosure Log. This will be a public register of information that an agency has released under the *FOI Act*. The Disclosure Log gives substance, thirty years on, to a foundation FOI principle that disclosure to one person is disclosure to the world at large. All members of the public have the same presumptive right of access to government documents. The OAIC published a disclosure log discussion paper, to ensure that this will be a robust mechanism that keeps FOI at the forefront of government practice and community engagement with government.

A third proactive publication featured in the *FOI Act* is a radical declaration in the new objects clause (Section 3), that government information is a national resource that must be managed for public purposes. We rely heavily on this declaration in our discussions with agencies and highlight the marked departure from previous thinking. Until now, agencies often regarded information they held as being created for a singular operational purpose – such as advising the government, providing guidance to their own staff, or in joint planning with another agency or government. That may explain the original collection of the information, but it now has an additional quality in the hands of government, that it is a national resource that must be used for public purposes.

Inherent in that statement is a presumption of openness. Government information, as a national resource, has been placed on the same legislative footing as beaches, forests and public parks. The public can expect to have unhindered access unless there is a convincing justification for a barrier to be erected.

The new objects clause has added force when combined with the IPS. The Act encourages agencies to go beyond the minimum IPS disclosure rules and to publish other information held by the agency. The new objects clause requires them to ask the question, 'why not?' Why is information that is published on the intranet not also published on the web so that it is publicly accessible? Why are internal reports that evaluate the agency's performance not shared with the public? Why are internal data sets that support agency research not a public resource?

Open government in the future

The changes to the Australian *FOI Act* are significant. Not only have the rules changed, but strong enforcement mechanisms have been added to make those rule changes effective. It is now relatively easy for a member of the public to bring a document disclosure dispute to a head and to get a binding ruling from the OAIC. Agencies must explain to the applicant or the OAIC their inability to meet the 30 day processing time limit. The office has a constant oversight and monitoring role of agency administration.

We can expect the reformed *FOI Act* to change government practice in Australia. Already there are signs of changed thinking and changed practices. The publication, albeit in a redacted form, of the Red Books of agency advice to the incoming government is an example.

Each instance of disclosure of that kind sends a message within government that it can function with a higher level of disclosure than has been past practice. Each instance of disclosure makes it harder for an agency, on the next occasion, to justify non-disclosure if the only concern is that agency business cannot be conducted in the same manner as previously. In particular, each instance of disclosure makes it progressively harder to maintain that frankness and candour in government deliberations will be impaired by disclosure.

Already we know, as we reflect on government trends over the past thirty years, that policy formulation and decision making are now more open and that public administration has adjusted to this change. The recent *FOI Act* reforms will accelerate that transformation of government. This will not occur without tension, nor will practice across government be consistent or linear.

The concern is regularly put to me by senior agency officers – and put persuasively – that increased disclosure will make it harder internally to debate tough policy choices. Briefing papers will either not be written or will be censored and understate the gravity of an issue. The minutes of meetings will be written with an eye to disclosure that robs them of value as an historical record. The business community will be reluctant to share views with government that could become publicly known, and communication between the public service and the political branch of government will not be as uncomplicated and trusting as it should be.

We will work through those issues in the years ahead, and from one FOI case to another. There is no doubt that increased disclosure can cause complexity and discomfort for government. Equally, there is no doubt that the business of government is changing in the direction of greater openness and that the change is unstoppable.

Privacy

A second area of responsibility in the OAIC is privacy protection, under the *Privacy Act* and related legislation. This is a well-established area of government oversight, supervised for over twenty years by an independent Office of the Privacy Commissioner that has been merged into the OAIC.

Privacy protection is a vibrant area of activity, spanning the private as well as the public sector. In the last year the Privacy Commissioner and OAIC received over 20,000 privacy inquiries and nearly 1,200 written complaints. It conducted 70 own motion investigations, and received 60 data breach notifications. The office publishes extensive guidelines and fact sheets, and is a frequent commentator on privacy issues in the media.

The proper management of personal information in compliance with privacy laws is nowadays a central concern of management in both the public and private sectors. The implementation or adoption of government programs can depend on whether agencies can reassure the community that privacy guarantees will be met. Many proposals, the most notorious being the Australia Card, have founded on this shoal. Senior corporate managers are also well aware of the sensitivity of privacy issues and the damage that can be caused to business reputation when a privacy breach is publicised.

Why privacy protection is important

One reason for the growing importance of privacy issues is the considerable and expanding volume of sensitive personal information that is held in government and business databases. Agencies hold extensive information about people's financial and taxation affairs, family and medical history, employment record, and transactions with agencies.

Another reason is that individuals take privacy protection seriously. They regard their privacy as a human right that should be properly respected. People are concerned with how much is recorded about them in the files of government and industry; with the inconvenience and damage that can result if that information is incorrect, out-of-date or incomplete; and with the danger that personal information will be misused within an agency, wrongly disclosed, merged inappropriately with other personal information, or revived at a time when it would be better buried or destroyed.

A third reason why privacy protection and personal information management are of growing importance is that privacy breaches can be damaging to the individual, costly to government and industry, and they can arise from simple programming and clerical mistakes.

Recent highly-publicised privacy breaches that the OAIC has investigated illustrate these points. One was a Telstra mail-out in which 220,000 letters containing personal information about customers were sent to the wrong address. More than 23,000 of those letters concerned customers with silent numbers.

A second was a privacy lapse by Vodafone, which did not have effective security measures to protect the personal information it held on 4 million customers. Staff at Vodafone outlets could access the personal database using shared logins and passwords, thus making it difficult to audit or control improper access to the database.

A third example was the collection by Google Street View cameras, in Australia and overseas, of unsecured Wi-Fi payload data from personal wireless networks. A fine of 100,000 euros was imposed on Google by a French privacy regulator, even though the collection of information by Google was not intentional, the personal information was destroyed, and there was a fulsome Google apology. Far higher penalties, as high as $4.3 million in one case, have been imposed elsewhere for corporate privacy breaches.

Legislative reform of privacy protection

The importance of effective privacy protection is reflected in the large number of legislative reform proposals that are currently under consideration in Australia. Some of these stem from the three volume report of the Australian Law Reform Commission in 2008, containing 295 recommendations for reform.[4]

The first Bill to emerge from that process is an exposure draft Bill that is currently before the Australian Parliament.[5] The Bill will create a new set of Australian Privacy Principles ('APPs'), to replace the Information Privacy Principles that apply to government agencies and the National Privacy Principles that apply to the business sector. The adoption of a universal set of 13 privacy principles will sharpen privacy protection in Australia, while making it simpler for government contractors to comply with legal obligations.

Looking ahead, the Australian Government has announced its intention to strengthen the powers exercisable by the OAIC and Commissioners.[6] The Privacy Commissioner will be empowered to make enforceable determinations in an own motion inquiry, to seek (through a court) a civil penalty for serious or repeated privacy offences, and to accept and enforce undertakings given by government agencies and private entities. The prospect of civil penalties for privacy breaches will provide an added incentive for organisations to take their privacy responsibilities seriously.

Other reform proposals being discussed between the OAIC and government point to the information privacy dimension that is part of a diverse range of government programs. Matters under discussion include reform of credit reporting, airport body scanning,

consolidated e-health records and individual healthcare identifiers, cross-border data flows, and service delivery integration in Centrelink and Medicare.

Information Policy

The third area of responsibility in the OAIC is the newer area of information policy. The scope of this responsibility is not settled, except that, broadly, the role of the office is to advise government on any aspect of information policy and practice. The OAIC is taking steps to engage with other agencies, and to highlight issues that should be addressed in government information policy. Though this role is emerging and open-ended, we find that it is generating as much interest within and outside government as our more recognised responsibilities in FOI and privacy.

The emerging issues are defined in numerous reports that have recently been commissioned by government into all aspects of information policy. This activity acknowledges that every decision and every activity of government uses information. It is a valuable and powerful resource. Government success will depend on how effectively information is collected, stored, managed, used and disclosed.

We mapped the themes in a discussion paper published last year, *Towards an Australian Government Information Policy*. Four themes stood out:

- There is a need for a coordinated approach to government information management. Many agencies have a role in this space; these include my own office, the Australian Government Information Management Office, the Australian National Archives, the Australian Bureau of Statistics, the Defence Signals Directorate, and the Departments of Broadband and Communications, the Prime Minister and Cabinet and Attorney-Generals. There is a larger number of policies and standards on information policy and management. What is lacking is a clear and settled framework for integrating and harmonising that work.
- Agencies need guidance and assistance to implement new information policy requirements. For example, agencies need guidance in preparing for the IPS and on the matter of disclosure logs. As well, agencies must develop a sound governance structure that ensures effective internal leadership on information policy and management, and is broader than the more traditional focus on information technology.
- Australia has much to learn from other countries. Though Australia is firmly committed to open government and to Web 2.0 innovation, we lag behind our international peers in web publication of government data, and in providing online access to government information and services.
- Australian Government agencies must publish a greater amount of public sector information on terms that allow re-use by the community. To that end, the OAIC Issues Paper proposed ten draft principles on open public sector information. After a public consultation process, in which there was strong endorsement of the principles by many of the government agencies and members of the public who participated, the principles were revised and launched in May 2011 as the *Principles on Open Public Sector Information.*

There are many innovative projects underway within government that illustrate those themes:

- The revamped data.gov site has recently been launched. It provides access to more than 200 data sets of government economic, taxation, environmental and social data,

covering topics such as crime patterns, BBQ locations, water consumption, regional funding, taxation statistics, employment patterns and Australian wetlands.

- The new My School 2.0 website attracted 186,000 visitors in the first 24 hours. The aggregation on a single site of all information held by government on school performance and funding has stimulated a broad community debate that is certain to change educational delivery in Australia.
- Other innovative data publication projects described in the OAIC Issues Paper include the National Statistical Service, the Australian Early Development Index, the Australian Spatial Data Directory, the Environmental Resources and Information Network, the Australian Social Science Data Archive, the Mapping our ANZACs project, and the National Toilet Map.

Integration

The OAIC integration model

The conferral of those three responsibilities upon the OAIC – FOI, privacy and information policy – was itself an innovation. There was no precedent in Australia for a single oversight agency having so many roles and functions in relation to government information.

The first issue we faced was whether to develop privacy and FOI along separate paths, as they had grown until then. This is the approach adopted in some other countries where FOI and privacy were merged in the same office.

Instead, from the outset we adopted an integrated model. The three Commissioners take joint responsibility for managing all office functions; many staff work across all three areas; there is a single telephone, email, web address, and protocol for agency contact; and the OAIC logo and tag line convey a message of integration.

The office can be more effective and develop a higher profile if its resources can be targeted at issues of greatest need or immediate demand. We would not, for example, have been able to complete some existing publications and projects without that staffing flexibility.

The integrated approach underscores the importance within government of treating information policy and practice as a core function that requires senior leadership within agencies. The need for a coordinated approach across government to information management will only be addressed if we join all the information dots.

In practice there is a high degree of overlap between FOI, privacy and information policy issues. Most FOI requests seek documents that contain personal information of one kind or another. Personal information will only be properly protected within agencies if information systems are expertly developed and managed. The new FOI theme of proactive publication is also a central theme in many of the recent reports on information policy. The IPS will not work within agencies unless managed by a multi-disciplinary team that hosts legal skills, technical understanding, data capability, public relations experience, and policy and research expertise.

Technology – shaping issues

Another compelling reason for adopting an integrated approach is that the same pressure – technology – is shaping many of the issues and driving the need for change within government. The FOI, privacy and information policy issues that are thrown up by technological developments and innovation are extensive and challenging. They include:

- Technology has increased the volume of information held by government. More information is collected, assembled, downloaded and stored. More information is available to be requested, to be considered for IPS publication, and to be secured against inappropriate dealings or disclosure.
- Information is recorded in many different forms. Hard copy filing systems are now joined by other data repositories, such as mainframe computers, backup files, desktop and portable computer hard-drives, USB pins, smartphones, central government sites such as govdex and data.gov, on social networking sites such as Facebook, and in the form of metadata, email exchanges and twitter messages. A host of new access and security questions arise that were not issues when FOI and privacy laws were conceived in the age of hard copy documentation.
- Those and other developments place pressure on agencies to move to electronic records management. Agencies will not be able to comply with their FOI obligations unless they can quickly locate, retrieve and publish information from an electronic data base. Privacy laws throw up other issues. How, for instance, do you destroy personal information that has been digitised, or how do you restrict the circulation of personal information that has reached an online environment?
- Information is stored differently in an electronic age. Many agencies are moving to cloud computing, where their information is housed by a contractor, including a contractor outside the jurisdiction. Special controls must be put in place to ensure that FOI and privacy rights are not foregone in that process.
- Technology enables government to use information differently. The MySchool website is an example. It will soon be joined by MySuper, and at State level we have MyTrain, MyBus and MyFerry. The logical span, some suggest, is for government to cover the full spectrum from MyBirth to MyFuneral! Even the use of 'My' as a prefix to describe a government database paints a different picture of the purpose and operation of the database.
- Technology creates new threats to information security. A disclosure of Wikileaks proportion is possible only because one person can download large of volumes of information and transfer it to others before being detected. Privacy breaches that arise through technological oversight tend to be more serious and affect thousands or millions of people simultaneously.
- Communication between government and the community now occurs in a different fashion. Most communication now occurs online, whether through email, online lodgement such as e-Tax, or through discussion blogs.
- There is greater use of social media by government agencies. Over 260 agencies and councils, for example, have a Twitter account. Most political leaders have embraced both Twitter and Facebook.
- Community and business expectations of government are transformed by technology. Businesses expect a right of free access to, and the right to re-use, information obtained from a government website. The community expects a quicker and fuller response when they engage an agency online.
- There can also be contradictory expectations of government that stem from technology. People expect greater privacy protection from government but also increased transparency in government. There are equal calls for more and for less government regulation of communication through the internet.

The technological pressures on government are changing not only the way that government uses information, but are causing a subtle change to government itself. Our traditional model of government is one of central planning. The experts control the levers. They decide what

information to collect, how to use that information, and what to disclose. Control of information enables experts to craft the justification for the policies which, in their view, are socially required.

Technology is changing that. The web is by nature an open forum, and it creates an open market in information and ideas. The principles that underpin the web are the antithesis of a central planning model.[7] Those principles include universality – web users or participants can enter the web from any location, link to any site, and participate equally with other web users. A second principle is decentralisation – no approval is needed or government licence required to access material, post material or communicate with others. A third principle is open standards – the tools needed to participate on the web are available free of charge and can be applied by anyone.

The community has already embraced the idea of the open market in information. People are more likely to consult Wikipedia, the community encyclopaedia, than Britannica, the expertly authored text. People are as likely to obtain medical advice by googling their symptoms as by consulting a medical specialist.

There are clear implications for government. People expect government to use web technology in innovative ways to share information, consult the community and conduct conversations. Better policy will arise from that process.

Conclusion

We are undergoing the most active phase of open government and information policy reform in Australia in over twenty years. There is strong government commitment to this reform and there is agency leadership in bringing it about. That in itself differentiates the present from earlier reform waves. Technology imposes an irresistible pressure for change that was not there in the past. We also have a better oversight framework in place to ensure that the reform is lasting.

It will not all be plain sailing. Information laws make life more difficult and challenging for the executive branch and for political leaders. There has been backsliding in the past and there may be again. But any counter-tensions will, I expect, have limited impact. The forces that are driving the open government and information policy reform process are now numerous, stronger and more compelling.

Endnotes

1 Report of the Government 2.0 Taskforce, *Engage: Getting on with Government 2.0* (2009), Department of Finance and Administration. Other Australian Government reports are discussed in Office of the Australian Information Commissioner, *Towards an Australian Government Information Policy*, Issues Paper 1, 2010.
2 *Australian Information Commissioner Act 2010* (Cth).
3 See *Guidance for agency websites*, available at www.oaic.gov.au.
4 Australian Law Reform Commission, *For Your Information*, ALRC Report 108, 2008.
5 See Australian Privacy Principles, Exposure Draft, before the Senate Finance and Public Administration Legislation Committee.
6 Powers conferred by the *Privacy Act 1988* are now formally conferred on the Australian Information Commissioner, but can be exercised by the Privacy Commissioner.
7 See T Berners-Lee, 'Walled off Web', *Australian Financial Review*, 11 February 2011.

HAVE RECENT CHANGES TO FOI CAUSED A SHIFT IN AGENCIES' PRACTICES?

Jane Lye*

Background to the reforms

In June 2008, the FOI Independent Review Panel chaired by Dr David Solomon AM published its report on Queensland's Freedom of Information legislation.[1]

The findings of this review were significant not only in prompting changes by the Queensland Government to the Queensland FOI legislation but also at Commonwealth level. The Solomon report was central to the Commonwealth Government's subsequent review and amendment of the *Freedom of Information Act 1982* (Cth) ('*FOI Act*').

Significant changes were made to the *FOI Act*, designed to ensure that 'information should be made available more quickly and it should be more responsive to the request that has been made.'[2]

At Commonwealth level, these changes centred on:

- the establishment of the Office of the Australian Information Commissioner;
- changes to the way in which the exemptions operate (including the operation of the public interest tests); and
- an increased emphasis on a push model for the disclosure of government held information, including a publication regime.

The Solomon report emphasised the need for a 'cultural shift' in the attitudes of agency personnel involved in the processing of requests.[3] However the subsequent amendments to the *FOI Act* did not amend to any great extent the mechanics of how requests are processed by agencies. This was despite the Queensland FOI Independent Review Panel receiving submissions from both government agencies and FOI applicants commenting upon or complaining about delays in processing times and unsatisfactory responses to requests.
The Solomon report commented upon the difficulties Queensland agencies were experiencing with respect to their handling of records and FOI and, in particular, electronic records. The report was critical of agency practices for the recording and preservation of emails.[4]
It considered various initiatives to improve record keeping of electronic records by Queensland agencies including:

- development of a state wide strategic information policy;
- a state wide audit of government record keeping practices;

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- better training of agency personnel; and
- development of a document management system for electronic documents to tag each document at the point of creation and assess whether it can be disclosed in response to an FOI request.[5]

However, the subsequent changes to the *FOI Act* did not result in specific changes to the way in which agencies were to manage their record keeping or respond to requests for electronic documents.

The problems associated with the processing of FOI requests for electronic documents have since been echoed in a report by the Western Australian Information Commissioner on the administration of freedom of information in Western Australia (2010).[6] In that report the Commissioner recommended that 'agencies should be aware of the importance of complying with their obligations under the State Records Act 2000, particularly in relation to matters raised in the review including the management of electronic and hard copy documents."[7]

The view is clearly expressed in both reports that government agencies have an obligation to properly store electronic documents and retrieve and process them in response to FOI requests. What does this mean at Commonwealth level and how far does a Commonwealth agency's obligation extend in its response to FOI requests for these records?

What is a document?

The term 'document' is broadly defined in the *FOI Act*[8]. It is accepted at both Commonwealth and State levels that the term includes electronic documents, whether stored on a computer server or backup tape and includes emails.[9] Databases are also specifically provided for under the *FOI Act*.[10]

While the question of metadata has not been specifically determined at Commonwealth level, there is a view that metadata is also a 'document'.[11]

The 1995 report on the review of the *FOI Act* conducted by the Australian Law Reform Commission and the Administrative Review Council[12] confirmed that 'data' or electronic information should continue to be accessible under the *FOI Act*.

At the time of the 1995 report, the problem of management of, search for and retrieval of electronic documents was an emerging one for Commonwealth agencies. It has presented increasing difficulties for agencies and applicants since then as the use of electronic records and email has become standard.

Agencies often report to AGS that they have difficulty in processing requests for electronic documents in an effective and timely manner; applicants and other stakeholders complain about what they perceive to be poor record keeping by agencies (particularly in the case of email) and poor records management training within agencies, resulting in poor searching and delays in responding to requests.[13] In cases where FOI applicants are presented with the cost of retrieval of electronic documents (particularly emails and back-up tape searches), we have seen further complaints to agencies about the outrageous cost of FOI, particularly when searches of back-up tapes are required.

In the meantime, the definition of 'document' in the *FOI Act* has continued to be shaped by advances in technology and the form of FOI requests from applicants who want to know what electronic documents (particularly emails) are within an agency's possession.

The Solomon report did not recommend any changes or qualification to the definition of 'document' in the Queensland FOI legislation but provision was made in the resulting *Right*

to Information Act 2009 (Qld) concerning metadata and backup tapes.[14] No corresponding amendments or qualifications were made to the definition in the *FOI Act* nor were any amendments made to the Act to specify the form in which electronic documents should be disclosed.

Requirements for search and retrieval of documents

Prior to the reforms at Commonwealth level, FOI requests for documents which included electronic documents tended to be answered by agencies in a manner largely dependent upon the wording of the FOI request and the attitude of the FOI applicant. Strategies for handling such requests included:

- an assumption that the request did not extend to documents held in electronic form, particularly where the documents were also held in paper form (on files) or, alternatively, that it only extended to those documents held on the agency server[15];
- seeking clarification from the applicant about whether electronic files were sought and, if so, which ones;
- asking the applicant to exclude certain categories of electronic documents (for example duplicates of paper documents and documents on backup tapes); and
- in some cases, the issue of a notice under s 24 of the FOI Act to the effect that the request would constitute an unreasonable diversion of agency resources.

The Administrative Appeals Tribunal's assessment of the sufficiency of these strategies was broadly consistent with the Federal Court's assessment of the sufficiency of searches associated with discovery undertaken pursuant to the Federal Court Rules.[16] Where the agency could demonstrate that the searches of electronic documents were unreasonably costly and/or were unlikely to produce relevant documents, the Tribunal was inclined to decline to exercise its power to require they be produced in answer to the FOI request.[17]

In 2005, the Federal Court in *Chu v Telstra Corporation Limited*[18] set a new minimum standard required before an agency could be excused from retrieval of a document falling within the scope of an FOI request.[19] In that case, Finn J held:

> A person requesting access to a document that has been in that agency's or Minister's possession should only be able to be denied on the s 24A ground when the agency (or the Minister) is properly satisfied that it has done all that could reasonably be required of it to find the document in question. Taking the steps necessary to do this may in some circumstances require the agency or Minister to confront and overcome inadequacies in its investigative processes. Section 24A is not meant to be a refuge for the disordered or disorganised.

This decision does not appear to have materially changed the way agencies search for and disclose electronic documents in response to FOI requests.

The role of the Office of the Australian Information Commissioner

The amendments to the FOI Act which commenced on 1 November 2010, not only provided for external review of FOI decisions by the Information Commissioner but also for the investigation of complaints relating to the handling of FOI matters under Part VIIB of the Act. This extends to requests lodged prior to 1 November 2010.[20]

Such investigations are not limited to the actions or processes of one agency; the Information Commissioner can also investigate recurring or systemic problems relating to FOI processes. The OAIC Guidelines set out in detail the processes associated with investigations as well as the Information Commissioner's powers.[21]

The Commissioner's Guidelines also make it clear that he has the power under s 55V(2) of the *FOI Act* to order an agency to undertake further searches for documents. Relevantly, in the case of electronic documents, he also has the power to order an agency to disclose a document in an alternate format.[22] This could extend to an order to disclose metadata associated with a document on the basis that this information itself is a document within the meaning of s 4 of the Act or part of a document falling within the scope of a request.

A higher standard for FOI requests for electronic documents?

Currently, the Information Commissioner's Guidelines do not provide any detail of the standards expected in search and retrieval or the handling of electronic documents by an agency, nor do they discuss the application of the *FOI Act* to electronic documents.

Presumably, the Commissioner in investigating complaints and reviewing decisions will be mindful, before ordering further searches be undertaken, of any evidence the agency can provide on the relevance of searches of electronic documents and, if relevant, the possible unreasonable diversion of resources of the agency if such searches are required.[23] It is too early to say.

A very recent decision of the United States District Court (*National Day Laborer Organizing Network et al and United States Immigration and Customs Enforcement Agency*[24]) has the potential to tempt the Information Commissioner as well as the Administrative Appeals Tribunal and the Federal Court to fundamentally change the way in which agencies search for electronic documents in response to an FOI request as well as the form in which those documents are disclosed to an FOI applicant.

The FOI applicants in this case sought documents pursuant to the *Freedom of Information Act* (US) ('*FOIA*') from 4 government agencies. The documents related to an interagency immigration enforcement program administered by the United States Immigration and Customs Enforcement Agency and the Department of Justice.

The case centred around 2 key issues, namely:

- the agencies' efforts to identify documents that were the subject of the request (search and retrieval); and
- the format in which the documents were produced (in static PDF format as opposed to a responsive (native) format with metadata that could be searched).

The agencies claimed that the processing of all documents relevant to the request would require the production of millions of pages for the applicant.

The agencies also claimed that production of the documents in native format would amount to an unreasonable burden on the agencies' resources.

The Court held, per Judge Scheindlin (USDJ),:

- certain metadata is an integral or intrinsic part of an electronic record;
- where metadata is maintained by an agency as part of an electronic record it is presumptively producible under *FOIA* unless the agency demonstrates such metadata is not readily reproducible;
- whether or not an *FOIA* request specifically requests metadata, the production of documents in static form without any means of permitting the use of electronic search

tools is an inappropriate downgrading of the electronically stored record for the purposes of the *FOIA*;

- future production of electronically stored documents pursuant to the request must include load files that contain minimum fields of information to enable them to be searched;
- the *FOIA* was not intended to supplant discovery. Nonetheless the goals for both processes is the same - to facilitate the exchange of information; common sense requires that the parties incorporate the spirit if not the letter of the rules of discovery in the course of *FOIA* litigation (in this case the Federal Rules of Civil Procedure which require that documents be produced in a reasonably useable form); and
- the Court approved the production of a list or schedule by the agencies for the purpose of negotiating with the applicant with a view to prioritising documents and if possible to narrow the scope of the FOI request.

Conclusion

The importance of the decision in *National Day Laborer Organizing Network et al and United States Immigration and Customs Enforcement Agency* cannot be overstated. It is important to bear in mind that nearly all requests currently lodged with Commonwealth agencies will cover a selection of electronic documents and that this decision makes it clear that an FOI request should be interpreted as including metadata for all documents stored electronically regardless of whether the applicant specifies this in his/her request.

It is unlikely that Commonwealth agencies would presently be in a position to easily comply with the requirements set down by Judge Scheindlin in response to FOI requests. However, will this difficulty translate into successful submissions to the Information Commissioner by agencies that they should not be obliged to comply with that standard?

The next generation of change in Commonwealth FOI practice for the handling of electronic documents will not be occurring as a direct result of the FOI reforms. The Information Commissioner, as the new regulator, will play a crucial role in shaping agencies' attitudes and responses to any changes in the law and further technological developments affecting how agencies create and store records and communicate with themselves, each other and the public. It will be interesting to see whether the standards being applied under the US *FOIA* will have any real impact here in Australia.

Endnotes

1 Solomon, Webb and McGann, *The Right to Information; Reviewing Queensland's Freedom of Information Act*, June 2008.
2 Ibid. 6.
3 Ibid. 299 to 313.
4 Ibid. 22 to 29.
5 Solomon, Webb and McGann, *The Right to Information; Reviewing Queensland's Freedom of Information Act*, June 2008, recommendations 4 and 5.
6 Western Australian Information Commissioner, 31 August 2010 *Report on the Administration of Freedom of Information in Western Australia* at 22.
7 Ibid. recommendation 4.
8 Freedom of Information Act 1982 (Cth) s 4.
9 See for example *Price and the Nominal Defendant,* decision of the Queensland Information Commissioner, S97/97, 24 November 1999 and more recently *Thomson and Lockyer Valley Regional Council*, decision of the Queensland Information Commissioner 23 September 2010. See also Re *Ross William Leighton and Shire of Kalamunda* [2008] WAICmr 52 (20 November 2008)
10 See the Freedom of Information Act 1982 (Cth) s 17 which deals with the provision of computer based documents, specifically information from databases.

11 Right To Information Act 2009 (Qld) s 28(1), expressly provides that an access application is taken not to include metadata for the documents within its scope, unless the application expressly covers metadata.
12 Australian Law Reform Commission and Administrative Review Council Report No 77 *Open Government: A Review of the Federal Freedom of Information Act 1982*, 1995.
13 See for example Western Australian Information Commissioner, 31 August 2010 *Report on the Administration of Freedom of Information in Western Australia* at 33 and Solomon, Webb and McGann, *The Right to Information; Reviewing Queensland's Freedom of Information Act*, June 2008 at 24 and 25.
14 See *the Right To Information Act 2009* (Qld) ss 28, 29 and 52(2).
15 Compare *Right To Information Act 2009* (Qld) ss 29 and 52(2), which regulate searches of agency backup systems in response to requests made under that Act.
16 See for example *NT Power Generation Pty Ltd v Power and Water Authority* [1999] FCA per Mansfield J 1669 and more recently *Slick v Westpac Banking Corporation* [2006] FCA 1712.
17 See for example *Lawrance and CRS Australia*, unreported decision of the Administrative Appeals Tribunal 24 May 2005 and more recently *Edwards and Secretary, Department of Health and Ageing* [2011] AATA 147.
18 [2005] FCA 1730 at paragraph 35.
19 Freedom of Information Act 1982 (Cth) s 24A permits an agency to refuse a request where documents cannot be found do not exist or have not been received.
20 *Freedom of Information Act 1982* (Cth) s 70.
21 *Guidelines Issued by the Australian Information Commissioner under section 93A of the Freedom of Information Act 1982, Part 11 - Complaints and Investigation*s, December 2010.
22 *Freedom of Information Act 1982* (Cth) s 20.
23 *Freedom of Information Act 1982* (Cth) s 24.
24 United States District Court, 10 Civ.3488 (SAS), 7 February 2011.