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ABN 97 054 164 064
PO Box 83, Deakin West ACT 2600
Ph: (02) 6290 1505
Fax: (02) 6290 1580
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PROBING THE FRONTIERS OF ADMINISTRATIVE LAW

Peter Johnston, Simon Young, Richard Hooker and Tom Pontre*

In its decision in *Plaintiff M70/2011 v Minister for Immigration and Citizenship* ('*Plaintiff M70*')[1] the High Court ruled unlawful the Gillard Government's 'Malaysian solution' to dealing with refugee arrivals by boat. It rather spectacularly brought the Court and its important role in national affairs into the public arena and even caught many Court-watchers by surprise. Yet the majority decision was quite consistent with recent trends in the Court's approach to administrative law issues. It is perhaps best understood in the context of other important cases decided in the last couple of years that indicate the High Court under Chief Justice French has been engaged in a fresh exploration of the outer boundaries of administrative law. The other cases are *Saeed v Minister for Immigration and Citizenship* ('*Saeed*'),[2] *Kirk v Industrial Relations Commission* (*NSW*) ('*Kirk*'),[3] *Minister for Immigration and Citizenship v SZMDS* ('*SZMDS*'),[4] and *Plaintiff M61/2010E v Commonwealth* ('*M61*').[5] There are parallels and commonalities here that present important 'frontier' issues where the French Court appears to be seeking a more rational, consistent and coherent basis for public law jurisprudence in Australia.

This article seeks to discern trends emerging in these decisions in which the Court is arguably developing and clarifying its approach to judicial review in Australia. This is at a time when Australian administrative law is apparently diverging from other common law jurisdictions, such as the United Kingdom, New Zealand and Canada.[6] In these recent cases the Court may be seen as working towards a rationale that justifies its development of a distinctively Australian jurisprudence. We seek to identify these emerging themes with a view to establishing whether they may be of some predictive value for future public law litigation. We first consider the themes becoming evident in *Saeed*, *Kirk*, *SZMD*S and *M61* and then assess how *Plaintiff M70* fits into the frame.

***Saeed v Minister for Immigration*: stricter scrutiny of immigration laws**

Background

Saeed comes out of that prolific field renowned for breeding administrative law principles, namely, immigration cases. Over the 35 years since *Kioa v West*[7] rejuvenated the concept of natural justice, the High Court has inched its way forward in developing that concept, alternatively known as procedural fairness. As is now notorious both the High and the Federal Courts have engaged in a strange contrapuntal dance with successive Federal governments of both political persuasions where the parliament and the judiciary have each followed the law of Newtonian physics in so far as each action has produced an equal and opposite reaction. As Commonwealth governments have enacted packages of amendments to the *Migration Act 1958* (Cth) ('*Migration Act*') designed increasingly to restrict access by persons claiming refugee status in Australia, we have seen the High Court and the Federal Court respond with narrow interpretations of those restrictive procedures. These decisions,

* *Dr Peter Johnston (University of Western Australian and Monash University); Prof Simon Young (University of Western Australia); Richard Hooker (Francis Burt Chambers (Perth) and Visiting Lecturer, University of Western Australia); Tom Pontre (Associate to the Chief Justice of Western Australia and sessional University of Western Australia tutor).*

to a significant extent, have often preserved the right of asylum seekers to judicial review. Inevitably, the contrary forces at play between the courts and government have given rise to much political tension.[8]

Two important pillars supporting the various governments' legislative program limiting judicial review have been, first, the restriction of the *grounds* on which migration decisions could be reviewed and secondly, the institution of geographically defined, offshore *exclusion zones* in which the rights of review were further restricted or even in some instances totally excluded. Both these elements were present in *Saeed*.[9]

By way of a countervailing force, the courts have engaged in an ongoing analysis of the extent to which judicial review of migration decisions, including asylum cases, can be constitutionally curtailed in the light of s 75(v) of the Commonwealth Constitution. It confers on the High Court jurisdiction to grant injunctions and writs of prohibition and mandamus against officers of the Commonwealth, including Ministers and their delegates.

A notable example of this tug of war *is Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* ('*Miah*').[10] Upon the High Court holding in that case that the Minister was obliged to afford a visa applicant an opportunity to comment on undisclosed information held by the Department, the Act was amended to restrict the matters that the Minister was required to disclose to applicants. This reduction in the content of the rules of natural justice was accompanied by amendments to the Act purporting to assert that the procedural requirements then incorporated into the Act were intended to constitute an *exhaustive code*. The extent to which that legislative response to *Miah* effectively reduced recourse to general principles of procedural fairness remained in contention until in *Saeed* the High Court held that the relevant provisions in the Act *did not exclude* the general common law obligation to provide visa applicants located outside Australia with an adequate opportunity to be heard.

The significance of the High Court's decision in Saeed

At first sight *Saeed* might appear to be just one more of the many migration cases involving intricate and detailed issues of statutory construction that largely turn on their own special terms and facts. However, upon closer analysis, the case has significant implications regarding:

- the way the High Court is currently approaching *issues of construction* involving the Act;
- in particular, the operation of the *principle of legality* in promoting interpretations directed to maintain the liberties of persons subject to executive detention or exclusion from Australia;
- recourse to *extrinsic materials* and the *mischief rule* in resolving textual ambiguity;
- the *interrelationship of common law principles of natural justice and the statutory foundation* on which procedural fairness is either engaged or is to be implied under particular provisions of the Act;
- the *content* of the natural justice hearing rule in the specific circumstances;
- the extent to which *accessible information*, capable of affecting the decision with respect to persons claiming asylum, *needs to be pursued* in departmental investigations; and
- the link with *constitutional issues* associated with s 75(v) of the Commonwealth Constitution, particularly in terms of possibly imposing implied obligations on executive decision-making where the executive could otherwise frustrate access to judicial review.[11]

The material facts

Ms Saeed was a Pakistani citizen who applied for a skilled occupation employment visa from outside Australia. She gave details of her employment as a cook at a restaurant in Pakistan. Departmental enquiries suggested that women were not employed as cooks at the business. The Minister's delegate therefore concluded that she was dishonest and without making further enquiry refused her application. She then instituted proceedings for judicial review under s 39B of the *Judiciary Act 1903* (Cth) claiming the delegate's decision was unlawful because she had not been advised about the adverse view taken about her honesty and given a chance to provide countervailing information.

The principal legislative issue

The Minister claimed that, by virtue of s 51A the Act constituted an exhaustive procedural code for applications of her kind and that the delegate was therefore not obliged to acquaint her with the details of the departmental enquiry, nor to afford her an opportunity to respond.

Textually, the crucial expression in 51A was that the provisions of the relevant part of the Act should be taken to be 'an exhaustive statement of the requirements of the natural justice hearing rule *in relation to matters it deals with*.' The High Court accepted that the phrase '*in relation to matters it deals with*' was ambiguous. The issue then became: was Ms Saeed's application made from outside Australia, a matter that the relevant Part of the Act 'dealt with'? If her application fell within the relevant Part of the Act she was not entitled to have the adverse view disclosed to her unless the Minister's delegate had chosen to reveal it.

The irony here is that the High Court, faced with a lack of clarity regarding the precise ambit of s 51A, construed it as only modifying the natural justice hearing rule in relation to applications made *onshore* in Australia. Since Ms Saeed's application had been made from outside Australia the common law rules of procedural fairness continued to apply. As they had not been complied with in terms of alerting her to the adverse information, the delegate's decision had not been lawfully made.[12]

The Court's approach to construction

The majority judgment (French CJ, Gummow, Hayne, Crennan and Kiefel JJ) first held that if a statute authorises decisions to be made that are capable of affecting a person's liberties, the statute must be construed against a background of common law notions of fairness.[13] The corollary is that the rules of natural justice are only to be taken as excluded to the extent that the statute itself prescribes and only then if it does so with unequivocal and irresistible clarity. Modification should not be based on uncertain inferences.

The principle of legality

Such a methodology was seen to be consistent with *the principle of legality* encompassing the presumption that legislation should be interpreted as far as possible so as not to interfere with established rights and freedoms, an approach which is becoming a regular feature of High Court interpretation.[14] This principle asserts that a court should not impute to a legislature an intention to interfere with fundamental rights unless the intention is manifested by unmistakable and unambiguous language. This was not the case with the expression 'in relation to the matters which it deals with' because it was not clear what was the extent of the relevant matters.

The respondent argued that the ambiguity should be resolved in favour of all applications, both offshore and onshore, because the relevant amendments were made in general response to the High Court's decision in *Miah.* This would ensure that there was an

exhaustive procedural code for all kinds of applications. This turned out to be a circular, 'catch 22' proposition. The principal judgment, in rejecting it, noted that *Miah* specifically involved an onshore visa application and the legislative response should be taken as confined to similar circumstances.[15] The respondent also contended that if this were the case, there would be two standards of natural justice applicable according to where the application originated. Justice Heydon described this as an appeal to anomaly.[16] Why should one standard of procedural fairness operate offshore and a different and more limited form be applicable onshore? However, the Court noted that in other respects the Act differentiated between onshore and offshore applications. Relevantly, an onshore applicant was entitled to a statement of reasons whereas no such concession was made to offshore applicants.[17]

Use of extrinsic materials

The Minister sought to persuade the Court that when Parliament amended Part 2 of the Act and included the 'exhaustive code' declaration in s 51A, it was attempting to reverse the High Court's decision in *Miah* by excluding certain elements of the fair hearing rule in respect of all applications under the Act. The Minister relied on extrinsic materials including the Minister's *Second Reading Speech* and the *Explanatory Memorandum* accompanying the Bill. The majority responded that first, courts should try to resolve statutory ambiguity primarily by reference to the provisions of the Act rather than extrinsic materials (that is, priority should be accorded to textual interpretation so far as reasonably possible).[18] Secondly, regarding the actual materials presented to the Court, they were taken to be only relevant to the amendments that were designed to reverse *Miah* itself. Since *Miah* was only concerned with onshore applications s 51A should be read as confined to the specific 'mischief' that was thought to flow from that case and no wider.[19] It is evident that since such extrinsic materials are rarely directed to explaining specific provisions in detail they will usually be 'unhelpful' in resolving more general issues of ambiguity.[20]

Application of general common law fair hearing rule

Having concluded that the common law rules of natural justice were not supplanted by the restrictive procedural provisions of Part 2 of the Act, the Court then had to determine just what the rules of natural justice were with respect to the application by the plaintiff. This is because the rules of natural justice are not absolute; they are flexible and vary according to the kind of interest likely to be affected in the context in which the rules apply. Here again the statutory text, read in the light of the circumstances to which the legislation is directed, is likely to be the key determinant of the extent to which common law procedural fairness is modified. According to French CJ: 'Courts approaching the question whether and how they [the common law rules] apply to a particular case will have regard to the practical exigencies of the kind of decision-making involved as well as the particular circumstances of the case.'[21]

Given the seriously adverse result of a decision refusing her a visa to work in Australia, the Court held she was entitled to have the departmental information revealed to her and an opportunity to present relevant information in response. Since that had not been the case, she was entitled to a writ of certiorari quashing the delegate's decision and an order of mandamus requiring the respondent to consider and determine her application according to law**.**[22]

Whether the Minister's delegate had an obligation to disclose reasons for refusal

Saeed also concerned the extent to which inferences adverse to an administrative decision-maker can be drawn when the discretion to grant or refuse a permit, such as a visa, is conditional on an officer's 'satisfaction' as to certain jurisdictional facts. Longstanding High Court authority holds that although a power may depend on an officer's opinion the decision

is not necessarily shielded from judicial review.[23] The majority judgment noted that this could have presented difficulties regarding a court's ability to review the delegate's decision. The Court did not find it necessary, however, to determine this aspect of the case as there had been a fundamental failure to provide procedural fairness.

In *Saeed* the reviewing courts, when determining whether the decision of the Minister's delegate was tainted by jurisdictional error, had the advantage of written reasons provided by the delegate. The tension between maintaining the reviewability of executive decisions to avoid unlawful action and allowing the decision-maker a margin of discretion is much more difficult when reasons are not provided. Possible miscarriage of discretion in that event depends on judicial inference.[24] Where the decision is ostensibly based on facts and matters about which the administrator *could have been* reasonably satisfied, a court will be reluctant to identify jurisdictional error. The need to reconcile holding the executive legally accountable in the absence of reasons and permitting the executive some leeway in decision-making so as to avoid entering on merits review is an issue that is likely to receive further High Court consideration in the next year or two.

Constitutional implications

Lurking in the background of that issue were constitutional objections. These were broadly founded on the proposition that exclusion of procedural fairness in a way that significantly shields a Commonwealth administrative decision from judicial review is incompatible with Chapter III of the Commonwealth Constitution, and specifically, s 75(v).[25] The role of s 75(v) in ensuring that Commonwealth officers act within the boundaries of legality is one of the primary aspects of the rule of law said to underlie the Constitution.[26]

In the event it was again not necessary to determine these constitutional objections. The question remains: will the Court recognize an implied fairness limitation on the Commonwealth's legislative power, derived from s 75(v), preventing Parliament dispensing with any requirement to give reasons or explain and justify the decision? The implications could be far-reaching. For example, the current orthodoxy is that unless compelled to do so by statute, Commonwealth decision-makers do not have to give a statement of their reasons for decision. Certainly, there is no common law right to reasons although in special circumstances such an obligation might be statutorily implied.[27] The question must inevitably arise whether Commonwealth decision-makers can shield themselves from effective review by refusing to provide an adequate explanation of the basis of their decisions. The High Court, however, arguably stepped closer to recognizing a constitutional requirement for a Commonwealth decision-maker to *justify* significant decisions in *Wainohu v New South Wales*.[28]

Conclusion on Saeed

Saeed represents a notably stricter approach, consistent with the principle of legality, to construing Commonwealth migration laws. Legislative attempts to exclude considerations of natural justice will be strictly scrutinised and only upheld if expressed in terms of irresistible clarity. Even then, there is the possibility that the High Court might invoke constitutional implications to strike down egregious exclusions of fair process that alter the fundamental nature of the judicial process. *Saeed* also emphasised the primacy of the legislative text where it was possible for courts to discern meaning over executive expressions of legislative intent in extrinsic materials.

Kirk v Industrial Relations Commission (NSW): the constitutional advance

Background

The most highly publicised of the recent High Court decisions under consideration emerged from a controversy concerning the administration of New South Wales occupational health and safety laws. Even in that narrow context the decision in *Kirk*[29] has had a significant impact – unpicking well-established prosecutorial practice in New South Wales,[30] prompting doubt over the status of completed and pending proceedings there and elsewhere,[31] and feeding concerns over the capabilities of the specialist adjudicative bodies operating in such fields.[32] This all came in the midst of a heated national debate over the proposed creation of uniform occupational health and safety laws.

Yet there is a deeper significance in the *Kirk* decision, in its important contribution to the advance of Australian constitutional and administrative law and to the strengthening collaboration between the two. Through a deft re-fit of *Kable*[33] style thinking, the High Court has replicated for state Supreme Courts the constitutional protection afforded to the Court's own s 75(v) judicial review jurisdiction (which was itself prominently underlined in the 2003 migration decision of *Plaintiff S157*).[34] *Kirk* could have been decided on the basis of a traditional textual confinement of the State privative clause at issue, however the Court instead crafted a general constitutional protection for Supreme Court supervision of jurisdictional error. This carries, in its wake, some important implications for the operation of privative clauses and the very notion of jurisdictional error in Australia.

Subsequent lower court decisions have explored various aspects of the *Kirk* decision – including its directions on appropriate prosecutorial practice, evidentiary matters, and of course the inability of State legislatures to immunize jurisdictional error from Supreme Court supervision.[35] The purpose of this examination is to draw out the primary implications of the case for ongoing Australian public law development.

The material facts

The 'Kirk Company' (Kirk Group Holdings) owned a farm in NSW. Kirk himself was a non-active director who left the day to day operations to an experienced employee farm manager named Palmer. In 2001 an ATV vehicle purchased by the Kirk Company overturned and caused Palmer's death, while he was delivering steel to fencing contractors on the property. The Kirk Company and Kirk himself (via directors' liability provisions) were charged with offences under the *Occupational Health and Safety Act 1983* (NSW) ('*OHS Act*').

Section 15(1) of that *OHS Act* relevantly imposed an obligation to 'ensure the health, safety and welfare of…employees' (s 15(2) gave examples of possible failures); and s 16(1) imposed an obligation to 'ensure' that non-employees were not exposed to risks to health or safety while on site (which was relevant to the contractors). Notable here is the high standard of liability imposed. Equivalent legislation in other states generally only requires the taking of practicable health and safety measures. Section 53 of the New South Wales Act provided defences, essentially where compliance with the Act or regulations was 'not reasonably practicable' (s 53(a)), or where there were causes outside the defendant's control and for which it was impracticable to make provision (s 53(b)).

The charges against Kirk and the Kirk Company were dealt with by the New South Wales Industrial Court (as subsequently re-named) and money penalties were imposed. Those proceedings were protected by the broadly worded privative clause found in s 179(1) of the *Industrial Relations Act 1996* (NSW) – a long-standing and prominent feature of the New South Wales industrial law landscape.[36] However, ultimately the High Court identified serious error, held the privative clause to be ineffective in those circumstances, and set

aside the New South Wales Court of Appeal's refusal of certiorari against the Industrial Court and quashed the original prosecution orders.

Errors in the proceedings

According to the High Court joint majority,[37] the proceedings were flawed by reason that the particular acts or omissions said to give rise to the contravention had to be identified in the statement of any offence charged under ss 15 or 16.[38] This flowed, it was said, from the terms of both the offence and defence provisions (and indeed common law principle). Their Honours pointed particularly in their reasoning to the awkward implications of the more general approach for the operation of the defence provisions, and indeed the fact that such an approach tended to place the Industrial Court in the position of acting as an administrative commission of inquiry.[39]

The joint majority also identified another error in the proceedings below. By agreement between the parties the prosecution had called Kirk as a witness, however *Evidence Act* provisions (expressly applied here via the *Industrial Relations Act*) stated that a defendant in such circumstances was not competent to give evidence for the prosecution. This was considered to be a restriction that could not be waived, and the breach was a substantial departure from the rules of evidence.[40]

Jurisdictional errors?

The High Court majority concluded that both the identified errors were 'jurisdictional errors'.[41] Ultimately for the Court this characterisation was quite straight forward, however the discussion en route was illuminating. Their Honours traversed the tangled history of relevant administrative law principle, pausing at various points to observe disjunctions and deconstructive commentary. They noted the odd remedial pairing of jurisdictional error and error on the face of the record, and indeed the historical interplay between the two. They also traced the development of the notion of jurisdictional error, emphasising its context-specific and very functional nature. This latter discussion, with its implicit admission of uncertainty, has traditionally been the staging point for troubled commentators rather than the High Court itself.

The High Court majority discussed the important decision of *Craig*,[42] with its generic formulas for the identification of jurisdictional error, in some detail.[43] However they emphasised that there is no 'bright line test', and declined to attempt to 'mark the metes and bounds' of jurisdictional error here – noting that *Craig* should not be read as providing a rigid taxonomy and that its examples were indeed just examples.

Yet ultimately the Court did not stray far from the formulas of *Craig* – explaining the nature of the 'jurisdictional errors' present here in the terms of those formulas.[44] The Industrial Court's error relating to requisite detail in the statement of charges, considered to have arisen essentially from a misconstruction of s 15 of the *OHS Act*, was said to involve both a misapprehension of its functions and powers and indeed the making of orders it had no power to make. The error as to evidentiary process (namely permitting the prosecution to call Kirk as a witness) was also said to involve misapprehension and breach of a limit on power. It was additionally noted that both of these errors appeared 'on the face of the record' as that expression must be understood in light of ss 69(3)–(4) of the *Supreme Court Act 1970* (NSW).[45] This extra conclusion ultimately had little practical bearing on the case. However, the High Court majority did take the opportunity to flag an impending reassessment of the common law's confined understanding of the scope of the 'record' (as perpetuated in *Craig*).

A new constitutional protection

The comments of the High Court on the nature of jurisdictional error are interesting, and perhaps will reinvigorate debate in this awkward and elusive sub-branch of administrative law. However, the most significant contribution of the *Kirk* decision came next; in the High Court's determination that state Supreme Courts' supervisory jurisdiction over jurisdictional error was constitutionally protected.

The Court confirmed[46] that Chapter III of the Constitution requires that there be a body fitting the description 'Supreme Court of a State'. It is beyond the power of a State, it was said, to alter the constitution or character of its Supreme Court so that it ceases to meet the constitutional description.[47] Most importantly, and more controversially,[48] it was said that a defining characteristic of state Supreme Courts is the power to confine inferior courts and tribunals within the limits of their authority via the grant of relief on grounds of jurisdictional error (which is of course ultimately subject to High Court supervision via s 73 appeals).[49] Particular reference was made in this context to 'accepted doctrine' at the time of federation, the importance of this Supreme Court review function as the mechanism for determination and enforcement of the limits on state executive and judicial power, and the fact that the dismantling of this function would create 'islands of power' immune from supervision and restraint.

Accordingly, it was declared that a privative clause in state legislation that purports to strip the Supreme Court of this function of correcting jurisdictional error is beyond state legislative power.[50] This, it was noted, reaffirms the continuing utility of the distinction between jurisdictional and non-jurisdictional error in Australia – the distinction marks the relevant limit on state legislative power as legislation which denies relief for non-jurisdictional error (including that appearing on the face of the record) is <u>not</u> beyond power.[51]

Armed with this new constitutional premise, as well as traditional interpretive tools for the confinement of privative clause protection to non-jurisdictional error, the High Court majority ultimately concluded that the privative clause (s 179 of the *Industrial Relations Act 1996* (NSW)) should be read down accordingly.[52] Section 179, it was said, does not (and could not validly) exclude the jurisdiction of the Supreme Court to grant relief via certiorari, prohibition or mandamus to enforce the limits of the Industrial Court's statutory authority. For the purposes of this case then, it did not on its proper construction exclude certiorari for jurisdictional error.

Implications and conundrums

Many interesting issues emerge from the *Kirk* decision,[53] beyond its immediate ramifications for the administration of occupational health and safety laws in New South Wales. In terms of constitutional law development, *Kirk* is of course an interesting new twist on the much vaunted but for some time under-performing *Kable* principle. Now, with this very practical turn, the constitutional personality of state Supreme Courts is likely to be much explored and debated in the coming years.[54] However the key notion of 'defining characteristics' does not make for easy predictions on what might come next.

In administrative law terms, the implications of *Kirk* are perhaps more slow-burning. First, there are some important questions yet to be fully answered as regards the Federal Court. Given the entrenchment of judicial review in the High Court[55] and Supreme Courts, what exactly is the position of the Federal Court – arguably the major player in the field of judicial review? Can we find in its far more limited constitutional connections some similar protection of its judicial review function? Secondly, what now is the appropriate methodology for dealing with a privative clause at state level – do the old *Hickman* provisos regarding 'manifest errors' continue to have a role? It seems there can be little room for *Hickman* at

state level[56] given that the conventional understanding of the *Hickman* formula is that it simply marks out a serious 'core' of jurisdictional error to which a strong presumption of reviewability has attached.[57] The role of *Hickman* largely dissolves by reason that the full range of jurisdictional error now necessarily remains reviewable under constitutional principles.

Faced with the apparent immovability of the *Kirk* guarantee, some commentators have been keen to remind us that in certain contexts the need for specialist expertise and/or finality does justify the removal of some decisions from the reach of judicial review.[58] There has been some discussion of exactly how state parliaments might still successfully achieve this.[59] The possible drafting options – such as non-invalidity clauses, procedural obstacles to review, artificially broad discretions, or the exclusion of grounds – appear now to be slim ones. The greatest promise perhaps lies in some new refinement of the ungainly concept of 'jurisdictional error' itself, but the tenor of the High Court's discussion in *Kirk* indicates that this is not likely in the near future.

Where exactly does *Kirk* take us on the notion of 'jurisdictional error', a concept which has of course haunted administrative lawyers in Australia for many years? The High Court's candour certainly suggests that it is ready for renewed debate. And there is a mounting urgency to this debate given that the creeping constitutionalisation of courts' supervisory jurisdiction over jurisdictional error places greater weight upon this long-troubled concept.

In the years between *Plaintiff S157* and *Kirk* the High Court had been largely spared difficult argument on the intricacies and boundaries of jurisdictional error, as the cases coming to it accumulated around established precedent on basic procedural error, 'jurisdictional facts' and natural justice.[60] Yet the *Kirk* facts stood on less steady ground, as revealed by the discrepancy between the conclusions of the High Court and the New South Wales Court of Appeal.[61]. This more difficult context seems to have revived some of the conceptual difficulty last seen clearly in *Plaintiff S157.* It will be recalled that owing to some conflation of the tasks at hand in *S157*,[62] there was arguably some circularity in the joint majority reasoning: was an error in such a case not protected by a privative clause because it was 'jurisdictional', or was it 'jurisdictional' because it was not protected by the privative clause (as 'reconciled')? More broadly, is the notion of jurisdictional error to some extent an externally-defined one or does it necessarily emerge internally from the specific legislative intention on what is essential to a particular decision? If both, then why?

The joint majority reasoning on jurisdictional error in *Kirk*, albeit somewhat peripheral to the larger constitutional target, ended up as a variation on the same theme. As noted above, the majority at various points acknowledged the uncertain nature of jurisdictional error and emphasised the non-rigid, purely illustrative role of the *Craig* classifications. Yet ultimately their Honours readily employed *Craig* categories without closer analysis. In the end therefore, we are left with an awkward combination of predictive formulas and admitted uncertainty which is unsettling in much the same way as the conceptual circularity in *Plaintiff S157*. This is an interesting methodological conundrum that perhaps lies somewhere quite close to the heart of the difficulty in this field.

Minister for Immigration and Citizenship v SZMDS: welcome clarification or further obfuscation?

Background

The potential to challenge administrative decision-making on the basis of 'illogicality' or 'irrationality' has, particularly in contemporary practice within federal jurisdiction, held something of a fascination for public law litigators. Lawyers acting for applicants in judicial review challenges frequently search for novel or imaginative grounds, whilst remaining ever

mindful of the critical distinctions between judicial review and merits review, and in turn jurisdictional error and non-jurisdictional error. A challenge to the 'logic' of a decision may, on its face, carry much promise of obtaining a successful outcome. Conversely, lawyers defending the legality of administrative decision-making may be wary about a ground of review which challenges the decision's 'logic' or 'rationality'. In particular, does it run the risk of skating dangerously close to review of non-jurisdictional error, or even review on the merits?

The continuing preponderance of applications in federal jurisdiction for judicial review of decisions of the Refugee Review Tribunal ('RRT') to deny protection visas to asylum seekers brings this tension into sharp focus[63]. Legal representatives of asylum seekers are obliged to analyse RRT decisions rigorously and carefully, ever alert for the detection of a basis to argue (and, importantly, *reasonably* to argue)[64] that the statutory criteria in ss 36 and 65 of the *Migration Act* have not been applied according to law. Frequently, RRT decisions will be expressed in a manner that is at best less than optimal, at worst in a manner downright confusing and difficult to interpret sensibly. But when does poor expression of written reasons, possibly borne out of an erroneous approach to fact-finding in determining whether there has been a well-founded fear of persecution on Convention grounds, amount to jurisdictional error sufficient to justify relief on judicial review?

For several years, some hope had been generated (for lawyers representing applicants on judicial review), or apprehensions created (for lawyers representing government decision-makers) that an absence of logic or rationality in arriving at findings of fact in administrative decision-making would ground judicial review. For example, Gummow J, in his important and influential judgment in *Minister for Immigration and Multicultural Affairs v Eshetu*[65] implied that, in the context of the arrival at a level of 'satisfaction' as a condition precedent to the grant or refusal of a protection visa, decision-making may involve 'findings or inferences of fact which were not supported by some probative material or logical grounds' and thus be open to judicial review. Moreover, in *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002*[66] Gleeson CJ referred, without apparent disapproval, to a ground of judicial review that the RRT's decision under challenge in that case was 'illogical, irrational, or was not based on findings or inferences of facts supported by logical grounds'.

Apparently more conclusive was a passage from the judgment of Gummow and Hayne JJ in *Minister for Immigration and Multicultural and Indigenous Affairs v SGLB*[67] where their Honours identified the condition precedent of 'satisfaction' as being a 'jurisdictional fact' upon which the exercise of administrative authority to grant a protection visa is premised, as necessitating a determination that did not suffer from any defect of being 'irrational, illogical (or) not based on findings or inferences of fact supported by logical grounds'.

Subsequent to those important statements, a substantial body of authority had developed in the Federal Court, in either its exercise of original jurisdiction to review the legality of decision-making concerning the grant or refusal of visas or its appellate jurisdiction determining appeals from the Federal Magistrates Court, which illustrated a range of different views as to whether illogicality or irrationality was capable of amounting to jurisdictional error.[68] The issue had truly become one of genuine complexity at the frontiers of contemporary Australian administrative law. *SZMDS* was a case which proceeded on appeal to the High Court from a judgment of Moore J of the Federal Court, who had allowed an appeal from the decision of the Federal Magistrates Court. Its circumstances appeared to provide genuine hope to practitioners that a real measure of certainty for the operation of this important area of administrative law in Australia would be achieved. By granting special leave to the Minister for Immigration and Citizenship, the High Court implicitly accepted that the case involved questions of law of general importance, particularly in light of the variance of views that had emerged in recent years in the Federal Court.[69]

The Respondent to the appeal in the High Court (SZMDS) was a citizen of Pakistan who had applied for a protection visa on the ground that he feared persecution because of his homosexuality if forced to return to Pakistan. Prior to coming to Australia, he had resided in the United Arab Emirates (UAE) for several years and claimed to have engaged in homosexual activity. Whilst residing in that country, he had returned to Pakistan on a number of occasions, including, most recently, three weeks before arriving in Australia. He had also visited the United Kingdom. The Minister asserted on judicial review, and in due course on appeal, that those circumstances reflected adversely on SZMDS's credibility. How could he assert that his claimed fear of persecution was 'well-founded' if he had returned to the very country where the persecution was said to be feared, and if he declined to avail himself of an opportunity to obtain protection in the United Kingdom? On SZMDS's account, he returned to Pakistan on the final occasion so as to finalise his relations with his wife and children, whereas he elected not to seek asylum in the United Kingdom because he had a good relationship and good life in the UAE.

A delegate of the Minister refused to grant SZMDS a protection visa and the RRT, on merits review, affirmed the decision of the delegate. Whilst the RRT accepted that male homosexuals in Pakistan comprised a particular social group for the purposes of the *1951 Convention on the Status of Refugees* (*Refugees' Convention*),[70] it nonetheless found that the applicant was not a member of that group and that, accordingly, his asserted fear of persecution was not 'well-founded'.[71] Specifically, the RRT found that SZMDS's return to Pakistan, and his failure to seek asylum in the United Kingdom, sat inconsistently with his asserted fear of persecution. It reasoned that a person's asserted fear that serious harm would result from activities becoming known in his or her country of origin, if asserted *genuinely*, would cause him or her to not return to that country and, further, to apply for protection at the first opportunity. Underpinning that reasoning was an assumption that SZMDS's homosexuality would become known, or carry the risk of becoming known, even on a short visit to Pakistan.

The application for judicial review by SZMDS in the Federal Magistrates Court was dismissed. However, Moore J, exercising the appellate jurisdiction of the Federal Court under s 25(1AA)(a) of the *Federal Court of Australia Act* 1976 (Cth), allowed the appeal on a ground that had not been raised before the Federal Magistrates Court, namely, that the RRT's conclusion that *SZMDS* was not a homosexual was based on an illogical or irrational process of reasoning, causing the RRT to fall into jurisdictional error.[72] His Honour expressed that finding in trenchant terms, noting that:

> I ***simply fail to see*** how the fact that the applicant briefly returned to Pakistan undermined his claim that he had become an active homosexual in the UAE in the preceding two years. There was *simply no basis*, in my opinion, for the Tribunal to have concluded that the fact that the applicant returned briefly to Pakistan was inconsistent with him having a fear of harm based, on his case, on his family and others in Pakistan coming to know he was a homosexual.[73]

and further:

> Similarly, the applicant's explanation as to why he did not claim asylum in the UK was perfectly plausible. Putting it slightly differently, the Tribunal's conclusion about the consequences of not claiming asylum in the UK is, in my opinion, ***completely unsustainable as a piece of logical analysis***.[74]

Did Moore J's criticism of the RRT's reasoning process properly establish a legitimate ground of judicial review? Or was his Honour *merely* expressing 'emphatic disagreement' with the correctness of the *conclusion* of the Tribunal on merits review in the manner alluded to in *Eshetu*[75] and *S20/2002*[76]. Three judges of the High Court (Heydon, Crennan and Bell JJ) concluded essentially the latter and thus that the Tribunal's reasons were not irrational or illogical and that the appeal ought to be allowed. Two judges of the High Court (Gummow

ACJ and Kiefel J) would have sustained the reasoning of Moore J as supporting the quashing of the decision and ordering a redetermination by the RRT. For their Honours, to decide by reasoning from the circumstances of the visits to the United Kingdom and Pakistan, that SZMDS was to be disbelieved in his account of his life that he had led while residing in the UAE was to make a critical finding by inference not supported on logical grounds.

Yet, by a differently constituted majority (Gummow ACJ, Kiefel, Crennan and Bell JJ; with Heydon J finding it unnecessary to decide the point), the High Court concluded that irrationality in the finding of the jurisdictional fact which is a precondition to the exercise of power enacted by ss 36 and 65 of the *Migration Act* is capable of amounting to a jurisdictional error. This proposition perhaps best represents the case's *ratio decidendi*. Beyond that, however, it is no easy task to derive further doctrinal certainty from the decision.

Salient features of the joint judgments

Gummow ACJ and Kiefel J, and at somewhat greater length Crennan and Bell JJ, examined a number of aspects of the development in Australian administrative law of the principles of jurisdictional error in the finding of jurisdictional facts. Heydon J, by contrast, saw it as unnecessary to determine any of the questions of law in issue, in light of his conclusion (forming part of the majority as to the outcome of the appeal) that the RRT's decision was not illogical. His Honour accordingly did not canvass any of the authorities or principles on illogicality, irrationality, or jurisdictional fact more generally.

The joint judgment of Gummow ACJ and Kiefel J emphasised a number of critical aspects of constitutional principle which mark the metes and bounds of recently enunciated doctrine of the High Court concerning judicial review. With reference to extra judicial writings of the late Justice Selway of the Federal Court[77] and the joint judgment in *Plaintiff S/157 of 2002 v Commonwealth*[78] their Honours reaffirmed the critical distinction, in the Australian constitutional setting, between jurisdictional and non-jurisdictional error of law. That led to their Honours referring to the now time-honoured statement of general principle by Brennan J in *Attorney General (NSW) v Quin*[79] regarding the duty and jurisdiction of a court on judicial review to go no further than declaring and enforcing the law in a way which determines the limits and governs the exercise of the repository's power. That duty may, in certain cases of judicial review, involve identifying the nature of a precondition to the exercise of statutory power.

Against that background their Honours observed that the power to grant a protection visa under ss 36 and 65 of the *Migration Act* fixes upon a criterion of 'satisfaction' as to the existence of a certain state of affairs. It was noted that Lord Wilberforce in *Secretary of State for Education and Science v Tameside Metropolitan Borough Council*[80] had remarked upon the necessity for a court, in undertaking judicial review as to the formation of a judgment of 'satisfaction', to enquire whether such a judgment has been made upon a proper self-direction as to those facts, among other essential features. This in turn led their Honours to refer approvingly to the line of authority traced back to the judgment of Latham CJ in *R v Connell; ex parte Hetton Bellbird Collieries Ltd*.[81] The principle guiding judicial review of judicial facts of that character is that the legislation conferring power upon such a pre-condition is to be taken to import a requirement that the opinion is one that could be formed by a reasonable person, thus:

> If the opinion which was in fact formed was reached by taking into account irrelevant considerations or by otherwise misconstruing the terms of the relevant legislation, then it must be held that the opinion required has not been formed. In that event the basis for the exercise of power is absent, just as if it were shown that the opinion was arbitrary, capricious, irrational or not bona fide.[82]

Another important earlier judgment is that of Dixon J in *Avon Downs Pty Ltd v Federal Commissioner of Taxation ('Avon Downs')*,[83] in which his Honour, likewise speaking of a decision-maker empowered to act upon 'satisfaction' of a state of affairs, commented to similar effect to Latham CJ in *Hetton Bellbird*. Dixon J noted *inter alia* that:

> If the result appears to be unreasonable on the supposition that (the decision-maker) addressed himself to the right question, correctly applied the rules of law and took into account all the relevant considerations and no irrelevant considerations, that it may be a proper inference that it is a false supposition.[84]

In expanding upon the significance, for this type of administrative decision-making, of *Wednesbury* unreasonableness, their Honours drew on the judgment of Gummow J in *Eshetu*[85] and noted that the case was concerned with unreasonableness in the sense of abuse of power in the exercise of discretion, on the assumption that the occasion for the exercise of that discretion had arisen upon the existence of any necessary jurisdictional facts.

Gummow ACJ and Kiefel J regarded that background as important to a consideration of the import of observations of Gummow and Hayne JJ in *SGLB* where the 'critical question' for the validity of the necessary 'satisfaction' was whether the determination was 'irrational, illogical and not based on findings or inferences of fact supported by logical grounds'.[86] That 'critical question', their Honours held in *SZMDS*, should not receive an affirmative answer that is lightly given.[87] To do so would risk falling foul of the warning expressed in *Minister for Immigration v Wu Shan Ling*[88] that the reasons for decision of a tribunal such as the RRT ought not be scrutinised over-zealously or 'with an eye keenly attuned to the perception of error'. Thus, whilst their Honours appeared to be enunciating a strict standard for the demonstration of jurisdictional error on the basis of irrational or illogical reasoning in arriving at a state of 'satisfaction', such a category of jurisdictional error was nonetheless explicitly recognised. To hold otherwise, in their Honours' view, 'would give insufficient weight to the importance of s 75(v) of the Commonwealth Constitution in ensuring that the legislative expression of jurisdictional facts in terms of satisfaction or opinion of a decision-maker does not rise higher than its source'[89].

The joint judgment of Crennan and Bell JJ, similarly, drew on the earlier key statements of principle from *Hetton Bellbird*, *Avon Downs*, and *SGLB*. Their Honours specifically addressed four reasons that had been advanced by the Commonwealth Solicitor General on behalf of the appellant Minister. The appellant had contended for a principle that jurisdictional error would not be established by 'mere' illogicality or irrationality in fact finding or, alternatively, if 'mere' illogicality 'were enough', that such illogicality or irrationality must be so extreme as to show that the opinion formed could not possibly be formed by a tribunal acting in good faith. Crennan and Bell JJ concluded, in countering those bases relied upon by the appellant, that if it be shown that illogicality or irrationality occurs at the point of 'satisfaction' for the purposes of s 65 of the Act, then jurisdictional error is established. To hold otherwise would fail to give proper regard to the distinction between errors of law and errors of fact, or between jurisdictional error and error in the exercise of jurisdiction. As *Kirk* had itself reinforced among other critical conclusions, entertaining a matter in the absence of jurisdictional fact will constitute jurisdictional error.

For Crennan and Bell JJ, three considerations complicated the acceptance of rationality as a 'free standing common law requirement in decision-making' with the consequence that what the appellant had described as 'mere' illogicality or irrationality may attract judicial review. First, as observed by Gleeson CJ in *S20/2002* and by Gleeson CJ and McHugh J in *Eshetu*, describing reasoning as 'illogical or unreasonable, or irrational' may merely be an emphatic way of expressing disagreement with it. Secondly, the overlap between irrationality,

illogicality and unreasonableness is supported not only by the linguistic sense of the terms themselves, but also by high level authority. In the United Kingdom, it has been observed that 'although the terms irrationality and unreasonableness are these days often used interchangeably, irrationality is only one facet of unreasonableness'.[90] Thirdly, more recent developments in England have included reference to the principle of proportionality in administrative decision-making as part of a wider component of administrative law doctrine in a number of European countries. The principles of reasonableness (as derived from *Wednesbury*) and proportionality are now said by the authors of a frequently cited British textbook on administrative law to 'cover a great deal of common ground'.[91]

Having identified those complicating factors in marking out the parameters of illogicality or irrationality as a basis for judicial review, Crennan and Bell JJ appeared content to confine their decision to jurisdictional error as it occurs in the statutory setting of the application of ss 36 and 65 of the *Migration Act*. Their Honours emphasised that not every lapse in logic will give rise to jurisdictional error and that a court should be slow, although not unwilling, to interfere in an appropriate case.[92] Because, here, there was an issue of jurisdictional fact on which different minds might reach different conclusions, it followed that a logical or rational decision-maker could have come to the same conclusion as the RRT. There was thus no sense in which the decision that the first respondent did not fear persecution, or the findings of fact upon which that ultimate conclusion by the RRT was based could be said to fall into any of the distinct but related categories of being 'irrational' or 'illogical', nor 'clearly unjust', 'arbitrary', 'capricious', 'not bona fide', or '*Wednesbury* unreasonable'.

Subsequent consideration of SZMDS

SZMDS has already been cited in numerous administrative law cases before Australian superior courts. In the majority of cases, a submission that jurisdictional error has been established by 'illogical' or 'irrational' reasoning, or some variant on the theme within the scope of the analysis in either of the joint judgments, has been rejected, demonstrating the strictness of the standard that *SZMDS*[93] enunciates as applying to judicial review on this ground.

However, an example to the contrary lies in the judgment of Kenny J as a member of a Full Court of the Federal Court in *Minister for Immigration and Citizenship v SZLSP ('SZLSP')*.[94] Her Honour was part of a 2–1 majority that dismissed an appeal from the Federal Magistrates Court on an application for judicial review of a decision of the RRT. Her Honour, applying *SZMDS,* held that the material relied on by the RRT as rejecting the credibility of the asylum seeker did not disclose any material by reference to which a rational decision-maker could have evaluated the asylum seeker's answers and, moreover, no other logical basis justified the RRT's finding. Kenny J thus regarded it as 'appropriate to infer' that the RRT's decision-making was arbitrary and irrational, such as to constitute jurisdictional error.[95] The other member of the majority, Rares J, dismissed the appeal on a different basis – namely that the RRT had failed properly to comply with s 430(1) of the *Migration Act*. Drawing on observations of the High Court in *Minister for Immigration and Multicultural Affairs v Yusuf ('Yusuf')*,[96] his Honour found that the limited scope of the written reasons of the RRT caused it to constructively fail to exercise its function of undertaking a review pursuant to s 414 of the *Migration Act*.[97]

The dissenting member of the Full Court in *SZLSP*, Buchanan J, considered that the RRT had committed no jurisdictional error and would have upheld the Minister's appeal accordingly. His Honour was unpersuaded that the reasoning of the RRT lacked any foundation in logic or rationality and regarded the obligation in s 430(1)(d) of the *Migration Act* as being merely a 'procedural one'. On those bases Buchanan J rejected the conclusions of Kenny J and Rares J respectively[98].

In another recent Full Court decision Buchanan J was again involved in a 2–1 majority outcome, this time in the majority which upheld an appeal on behalf of the Minister, setting aside orders of the Federal Magistrates Court which had itself upheld an application for judicial review of an RRT decision. The case was *Minister for Immigration and Citizenship v SZOCT ('SZOCT')*,[99] where Buchanan J, together with Nicholas J, applied *SZMDS*, specifically adverting to an important passage of the joint judgment of Crennan and Bell JJ.[100] Their Honours concluded in *SZOCT*, not without reservation, that the conclusion of the Federal Magistrates Court on judicial review, intervening so as to overturn the assessment made by the RRT of the asylum seeker's credit, was not a course which was open to that Court on the material before it. Despite expressing a concern about the nature and focus of the RRT's questioning of the asylum seeker, Buchanan J concluded that there was no 'clear case' of jurisdictional error which 'emerged from the record' so as to justify intervention on judicial review[101].

Jacobsen J dissented in *SZOCT*. His Honour applied the same statement of principle as had Buchanan J and also observed that a court should be slow to interfere and that a clear case of jurisdictional error must be made out. Jacobson J, as with Buchanan J, found the question in *SZOCT* to be a difficult one. Ultimately his Honour came to the view that the answer was not one on which reasonable minds may differ and that there was an absence of probative material put forward by the RRT to justify its finding of a well-founded fear of persecution on the basis of the applicable Convention ground, namely religion[102].

A third recent decision of a Full Court of the Federal Court of which Buchanan J was a member illustrates the practical reality that, even where a ground of review of illogicality or irrationality in the limited sense endorsed in *SZMDS* has been invoked, judicial review may be undertaken on distinct, albeit related, grounds. In *Tisdall v Webber*[103] Greenwood, Tracey and Buchanan JJ allowed an appeal on the basis that the primary judge determining a judicial review application had committed appealable error in failing to find that the *findings* of the committee making the administrative decision were not reasonably open on the material before the committee and that there was no reasonable basis for the committee's *conclusions.*[104]

Concluding comments – how much clearer at the frontier?

It is a grave mistake for public law practitioners to over-read *SZMDS* and construe it as establishing some kind of broad-based ground of jurisdictional error by reason of illogicality or irrationality in the course of administrative decision-making. The *ratio decidendi* at the case itself extends no further than the scope of judicial review of decisions of the RRT in reaching, or not reaching, a level of 'satisfaction' for the purposes of ss 36 and 65 of the *Migration Act*. It does not provide any support for a broader proposition that, in cases where an exercise of statutory power is grounded on the *actual existence or non-existence* of a particular fact, a challenge on the basis of illogicality or irrationality will be open.

The point directs attention to the process of statutory construction by which the nature of a jurisdictional fact is to be discerned. Public law litigators understand, or certainly should understand, the recurring importance of principles of statutory interpretation in numerous facets of their practices. An oft-cited authority on the point is *Timbarra Protection Coalition v Ross Mining NL ('Timbarra Protection')*.[105] In that case Spigelman CJ, speaking for the New South Wales Court of Appeal, canvassed and applied to the legislation before the court the range of indicators that ought to be taken into account in reaching a conclusion as to which form of jurisdictional fact was intended by the enacting legislature. As the contemporary approach to interpretation in Australian law recognises generally, purpose and context are primary indicators of statutory meaning, to be applied in the first instance, not merely when an ambiguity has been shown to arise. In the particular circumstances of the characterisation of a precondition to the exercise of jurisdiction, additional indicators include:

- whether the precondition is perceived to be truly 'essential' to the exercise of jurisdiction;
- the extent of the experience and expertise the primary decision maker has, or has access to; and
- the consequences,[106] particularly any potential inconvenience, of classifying the precondition as a 'true' jurisdictional fact, not one premised on a state of satisfaction or belief.

Timbarra Protection is consistent with the subsequent High Court authority of *Corporation of the City of Enfield v Development Assessment Commission*[107] and now *Plaintiff M70/2011 v Minister for Immigration and Citizenship* ('*Plaintiff M70*').[108] As the High Court emphasised in *City of Enfield*,[109] where a jurisdictional fact *properly so called* is to be established, it is open to a reviewing court to determine for itself, on the evidence led before it, whether the factual precondition is present or not. By contrast, where a decision-maker's jurisdiction is premised on a 'satisfaction' or similar formulation, the line of authority marked by *Hetton Bellbird* and its progeny becomes applicable. *SZMDS* is now an important component of that line of authority.

The differing analyses of on the one hand French CJ and, on the other hand, Gummow, Hayne, Crennan and Bell JJ in the very recent decision of *Plaintiff M70* (further discussed below) illustrate the subtleties of construction of relatively complex statutes such as the *Migration Act* that can be presented where true 'jurisdictional facts', in that former sense, are claimed to have been enacted. The Applicant in *Plaintiff M70* asserted that the statutory criteria enacted in s 198A(3)(i)–(iv) were such jurisdictional facts.[110] The competing contention of the Respondent Minister was that the requisite power was constrained only by requirements that it be exercised *bona fide* and within the scope and for the purpose of the statute.

As will be seen below, Gummow, Hayne, Crennan and Bell JJ accepted the Applicant's characterisation, holding that to accord the Minister the flexibility for which he contended would pay insufficient regard to the text, context and purpose of the provision, particularly the need to identify the relevant criteria with particularity.[111] By contrast French CJ rejected the Applicant's characterisation, holding that clearer language than that enacted in s 198A was required to construe the relevant criteria as needing to be objectively found to exist for the executive function so conferred to be enlivened.[112]

Ultimately, *SZMDS* went barely any further than it needed to so as to resolve the controversy that had justified a grant of special leave to appeal. There are other types of public law litigation where the High Court has adopted a similarly minimalist approach. It has, for example, in certain cases applied a "settled practice" of declining to determine constitutional questions "unless necessary for the decision of the case".[113] A related principle is the strong canon of statutory construction that the Commonwealth and State Parliaments do not intend their statutes to exceed constitutional limits and that, accordingly, Australian legislation should be interpreted, as far its words allow, to keep within constitutional limits[114].

Questions accordingly remain, notwithstanding *SZMDS*, about the nature and limits of the overlap between 'illogicality' and 'irrationality' on the one hand, and *Wednesbury* unreasonableness on the other. Administrative lawyers have tended to plead the latter ground of jurisdictional error sparingly, in recognition of the relatively few cases where it has successfully been established in its own right. But as noted, the line of cases evolving through *Eshetu, S20/2002* and now *SZMDS*, consistently with parallel trends in British administrative law, manifests a blurring of the division between the grounds.

Interestingly, then, and perhaps somewhat paradoxically, the High Court's insistence on the meeting of a strict standard in demonstrating illogicality by administrative decision-makers in

finding jurisdictional facts appears to be tempered by a slightly greater inclination to entertain an associated ground of *Wednesbury* unreasonableness. Whether this turns out to be of any real consequence in practical terms is another matter. As in other areas of judicial review, the fundamental principles that lie at the heart of jurisdictional error will continue to be of crucial practical importance.

***Plaintiff M61 v Commonwealth of Australia*: restoring judicial oversight to offshore processing**

Background

The two plaintiffs in this case, both citizens of Sri Lanka, arrived by boat on the Territory of Christmas Island without visas. The *Migration Act* defines Christmas Island as an 'excised offshore place'.[115] As a result, the plaintiffs were 'unlawful non-citizens'[116] and 'offshore entry persons'[117] for the purposes of the Act, and were detained under s 189 of the Act.

Section 46A of the Act precludes unlawful offshore entrants from making a valid application for any visa, including a protection visa, whilst in Australia. As a result, in the absence of the capacity to make a valid application, the plaintiffs could not rely upon the provisions of the Act which would otherwise have required the Minister to consider such an application and, if the criteria were met, grant a visa.[118] However, s 46A also provides that the Minister has the power to allow a visa application from an unlawful offshore entry person if the Minister thinks it is in the public interest. This power is known as 'lifting the bar'. Section 195A then provides the Minister with a power to grant a visa, notwithstanding that no application has been made, if the Minister thinks it is in the public interest. Both sections expressly state that the powers conferred must be exercised by the Minister personally,[119] but that the Minister has no duty, in any circumstances, to *consider* whether to exercise the powers.[120]

However, under the *Refugees' Convention*[121] and its *Protocol,*[122] Australia has basic obligations not to expel or return refugees to the frontiers of territories where 'life or freedom would be threatened on account of race, religion, nationality, membership of a particular social group or political opinion'.[123] At first sight, s 46A and s 195A would not appear to guarantee compliance with these obligations, given that consideration need not ever be given to whether an illegal offshore entrant should be allowed to apply for a visa to enter Australia, or to whether such a visa should nevertheless be granted in the absence of an application. Instead, to ensure compliance with these international obligations, the Department of Immigration and Citizenship (the Department) undertook a 'Refugee Status Assessment' (RSA) regarding each plaintiff to determine whether either was a person to whom Australia owed protection obligations. This assessment was described in departmental material prepared for those executing the process as being 'non-statutory' and that, as a result, 'the *Migration Act*, the *Migration Regulations 1994*...and Australian case law on the interpretations of the definition of a refugee and 'protection obligations' do not apply'.[124] Instead these materials said that those bodies of law should only guide those carrying out the process as a matter of policy.

The RSA process resulted in a conclusion that neither plaintiff was owed any protection obligations.[125] However, the plaintiffs sought an 'Independent Merits Review' (IMR) of this conclusion. This process, similarly described in departmental materials as 'non-statutory' and outside the force of Australian migration law, was not undertaken by officers of the Department. Instead, a private company, Wizard People, was engaged by the Department to conduct these reviews. The result of the IMR was to confirm that neither plaintiff was owed protection obligations.[126]

The plaintiffs then commenced proceedings in the High Court's original jurisdiction seeking relief against the Commonwealth, the Minister, and those who conducted the IMR and the

RSA. They alleged that they had been denied natural justice in the RSA and IMR process and that errors of law had been committed because those who undertook those processes considered that they were not bound by the provisions of the *Migration Act* and relevant case law, but that, rather, those bodies of law were mere guides. Relief by way of mandamus, certiorari, and injunction was sought.

The second plaintiff, M 69, also sought a declaration that s 46A and related provisions of the Act, were constitutionally invalid. It is convenient to summarise the court's brief disposition of this issue first.

Constitutional invalidity?

Plaintiff M69 said that s 46A was invalid because the provision exempting the Minister from the duty to consider the exercise of the power to lift the bar gives 'an effectively unfettered and unreviewable statutory power to decide whether or not to exercise the power' to lift the bar.[127] It was argued, broadly, that this provision was invalid because Chapter III of the Commonwealth Constitution precludes the Commonwealth Parliament from conferring arbitrary powers, without enforceable limits, upon decision makers.[128]

This constitutional argument began, at its most abstract, with two premises. First, that it is an essential characteristic of the system of courts set up by Chapter III that those courts have the capacity to declare and enforce the statutory limits upon the powers of the decision makers[129] and, second, that s 75(v) of the Commonwealth Constitution entrenches this core review jurisdiction. The implication said to arise from these premises was that there must be some limit on all powers rendering them capable of being checked under s 75(v). The specific result argued to flow from that implication was that a power could not be granted by the Commonwealth Parliament without any obligation on the decision maker to consider the exercise of that power in any circumstances.[130] This conclusion was also said to be supported by rule of law considerations, the specific holding in *Kirk* as regards avoiding 'islands of power immune from supervision and restraint', and the proposition that administrative decision makers cannot determine the limits of their own power.

However, the court swiftly rejected the contention that a power could not be granted without some duty on a decision maker to consider its exercise on the basis that '[m]aintenance of the capacity to enforce limits on power does not entail that consideration of the exercise of a power must always be amenable to enforcement, whether by mandamus or otherwise. Nor does it entail that every discretion to exercise a power must be read as if satisfaction of identified criteria would require its exercise'.[131] Put another way, the absence of a duty to consider the exercise of a power may preclude a decision maker from being judicially compelled to do so, but that is not to say that the power itself is without enforceable limits.

Because the court's reasoning exposed the fallacy in the final conclusion of the argument, it was not necessary for the court to examine the frontiers of the broader proposition that all powers must have some form of reviewable limit. As a result, the court avoided the invitation to add to the propositions established so recently in *Kirk.*

The legality of the plaintiffs' detention

As mentioned, upon entering Christmas Island, the plaintiffs were detained under s 189 of the Act. The legality of their detention was not disputed by the plaintiffs, although the basis for that legality was at odds with that asserted by the Commonwealth. The plaintiffs claimed that the detention was lawful because steps were being taken under the *Migration Act* to determine their refugee claims. The Commonwealth argued that it was lawful because, although steps were *not* being taken under the *Migration Act*, those steps could potentially lead to the exercise of power under the Act.[132]

Section 196 provides that persons detained under s 189 must be kept in detention until they are granted a visa or removed or deported from Australia. However, the Act also provides that a person who 'has not made a valid application for a substantive visa that can be granted when the applicant is in the migration zone' must be removed from Australia 'as soon as is reasonably practical'. It appeared then that the obligation to remove the plaintiffs as soon as practical arose the moment they entered Christmas Island.[133]

However, the court rejected that suggestion, holding that the provisions authorised the detention of illegal offshore entrants whilst the RSA and IMR processes were completed.[134] This conclusion was reached having regard to the text of the provisions and that context. Regarding the first, the court held that the provisions contemplate the possibility of an illegal offshore entrant making a valid application for a protection visa. The foremost reason of context was that the Act, read as a whole and having regard to its legislative history, is directed at compliance with Australia's international obligations regarding refugees.[135] Consistency with that purpose meant that the Act should be read so as to provide the power to grant a protection visa in an appropriate case and so as not to require the removal of a person where they satisfy the protection requirements of the Convention. These considerations led to the conclusion that detention was necessarily authorised whilst steps were taken to determine whether the Minister should 'lift the bar'.

What was the source of the power being exercised to conduct the IMR whilst the plaintiffs were detained?

A further preliminary issue which required resolution was the precise nature of the power being exercised by those undertaking the IMR process. As noted above, the process was essentially the result of a Ministerial statement made in July 2008, and the manuals which were subsequently issued to those executing the process stated that it was 'non-statutory'. The Commonwealth therefore submitted that the process involved the exercise of a 'non-statutory executive power under s 61 of the Constitution'.[136] On the other hand, the plaintiffs said the process occurred as 'either part of the Minister's exercise of powers in ss 46A and 195A or as informing their exercise because of the centrality of a refugee status determination to the execution of the Act'.[137]

Before resolving this issue the court addressed what it saw as an apparently irreducible tension between the conclusions it had previously drawn regarding the legality of the plaintiff's continued detention and the manner in which the Commonwealth characterised the RSA and IMR processes. Namely, on the one hand, the ongoing detention of the plaintiffs had been found to be legal only because inquiries were being made in accordance with the *Migration Act* as to whether the power to lift the bar should be exercised and, on the other hand, the Commonwealth argued that those inquiries had no statutory foundation.[138] The court observed that the Commonwealth's characterisation of the RSA and IMR process would effectively put the period of the plaintiffs' detention entirely within the unconstrained discretion of the executive (aside from the possibility of review on the very uncertain basis of whether the possibility of the exercise of the power to lift the bar actually existed).[139] This potentially unpalatable result laid bare the problematic nature of the proposition that the process was non-statutory.

In resolving the issue, the court again noted that the RSA and IMR processes were the result of a Ministerial announcement in July 2008. It went on to hold that these processes should be conceptualised not simply as a request by the Minister to be provided with advice on whether the bar should be lifted, but rather as a decision by the Minister, under the Act, to *consider* whether to exercise the power in respect of every offshore entry person making a claim that he or she is owed protection obligations.[140] This conclusion was consistent with, and confirmed, the court's finding as to the legal basis for the plaintiffs' detention. The

detention was lawful because a decision had been made to consider whether to lift the bar under the Act.[141]

The court then explained that such a conceptualisation was consistent with the requirement that the powers may only be exercised personally on the basis of a distinction between a decision to *consider* whether to lift the bar and a decision to actually do so or not do so.[142] Although the latter can only be done personally by the Minister, the statute did not require the former to be.

The court also touched upon the intersection between these conclusions and the so called '*Carltona* principle'.[143] That principle contemplates a relationship of agency without a formal delegation of power. This was relevant because, consistent with its argument on the legal basis of the plaintiffs' detention, the Commonwealth had argued that the *Carltona* principle should not be invoked to find that the RSA and IMR process were an exercise of the Minister's powers under s 46A or 195A, as the Act required the Minister to act personally. However, the court held that it was unnecessary to consider whether this principle could operate to link the RSA and IMR processes back to the *Migration Act* because it had already been found that the Minister had made a decision under the Act, and the RSA and IMR processes were the result of that decision.[144]

Application of natural justice?

These conclusions allowed the court to engage in a conventional analysis on the question of whether natural justice applied to the Minister's decision to consider the exercise of the powers. The court seemed to tread particularly carefully in this portion of its reasons to avoid a number of the ongoing controversies in this area.

Although the court seemed to side-step the much debated question of whether natural justice applies by virtue of the common law or by statutory implication, a close reading of the reasons might provide evidence to some that this particular controversy has run its course. The court observed that it was 'unnecessary to consider whether identifying the root of the obligation remains an open question'[145] and cited *Saeed* for that proposition. In that case six justices seemed to favour Brennan J's view on that point in *Kioa v West.*[146] Reading between the lines, it seems that the court may have been of the view that a consideration of whether the question even remained open was unnecessary because it had been answered elsewhere.

In the result, the court held that natural justice applied to the decision by the Minister to consider whether to lift the bar because that decision, along with the consequential necessity to make inquiries, affected the liberty of the plaintiffs by prolonging their detention, and so affected their rights and interests.[147] The Commonwealth had argued that, if the power exercised was found to be statutory, natural justice should not apply to it because it was simply a discretionary power to confer a right, being the right of entry to Australia. It was not a power to defeat or prejudice a right already held.[148] The court explained that this proposition ignored the fact that under *Annetts v McCann*[149] natural justice would apply where rights, interests and legitimate expectations were defeated or prejudiced. However, it went on explicitly to state that it saw no need to comment on the continuing relevance of legitimate expectations[150] because rights and interests were sufficiently affected to enliven procedural fairness. This (strictly unnecessary) reference to legitimate expectations combined with an express refusal to consider its ongoing validity is intriguingly ambiguous and perhaps a result of the compromises necessary to secure unanimity.

Next, the court turned to the question of whether any breach of natural justice had occurred. The court's focus was the errors said to have been committed in the IMR process, on the basis that any assessment during the RSA had now been overtaken.[151] This is interesting,

as it seems to involve some running together of the decision of the Minister to undertake a consideration of the plaintiff's claims, and the process that resulted from that decision. Although the court previously disclaimed any reliance upon the *Carltona* principle to link the review process to the Act, it seems to be implicitly operating in the background here to link the RSA and IMR process to the Minister's decision.

In considering the IMR process the court swiftly determined that natural justice breaches had occurred in the case of each plaintiff.[152] It also found, as a result of the conclusion that the RSA and IMR processes were essentially the consideration of whether to exercise a statutory power, that error had been committed by the reviewers in failing to consider themselves bound by the *Migration Act* and associated case law.[153]

Jurisdiction to review public law functions outsourced to private corporations

The court left to another day the question of whether the officers of a company like Wizard People Pty Ltd could be said to be 'officers of the Commonwealth' for the purposes of founding the court's jurisdiction under s 75(v), on the basis that jurisdiction was found under s 75(iii) due to the Commonwealth being a party and, possibly, under s 75(i) relating to matters arising under a treaty (in this instance the *Refugees' Convention*).

Superficially, it could be thought that this case raised similar issues to those raised in *NEAT Domestic Trading Pty Ltd v AWB Pty Ltd ('NEAT')*[154] where a private company was conferred with apparently public law type functions. Interestingly, however, that case was not mentioned in the reasons. It seems that the court avoided commenting upon the difficult issues which arose in *NEAT* by treating the actions of the corporation conducting the IMR as those of the Minister, as was noted above. In any case, both the source and nature of the power exercised in the RSA and IMR process were arguably public. Those facts may have been sufficient to distinguish *NEAT*, given that in that case the court found that the apparently public power in issue derived from a private source, being the *Corporations Law* of Victoria.

Remedy

The court refused the grant of mandamus because the statute expressly provided that the Minister was not under a duty to consider whether to lift the bar.[155] This in turn entailed that certiorari be refused as a matter of discretion on the ground that its issue would be futile if mandamus could not then issue.[156] This conclusion meant that the court eschewed consideration of whether the writ should lie to quash an interim decision, where that interim decision is not a mandatory relevant consideration to the final decision it precedes.[157] Instead, declaratory relief was awarded.

A legacy?

By elegantly linking the 'non-statutory' process which applied to unlawful offshore entrants back to the *Migration Act* the court was easily able to conclude that the obligations of natural justice were enlivened. In so doing, it confirmed that the full protections of Australian administrative law applied to supervise the decision makers involved, and exploded the Departmental directions to the contrary. This result is particularly significant given that arguably the underlying intent of those directions was to circumvent curial oversight of the processing of asylum seekers offshore.[158] The court's unanimous reasons to this effect therefore again send a strong and heartening signal regarding the court's commitment to dismantle any attempt to remove fundamental administrative safeguards in the absence of unmistakable and unambiguous parliamentary language to the contrary.

***Plaintiff M70/2011 v Minister for Immigration and Citizenship*: the final demise of offshore processing?**

Background

Each of the plaintiffs in this matter were Afghani citizens who travelled by boat from Indonesia to Christmas Island. M70 was an adult. M106 was a minor and was unaccompanied by any parent or guardian. Both lacked visas to enter Australia. On arrival each became 'unlawful offshore entrants' and were subsequently detained and, pursuant to s 41A, precluded from applying for visas. Both plaintiffs claimed that they were persons to whom Australia owed protection obligations.

M70 and M106 were subject to a new set of administrative arrangements applicable specifically to offshore entry persons. The first part of those arrangements was a direction from the Minister to the Department that all consideration of whether to exercise the power to lift the bar in respect of such entrants was to stop until further notice. This essentially suspended the scheme considered in the *M61* decision (discussed above). The second part was an agreement with the government of Malaysia to transfer up to 800 offshore entrants, claiming protection obligations, to that country for the assessment of their claims. That agreement contained a number of assurances relating to the transferred persons, including an assurance that the transferred persons would be treated 'with dignity and respect and in accordance with human rights standards'. However, the agreement expressly provided that its terms were not legally binding upon the two countries.

The second part of this arrangement was said to be carried out pursuant to s 198(2) and s 198A(1) of the *Migration Act*. Section 198(2) provides that an officer must remove as soon as practicable an unlawful non-citizen who, relevantly, is detained as an offshore entry person, has not been immigration cleared and has either not made a valid application for a visa that can be granted to them, or has made such an application and that application has been determined.[159] Section 198A(1) specifically confers power on an officer to take an offshore entry person to a 'declared' country. Section 198A(3) then provides that the Minister may ‘declare’ that a country provides access to effective procedures to assess protection claims, provides protection pending and after determination of these claims, and meets relevant human rights standards in providing this protection.[160]

The Minister had made a declaration in respect of Malaysia following the execution of the agreement with Malaysia. That declaration was made after the Minister considered a submission from the Department which contended that Malaysia fulfilled the criteria in s 198A(3), primarily on the basis of the political commitments made by it under the arrangement; a submission from the Department of Foreign Affairs and Trade that, relevantly, advised that Malaysia was not a party to the Refugee Convention and did not recognise, or have domestic legal protections in place for, asylum seekers; and some materials from the United Nations High Commissioner for Refugees (UNHCR).

The plaintiffs commenced proceedings in the High Court's original jurisdiction challenging their proposed transfer to Malaysia and claiming an order prohibiting that action. Both claimed that the declaration made by the Minister under s 198A was invalid and that s 198(2) did not confer a power to remove them to Malaysia.

In addition, M106 also claimed that consent was required to transfer him to Malaysia and that this consent had not been validly given. This argument rested primarily upon s 6 and s 6A of the *Immigration (Guardianship of Children) Act 1946* (Cth) which together provide that the Minister is the guardian of all non-citizen children who arrive in Australia and that such children shall not leave Australia without the consent of the Minister. It was an agreed fact that no written consent had been given by the Minister in respect of the plaintiff.

The much-anticipated High Court decision: declaration criteria satisfied? A second source of power?

The case of *Plaintiff M70* has been the most politically charged High Court matter in some years, and the judgments were keenly awaited and prepared quickly. The Court was acutely aware of the ramifications of its conclusions, and the potential controversy that would follow. The Chief Justice declared, at the opening of his separate judgment:[161]

> [it] is the function of a court when asked to decide a matter which is within its jurisdiction to decide that matter according to law. The jurisdiction to determine the two applications presently before this Court authorizes no more and requires no less.

The central concern of the High Court was of course the lawfulness of the proposed removal of the plaintiffs from Christmas Island to Malaysia. Arguments around this question proceeded principally on three issues:[162]

1. whether a valid declaration relating to Malaysia had been made under s 198A(3) of the *Migration Act*, such that s 198A provided power to remove the plaintiffs to Malaysia;
2. whether the general provisions relating to the removal of 'unlawful non-citizens' found in s 198(2) of the *Migration Act* provided power to remove the plaintiffs to Malaysia; and
3. whether the consent of the Minister, as guardian of the second plaintiff, was necessary before that person could be lawfully taken from Australia.

Dealing with the second point first, the joint majority of Gummow, Hayne, Crennan and Bell JJ[163] held that s 198A was the only relevant legislative source of power. Their Honours emphasised that the ambit of s 198(2)'s operation, read in light of s 198A, must be understood with reference to the fact that the *Migration Act* responds to Australia's international obligations, including the obligation of not returning a person (directly or indirectly) to a country where he or she has a relevant fear of persecution.[164] It was also said that the ambit of a removal power must be understood in the context of international law principles concerning the movement of persons from state to state.[165] Importantly, it was felt that to remove a person to their country of nationality or any third country willing to receive them, without first having assessed whether they had a relevant fear of persecution, may put Australia in breach of its international law obligations.[166] Given that s 198A is directed to taking persons to a country that provides the access and protections identified in s 198A(3), s 198(2) should not be read as requiring or permitting removal prior to a determination of their refugee status. The Act, it was said, confers only one power to take that action – the power given in s 198A, and the generality of the s 198(2) power must be confined by reference to the s 198A restrictions.[167] It was noted that the legislative history reinforced this conclusion, and indeed that the alternative reading would leave s198A no separate work to do.[168] French CJ in his separate judgment arrived at a similar conclusion regarding the interaction of s 198(2) and s 198A.[169]

Proceeding then to the larger questions concerning s 198A, the joint majority reviewed the history of the Malaysian Arrangement and noted that on its own terms it was no more than a statement of the intentions of the participants and political commitments – creating no obligations for the purposes of international law.[170] Their Honours then considered the terms of the declaration-making power in s 198A, pointing out the unusual wording (the Minister 'may: (a) declare…that a specified country' has the four characteristics identified).[171] The plaintiffs submitted that the listed criteria were jurisdictional facts, either in the 'objective' sense (such that they must actually be satisfied for valid exercise of the power) or in the

sense that the Minister must be satisfied that the criteria were met.[172] The Commonwealth submitted that it was the existence of the declaration itself, not the truth of its content, that enlivened a power – and that the power was constrained only by requirements of good faith and consistency with legislative scope and purpose. The joint majority accepted the Commonwealth's admitted constraints, but felt that to accept only those minimal constraints and reject the view that the criteria were jurisdictional facts would pay insufficient regard to the provision's text, context and evident purpose – which required identification of the criteria with particularity.[173]

For the joint majority the central question then became whether the 'complex of elements' in each criteria were wholly factual (as submitted by the Commonwealth) or included elements of legal obligation (as contended by the plaintiffs). Their Honours noted that in each of the criteria there appeared to be elements of fact involved (as to what actually happens in the relevant county). However, they quickly distanced themselves from that point (with its attendant difficulties over the temporal ambit of the inquiry) and any need actually to express a view on whether Malaysia in fact meets appropriate standards in handling asylum seekers. Whilst they may have backed themselves into the possibility of such a factual analysis in the future (see below), the critical issue in this instance, as they saw it, was that the references in the criteria to 'provides access' and 'provides protection' did not refer *only* to a state of facts (or conclusions about them), but rather to something that must be legally assured. In so concluding, their Honours made particular reference to the international law context of the provisions and the various obligations thereby implicated as regards at least persons already determined to be refugees. They considered that the statutory references to a country that provides access to certain procedures and protections of certain kinds must be understood as referring to access and protections of the kind that Australia itself has undertaken to provide under international law – which involve a myriad of obligations relating to such matters as education, religion, employment, housing, court access etc.[174] Therefore, the Commonwealth's attempt to limit the inquiry under s 198A(3)(a)(iii), for example, to whether as a matter of fact there is a real risk that a person determined to be a refugee in the country they are to be taken to will be returned to relevant danger, failed for multiple reasons. Their Honours reinforced their reasoning here by reference to the specific interrelationship of the s 198A subsections,[175] and a careful disassembly of the Commonwealth's reliance on the 'safe third country' cases[176] and the political context of the enactment of the relevant provisions.[177]

In his separate reasons, French CJ[178] considered that the judgment required by the declaration criteria was necessarily a judgment that the circumstances described were present and continuing, and that this pointed to the need for a supporting legal framework. Correlatively, it indicated that a declaration based upon a hope or belief or expectation that a country will meet the criteria in the future would not be valid. French CJ considered that this appeared to be, at least in part, how the Minister approached the issues.[179] Moreover, his Honour felt that the questions the Minister must ask himself, about 'access' and 'protection' and 'human rights standards', are questions which could not be answered without reference to the domestic laws and international obligations of the relevant country. French CJ considered that the exercise of power had miscarried here for these reasons, and made specific reference to the legal fragility of the asylum seekers' position under the Malaysian system.[180] He did however confirm, conversely to the main focus of the case, that reference only to a country's laws and international obligations would not be the end of the inquiry: the criteria do require consideration of the extent to which a country actually adheres to its relevant obligations.[181]

On the final issue raised in the case, the necessity of ministerial consent to the removal of the second plaintiff, the joint majority also found in favour of the plaintiff (despite it being strictly not necessary to do so). It was held that a determination (when made) by the Minister that an unaccompanied minor should be taken to a declared country under s 198A would not constitute a consent in writing of the kind required by s 6A of the *Immigration (Guardianship*

of Children) Act 1946 (Cth) ('*IGOC Act*'). Nor, it was said, would a s198A removal fall within the express exemptions to the consent requirement found in s 6A(4) of the *IGOC Act*, as s198A was not a 'law regulating the departure of persons from Australia' within the meaning of that exemption.[182] Pointing to a very important consequence of these conclusions, the joint majority noted that a consent decision of the requisite kind would engage the provisions of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) ('*ADJR Act')* with regard to the giving of reasons and potential review.[183] Of course the engagement of review mechanisms in relation to minors, *ADJR* or otherwise, would seriously complicate the government's intended Malaysia arrangements. French CJ and Kiefel J expressed agreement with the joint majority on the issue of guardian consent.[184]

Implications for government refugee processing policy

The reference to political context in the discussion above of the joint majority's reasoning leads us to a critical question: what is the future of offshore processing under this or other arrangements? The political context referred to above was of course the establishment of a processing regime on Nauru – then not a signatory to the relevant international conventions.[185] The joint majority, and indeed French CJ,[186] viewed sceptically the Commonwealth's attempt to rely on this background in the construction of s 198A. Yet more importantly, the joint majority noted (albeit tentatively) that the Nauru arrangements seemed 'very different' to those in issue given that in that case it was Australia that would provide the relevant access and protection and in that case the arrangement appeared to create obligations between the parties. Of course a proper assessment of the satisfaction of the s 198A declaration criteria, on the interpretation of the provisions offered by the Court, could be a highly complicated and contested matter.

With reference to the Malaysian example, the joint majority did suggest that a country 'provides access' to effective procedures for assessing asylum claims of the kind described in s 198A(3)(a)(i) if its domestic law provides for such procedures or if it is bound, as a matter of international obligation, to allow some third party (such as the UNHCR) to undertake such procedures (or to do so itself). The mere provision of permission for a body such as UNHCR to undertake its own procedures would not be sufficient. Moreover, it was suggested that a country does not provide protections of the kind described in s 198A(3)(a)(ii) or (iii) unless its domestic law deals expressly with the classes of persons mentioned there or it is internationally obliged to provide the particular protections. It was said in particular that a country does not provide protection to those given refugee status, pending their voluntary repatriation or resettlement, unless it provides to those persons rights of the kind mentioned in the *Refugees' Convention*. Here, not only did the Arrangement not oblige Malaysia to provide any of those rights, no provision was made in the Arrangement that (if carried out) would provide any of those rights.[187]

Subsequent advice of the Commonwealth Solicitor-General emphasized, in relation to Nauru (which acceded to the *Refugees' Convention* and *Protocol* on 28 June 2011), that 198A removals to that country would only be available if it were able to be demonstrated to the satisfaction of an Australian court that appropriate arrangements were in place to ensure practical compliance by Nauru with its international obligations; and that Nauru in its treatment of asylum seekers and refugees complied in practice with human rights standards acceptable at least to the UNHCR. These are, it was noted, complex issues of fact and degree.[188] The Solicitor General also suggested that 'significant development' to Papua New Guinea's international obligations or domestic laws relating to refugees would be necessary for a valid application of the s 198A process to that country.

The legal complications of the assessment task, and the surrounding controversies, might be largely pre-empted by foreshadowed amendments to the relevant *Migration Act* provisions. However, protection of the executive assessment from judicial intervention would not in itself

avoid the additional practical difficulties arising from the need for Ministerial consent to any removal of minors.

Implications for Administrative Law

In pure administrative law terms, ultimately the joint majority appeared to classify the s 198A declaration criteria as objective jurisdictional facts, objectively reassess their satisfaction, and define the error accordingly.[189] At one point they noted (a little confusingly) that it was not necessary to determine whether or to what extent there could be judicial review of a Minister's determination that 'factual elements' were met here – because the criteria contained the further element that the access and protections in question should be provided under domestic or international legal obligation.[190] This perhaps hinted at a disinclination to fully reassess the facts in issue. However, ultimately their Honours did appear to conduct an objective reassessment of the satisfaction of the relevant criteria (rather than, for example, the Minister's opinion as to those criteria).[191] It was emphasised that it was not open to the Minister to make a declaration in relation to Malaysia where it was agreed that Malaysia: does not recognize the status of refugees nor undertake relevant reception, registration, documentation and status determination activities (it generally permits the UNHCR to undertake those tasks in Malaysia); is not a party to the relevant international law instruments; and has made no legally binding arrangement with Australia obliging it to accord the protections required by those instruments. A conclusion that asylum seekers in Malaysia have access to UNHCR assessment processes and that neither asylum seekers nor refugees are ill-treated there was said to be insufficient. Critically, it was ultimately stated that the 'jurisdictional facts necessary to making a valid declaration…were not and could not be established.'[192]

French CJ, in his separate judgment, engaged more directly with the plaintiffs' submissions on the precise nature of the Minister's error and the jurisprudence relating to jurisdictional facts.[193] His Honour noted that clear language would be needed to support the contention that the criteria were facts that themselves conditioned the exercise of the Minister's power to make a declaration, such that the courts could substitute their judgment for that of the Minister. He considered that the language and factors at play indicated the need for 'ministerial evaluative judgment'. However, his Honour noted that the Minister must properly construe the criteria, otherwise he would be making a declaration not authorized by the enactment and the misconstruction would be a jurisdictional error. He stepped back and pointed in this context to the established formulas of jurisdictional error as listed in the *Yusuf* decision.[194] However, he did acknowledge the sharper possibility that the relevant power could be treated as being, by necessary implication, conditioned upon the formation of an opinion or belief that each of the matters listed were true – and noted that the requisite opinion or belief would be a jurisdictional fact and must not be based on a misconstruction such that it would not be an opinion or belief which the subsection requires in order that the power be enlivened.[195]

In an important respect French CJ's approach is perhaps preferable to that of the joint majority: it avoids the need for a court to directly reassess the factually, legally and politically complex criteria. Such a descent into the executive arena would not be relished by subsequent review courts. Despite the joint majority's express reluctance to assess the actual performance of particular countries,[196] it seems extremely likely that their reading of the provisions could require this in particular cases.

Of course, the Minister's failure to engage with all of the criteria (properly interpreted) and consequent erroneous conclusion could be conceptualized and classified in various ways (e.g. according to objective or subjective jurisdictional fact principles,[197] or a straight 'relevant considerations' analysis). However, ultimately in this case the point was somewhat moot as on the majority's reading of the legislation, error could be readily demonstrated here in

multiple ways. Perhaps the more important aspect of the judgment is the preparedness of the joint majority to reach through the statutory provisions to the underlying international law obligations

The decision should be seen as a further step in the High Court's recent assertion of the rule of law. The Court was not prepared to leave it to the executive government to assess whether Malaysia was a compliant country. Given that the statutory criteria in s 198A(3) marked the boundary of the Minister's discretion, the majority of the Court was not deferential to considerations of comity in ensuring the Minister acted upon a correct understanding of the statutory pre-requisites that conditioned his declaration. *Plaintiff M70* joins the other cases surveyed in this study as an assertion of judicial vigilance requiring the executive to comply with legislative prescriptions, particularly where human rights values are at stake.

Conclusion

Returning from the fine detail of these five important High Court cases at the frontier of Australian administrative law, what themes are emerging in the jurisprudence of the French Court and do they allow for confident prediction of future directions?

Perhaps the biggest winner in the recent wave of cases is the centrally important and ever controversial doctrine of natural justice. While the precise requirements of 'procedural fairness' continue to grow organically with evolving regulatory methodology and perceptions of citizen-state relations, the High Court is now once again shoring up the doctrine's broader advance in important ways. In the first place, the result of the migration skirmishes in *Saeed* and *M61* indicate that legislative attempts to exclude natural justice will need to be irresistibly clear. The Court clinically cut through the attempts in these two cases, with considerable textual and conceptual effort, to emerge with conventional fairness obligations that were of course found not to have been met. The 'clear contrary intention' rule, as regards attempted exclusion of natural justice, has therefore perhaps never been stronger. At the very least we have returned (with a larger High Court majority) to the conviction of the *Miah* decision – stepping over some interim lower court retreat in the *Lay Lat*[198] line of cases.

In addition to the good health of the 'clear contrary intention' rule, natural justice is of course a conspicuous beneficiary of the constitutionalisation of jurisdictional error review (now extended to the State level by *Kirk*), and indeed of the progressive elucidation of the essential features of constitutionally protected judicial process.[199] In emphasising the importance of natural justice in administrative process the Court is reinforcing for contemporary times some core tenets of executive accountability, fairness and equality before the law.

The current High Court is yet to provide definitive guidance on the old debate over the true source of natural justice obligations (statute v common law?), and is yet to revisit some of the specific doctrinal troubles of the last decade (such as the stumbling addition of an 'actual unfairness' requirement and the difficulties surrounding 'legitimate expectations'). However, the strength of the general advance indicates that we have now emerged from the circumspection of the *Lam* era.[200] In the process, it should be added, the Court has dismantled some central components of the 'off shore' approach to illegal immigration control.

The constitutional dimension is an interesting one – *Kirk* is a once-in-a-decade public law decision both in terms of its clarity and practical impact. The High Court so confidently embraced the entrenchment of Supreme Court supervisory jurisdiction, thereby adding to the contemporary re-invigoration of *Kable*-style thinking, that it seems likely that the constitutional dimension has now been clearly identified as a potential organizing rationale

for the ongoing development of a distinctively Australian administrative law. Yet, while the constitutional exploration still has some distance to run, the Court appears determined to avoid *ad hoc* development of principle. In both *Saeed* and *M61* constitutional issues were raised, but the Court largely avoided those arguments.

Perhaps the lesson for administrative lawyers is that while they will now need to come equipped with an awareness of Chapter III constitutional principles, they can expect that the bold collaboration of constitutional and administrative law in Australia will emerge in a carefully measured way – and things will not always be as easy as they were in *Kirk.* Ultimately, however, having taken the step in *Kirk* to protect the institution of judicial review, the Court may be induced in future cases to explore questions regarding the efficacy of that guarantee of review. It is arguably meaningless to have a constitutionally embedded system of review if it is deficient in content.

The *SZMDS* case perhaps stands on its own in this selection as a more tentative offering by the French Court. It did present the opportunity for the Court to provide some significant clarification of the notions of irrationality and unreasonableness, the relationship between the two, and the capacity of judicial review courts more generally to respond to allegations of inadequate factual reasoning. There are many unresolved issues here. Yet the Court ultimately adopted the more incrementalist approach of earlier eras, consistently with what has been described as a "settled practice" of leaving constitutional issues undetermined unless it be necessary for those issues to be confronted and, potentially, decided. Compatibly with this approach to the exercise of judicial power, the French Court in *SZMDS* was content to acknowledge some of the doctrinal difficulties but not stray far beyond the essentials required for disposition of the case.

The decision in *M70* presented no significant doctrinal advance; the judges' varying characterizations (in administrative law terms) of the errors identified was more instinctive than closely reasoned. However, the decision is remarkable in at least two ways. First, it is notable for the joint majority's readiness to step to the outer reaches of judicial review methodology in such a politically-charged context. Their Honours categorized the broadly-drawn statutory criteria at issue as objective jurisdictional facts, which annexed to the judicial review process the actual assessment of their satisfaction. It is difficult to recall another example of such a deep judicial descent into executive function. French CJ's more circumspect approach to the dispute may prove to be more sustainable. Secondly, the case is notable for the preparedness of the Court to reach through the domestic statutory provisions to the detailed and somewhat aspirational international law underlay. International law principle has rarely been so accessible to administrative law complainants in Australia. *M70* is clearly a case that sits at the frontier of Australian administrative law and it contributes significantly to the meaningful solidification of the 'rule of law' ideal.

It is difficult to deny that it is an exciting time for administrative law in Australia. Whilst we continue to proceed in a somewhat insular manner, diverging further from our comparable legal neighbours, the new jurisprudence is generally marked by a confidence and slowly emerging coherency that will be appealing to lower court judges, practitioners and academics.

Endnotes

1 [2011] HCA 32.
2 (2010) 241 CLR 252.
3 (2010) 239 CLR 531.
4 [2010] HCA 16.
5 [2010] HCA 41.

6 See Michael Taggart, 'Australian Exceptionalism in Judicial Review' (2008) 36 *Federal Law Review* 1.

7 (1985) 159 CLR 550.

8 John McMillan, 'Judicial Restraint and Activism in Administrative Law' (2002) 12 *Federal Law Review* 335.

9 This case is also discussed by Rebecca Heath, 'Saeed v Minister for Immigration and Citizenship' (2010) 18 *Australian Journal of Administrative Law* 9.

10 (2001) 206 CLR 57.

11 Although the Court did not need to address several constitutional issues advanced by the plaintiffs concerning a claimant's right to effective judicial review under s 75(v), it is evident that these constitutional arguments, presently lurking in the background, will have to be resolved in future litigation.

12 *Saeed* (2010) 241 CLR 252, 267 [42].

13 Ibid 258–9 [11]–[15], 271 [58]–59].

14 Ibid 259 [15]. See further *Al-Kateb v Godwin* (2004) 219 CLR 562, 577 [19] (Gleeson CJ); *K-Generation Pty Limited v Liquor Licensing Court* (2009) 237 CLR 501, 520 [47] (French CJ); *South Australia v Totani* (2010) 242 CLR 1, 28–30 [31] (French CJ); *Lacey v Attorney-General, Queensland* [2011] HCA 10, [17] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ); *Hogan v Hinch* [2011] HCA 4, [6], [27], [29], [36] (French CJ); *Momcilovic v The Queen* [2011] HCA 34, [41]–[51] (French CJ).

15 *Saeed* (2010) 241 CLR 252, 263 [26], 265–6 [34]–[35], 267 [42], 271 [57].

16 Ibid 281–2 [84]–[85].

17 Ibid 268 [44]–[46].

18 Ibid 265–6 [33]–[34]; 280–1 [82] (Heydon J).

19 Ibid 264–6 [30]–[34].

20 Explanatory memoranda may still be relevant in some cases; see *Haskins v The Commonwealth* [2011] HCA 28 and *Commissioner of Taxation v BHP Billiton Lim*ited [2011] HCA 17. Recourse to these is authorised by s 15AB(1) and (2)(e) of the *Acts Interpretation Act 1901* (Cth) in appropriate cases.

21 Chief Justice Robert French, 'The Role of the Courts in Migration Law' (Paper presented at the Migration Review Tribunal and Refugee Review Tribunal, Annual Members' Conference, Torquay, Victoria, 25 March 2011,)17.

22 *Saeed* (2010) 241 CLR 252, 269–70 [52], 271[59].

23 See ibid 270 [53]–[55].

24 In that case a reviewing court must usually rely on a non-characteristic departure of the administrative decision from what could be reasonably expected to support an inference that a relevant consideration could not have been taken into account when arriving at the requisite state of 'satisfaction' or the decision-maker must have misunderstood the legal nature of the function to be performed: *Avon Downs Pty Ltd v Federal Commissioner of Taxation* (1949) 78 CLR 353, 360 (referred to further in notes below). Either conclusion is near-impossible to reach unless the decision is egregiously discordant with reality.

25 Such a principle arguably underlies the Court's decision in *Bodrudazza v Minister for Immigration and Multicultural Affairs* (2007) 228 CLR 651. In *Saeed* the applicant submitted that procedural fairness is an incident of the judicial power with which Chapter III of the Constitution is concerned; *International Finance Trust Company Ltd v New South Wales Crime Commission* [2009] HCA 49, [54] (French CJ). The Commonwealth has no power to pass a law that requires a court exercising federal jurisdiction to act in a way repugnant to the standards of Chapter III. This would include permitting a Commonwealth officer to act in a way that is fundamentally unfair but unreviewable. This is consistent with the view that under s 75(v) the High Court can restrain breaches of natural justice (*Re Refugee Review Tribunal; Ex Parte Aala* (2000) 204 CLR 81, 101 [41] (Gaudron and Gummow JJ).

26 This phenomenon has been described as the "constitutionalisation" of Australian administrative law. See Linda Kirk, `The Constitutionalisation of Administrative Justice' in Robin Creyke and John McMillan (eds) *Administrative Justice – The Core and the Fringe: Papers presented at the 1999 National Administrative Law Forum* (2000) 106. The primacy of the Court's jurisdiction to ensure Commonwealth officers operate within the bounds of legality is affirmed in cases such as *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, *Bodruddaza v Minister for Immigration and Multicultural Affairs* (2007) 228 CLR 651, 668–9 [44]–[46] (Gleeson CJ, Gummow, Kirby, Hayne, Heydon and Crennan JJ) and indeed in *Plaintiff M70/2011 v Minister for Immigration and Citizenship* [2011] HCA 32.

27 *Public Service Board of NSW v Osmond* (1986) 159 CLR 656, 667 (Gibbs CJ). Regarding the general duty see Matthew Groves, 'The Duty to Inquire in Tribunal Proceedings' (2010) 33 *Sydney Law Review* 170.

28 [2011] HCA 24. Although not directly engaging s 75(v), the Court held by majority that a constitutional limitation may be derived from Chapter III of the Constitution that rendered invalid State legislation which failed to provide for giving of reasons in a case where the liberties of a person were threatened. While not expressed in positive terms the Court effectively held that there was a constitutional requirement for Supreme Court judges, when acting in their personal capacity under State law to make certain orders restricting a person's liberty, to give reasons for their decisions.

29 *Kirk* (2010) 239 CLR 531.

30 For analysis and contrasting views, see, e.g. Neil Foster, 'General Risks or Specific Measures? The High Court Decision in *Kirk*' (2010) 23 *Australian Journal of Labour Law* 230 and Kelly Godfrey, 'The High Court Finishes Workcover's Sport with Mr Kirk But the Game is Not Over Yet!' (2010) 38 *Australian Business Law Review* 196.

31 See, e.g. the arguments in *Inspector Hamilton v John Holland Pty Ltd* [2010] NSWIRComm 72; *Thiess Pty Limited v Industrial Court of New South Wales* [2010] NSWCA 252; *Kirwin v Laing O'Rourke (BMC) Pty Ltd* [2010] WASC 194; *NK Collins Industries Pty Ltd v Peter Vincent Twigg* [2010] QIRComm 63; *R v FRH Victoria Pty Ltd* [2010] VSCA 18.

32 Note particularly the comments of Heydon J: *Kirk* (2010) 239 CLR 531, 585 [113]ff.

33 *Kable v DPP* (1996) 189 CLR 51 ('*Kable*').

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

35 Most recently, see, eg, *Mount Gibson Mining Ltd v Anstee-Brook* [2011] WASC 172; *GPI (General) Pty Ltd v Industrial Court of New South Wales* [2011] NSWCA 157. A number of other recent cases will be referred to in context below.

36 The privative clause provided in effect that a decision was final and could not be appealed against, reviewed, quashed or called into question by any court or tribunal, and this was extended to any relief or remedy (writ, equitable remedy or otherwise) by s179(5).

37 French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ. Heydon J agreed generally with the substance of the joint majority reasoning, but dissented as to orders.

38 *Kirk* (2010) 239 CLR 531, 553[13]ff.

39 Ibid 559 [30].

40 Ibid 565 [50]ff.

41 Ibid 573 [71]ff.

42 *Craig v South Australia* (1995) 184 CLR 163 ('*Craig*').

43 *Kirk* (2010) 239 CLR 531, 573–4 [71]–[73]. Cf *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323, 351 [82] (McHugh, Gummow and Hayne JJ).

44 *Kirk* (2010) 239 CLR 531, 574–5 [74]–[77].

45 Ibid 575 [78]ff.

46 Cf earlier comments in, for eg, *Gypsy Jokers Motorcycle Club Incorporated v Commissioner for Police* (2008) 234 CLR 532, 591 [161] (Crennan J); *Forge v Australian Securities and Investment Commission* (2006) 228 CLR 45, 73–4 [57]ff (Gummow, Hayne and Crennan JJ).

47 *Kirk* (2010) 239 CLR 531, 566 [55], 578-9 [91]ff.

48 See, eg, the comments in Nick Gouliaditis, 'Privative Clauses: Epic Fail' (Paper presented at Gilbert & Tobin Centre for Public Law 2010 Constitutional Conference, Sydney, 19 February 2010).

49 *Kirk* (2010) 239 CLR 531, 566–7 [55], 580 [97]ff.

50 Ibid 566–7 [55], 581 [100].

51 Ibid 581 [100].

52 Ibid 581–2 [101]ff.

53 For further exploration of these issues, see Simon Young and Sarah Murray, 'An Elegant Convergence? The Constitutional Entrenchment of 'Jurisdictional Error' Review in Australia' *Oxford University Commonwealth Law Journal* Winter 2011/12 (forthcoming).

54 See more recently *Wainohu v New South Wales* (2011) 85 ALJR 746.

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

56 See, eg, *Director General NSW Department of Health v Industrial Relations Commission (NSW)* [2010] NSWCA 47.

57 See, eg, Chris Finn, 'Constitutionalising Supervisory Review at State Level: The End of Hickman?' (2010) 21 *Public Law Review* 92, 103; Chief Justice Marilyn Warren, 'The Dog That Regained its Bark: A New Era of Administrative Justice in the Australian States' (Speech delivered to the Australian Institute of Administrative Law Conference, Sydney, 23 July 2010) 15, Chief Justice James Spigelman, 'The Centrality of Jurisdictional Error' (2010) 21 *Public Law Review* 77, 82.

58 See particularly Nick Gouliaditis, 'Privative Clauses: Epic Fail' (Paper presented at Gilbert & Tobin Centre for Public Law 2010 Constitutional Law Conference, Sydney, 19 February 2010); cf Mark Aronson, 'Commentary on "The Entrenched Minimum Provision of Judicial Review and the Rule of Law" by Leighton McDonald' (2010) 21 *Public Law Review* 14.

59 See additionally Chris Finn, 'Constitutionalising Supervisory Review at State Level: The End of Hickman?' (2010) 21 *Public Law Review* 92; Chief Justice James Spigelman, 'The Centrality of Jurisdictional Error' (2010) 21 *Public Law Review* 77.

60 See, eg, *Re Minister for Immigration and Multicultural Affairs; Ex Parte Applicant S20/2002* (2003) 77 ALJR 1165; *Minister for Immigration and Multicultural and Indigenous Affairs v SGLB* (2004) 78 ALJR 992; *SAAP v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 228 CLR 294; *NAIS v Minister for Immigration and Indigenous Affairs* (2005) 228 CLR 470; *Minister for Immigration and Citizenship v SZIZO* (2009) 238 CLR 627.

61 See *Kirk v Industrial Relations Commission of New South Wales* [2008] NSWCA 156.

62 *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, especially 504 [69], 506–7 [76]–[78] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).

63 One consequence of *Plaintiff M61/2010E v Commonwealth of Australia* (2010) 272 ALR 14 has already been a glut of applications in the Federal Magistrates Court for judicial review of recommendations of independent merits reviewers that asylum seekers not be recognised by the Minister for Immigration and Citizenship as people to whom Australia has protection obligations.

64 Under s 486I of the *Migration Act 1958* (Cth) lawyers are obliged to certify in court proceedings in relation to a "migration decision", that there are reasonable grounds for believing that the litigation has a reasonable prospect of success. In the absence of such certification, a federal court must refuse to accept for filing a document commencing such litigation. (See also the forms approved under Rule 31.22(1) of the *Federal Court Rules 2011* and Rule 44.05(1) of the *Federal Magistrates Court Rules 2001*).

65 (1999) 197 CLR 611, 651–7 [131]–[146].

66 (2003) 198 ALR 59, 61.

67 (2004) –207 ALR 12, 20.

68 Approximately a dozen cases are collected at footnote 84 in *SZMDS* in the joint judgment of Crennan and Bell JJ: 240 CLR 611, 638–639[103].

69 Transcript of Proceedings, *Minister for Immigration and Citizenship v SZMDS* [2009] HCATrans 183 (31 July 2009).

70 A criterion under s 36(2)(a) of the *Migration Act* is if the Minister is satisfied that Australia has protection obligations under the Refugees Convention. That Convention, as amended, applies to *inter alia*, a "person who owing to a well-founded fear of being persecuted for reasons of … membership of a particular social group".

71 Since *Chan v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379, 389, 396–397, 406, 413, 429 and *Minister for Immigration and Ethnic Affairs v Guo* (1997) 191 CLR 559, 571–572, 596 the High Court has accepted it as well settled that the requirement that the "fear" be "well-founded" adds an objective requirement to the examination of the facts and that this examination is not confined to those facts which formed the basis of the fear experienced by the particular applicant: see most recently *SZATV v Minister for Immigration and Citizenship* (2007) 233 CLR 18, 25 [18], 49 [105]; cf41–2 [78].

72 *SZMDS v Minister for Immigration and Citizenship* (2009) 107 ALD 361, 370–1 [29]–[30].

73 Ibid 370[26] (emphasis added).

74 Ibid 107 ALD 361, 370 [27] (emphasis added).

75 *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611.

76 *Re Minister for Immigration and Multicultural Affairs; Ex Parte Applicant S20/2002* (2003) 77 ALJR 1165.

77 Bradley Selway, 'The Principle Behind Common Law Judicial Review of Administrative Action – the Search Continues' (2002) 30 *Federal Law Review* 217, 234.

78 (2003) 211 CLR 476, 508 [83].

79 (1990) 170 CLR 1, 35–36.

80 (1977) AC 1014, 1047.

81 (1944) 69 CLR 407 at 432 ('*Hetton Bellbird*').

82 *Hetton Bellbird* (1944) 69 CLR 407, 432 (Latham CJ), quoted in *SZMDS* (2010) 240 CLR 611, 644–5 [122] (Crennan and Bell JJ), see also 620 [23] (Gummow ACJ and Kiefel J).

83 (1949) 78 CLR 353. .

84 Ibid 360, quoted in *SZMDS* (2010) 240 CLR 611, 639 [104] (Crennan and Bell JJ).

85 *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611.

86 *Minister for Immigration and Multicultural Affairs v SGLB* (2004) 207 ALR 12, 21 (Gummow and Hayne JJ). quoted in *SZMDS* (2010) 240 CLR 611, 625 [40] (Gummow ACJ and Kiefel J).

87 *SZMDS* (2010) 40 CLR 611, 625 [40] (Gummow ACJ and Kiefel J).

88 (1996) 185 CLR 259, 277.

89 *SZMDS* (2010) 40 CLR 611, 625 [42].

90 *R v Secretary of State for Home Development; ex parte Onibiyo* [1996] QB 768,785 (Sir Thomas Bingham MR).

91 William Wade and CF Forsyth, *Administrative Law*, (Oxford University Press, 10th ed, 2009) 312.

92 *SZMDS* (2010) 240 CLR 611,647–8 [130].

93 Examples include: *SZORJ v Minister for Immigration and Citizenship* [2011] FCA 251, [49]–[50] (Cowdroy J); *Kimberley Clark Australia Pty Ltd v Minister for Home Affairs* [2011] FCA 225,[92]–[95] (Edmonds J); *BZAAF v Minister for Immigration and Citizenship* [2011] FCA 480, [14] (Logan J); *WZAOD v Minister for Immigration and Citizenship* [2011] FCA 1044, [60]–[64] (Gilmour J). In *Hardingham v Chief Executive Officer, Department for Child Protection* [2011] WASC 86, [80]–[88], EM Heenan J granted leave to appeal from a decision of the State Administrative Tribunal of Western Australia because the proposed grounds raised questions of law and were supported by real or significant argument. Those grounds included an assertion of illogical reasoning. However the grounds that were established so as to warrant the appeal being allowed did not include any conclusion that there had been illogical or irrational reasoning.

94 (2010) 187 FCR 362 ('*SZLSP*').

95 Ibid 384 [72].

96 (2001) 206 CLR 323.

97 *SZLSP* (2010) 187 FCR 362, 388–9 [91], 390 [98].

98 Ibid 394 [107]–[108], 396 [114]–[116].

99 (2010) 189 FCR 577 ('*SZOCT*').

100 Namely that jurisdictional error is established if the RRT's conclusion of purported "satisfaction" pursuant to s 65 of the *Migration Act* is "one at which no rational or logical decision-maker could arrive on the same evidence": *SZMDS* (2010) 240 CLR 611, 647–8 [130]–[131].

101 *SZOCT* (2010) 189 FCR 577,595–6 [64]–[68].

102 Ibid 580–1 [19]–[23].

103 [2011] FCAFC 76.

104 Ibid, [135]–[136].

105 (1999) 46 NSWLR 55, 63–4 [37]ff.

106 Cf *Project Blue Sky v Australian Broadcasting Authority* (1998) 194 CLR 355, [78].

107 (2000) 199 CLR 135 ('*City of Enfield*').

108 [2011] HCA 32.

109 And essentially endorsed in the joint judgment of Gummow, Hayne, Crennan and Bell JJ in *Plaintiff M70* [2011] HCA 32, [107].

110 The range of indicators relied upon by the Applicant as evidencing that characterisation of the statutory criteria was identified by French CJ: *Plaintiff M70* [2011] HCA 32*,* [56].

111 Ibid [107]–[109].

112 Ibid [57]–[59]. French CJ did conclude, however, that the executive function conferred by s 198A was required to be exercised according to law, meaning *inter alia* that the Minister had to properly conceive and correctly construe the power that he purported to invoke. On the material before the High Court on judicial review that had not occurred, so the purported declaration under s 198A was infected by jurisdictional error and of no effect in law accordingly: ibid [58]–[68].

113 *Chief Executive Officer of Customs v El Hajje* (2005) 224 CLR 159, 171[28]; [2005] HCA 35 applying *R v Patterson; Ex parte Taylor* (2001) 207 CLR 391, 473-474 [248]-[252]. See further Richard Hooker, "'Necessity' in the Eye of the Beholder: Leaving Constitutional Questions Undecided" (2006) 17 PLR 177.

114 See, e.g, by way of recent illustration, *New South Wales v The Commonwealth (Work Choices Case)* (2006) 229 CLR 1, 161 [355]; *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 234 CLR 532, 553 [11]; *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501, 519 [46].

115 *Migration Act 1958* (Cth), s 5(1).

116 *Migration Act 1958* (Cth), s 5(1), s 14.

117 *Migration Act 1958* (Cth), s 5(1). Defined to mean 'a person who entered Australia at an excised offshore place after the excision time for that offshore place and...became an unlawful non-citizen because of that entry'.

118 *Migration Act 1958* (Cth), s 65.

119 *Migration Act 1958* (Cth), s 46A(3), s 195A(5).

120 *Migration Act 1958* (Cth), s 46A(7), s 195A(4).

121 *Convention Relating to the Status of Refugees*, opened for signature 28 July 1951, 189 United Nations, Treaty Series 150 (entered into force 22 April 1954) ('*Refugee Convention*').

122 *Protocol Relating to the Status of Refugees*, opened for signature 16 December 1966, 606 UNTS 267 (entered into force 4 October 1967).

123 *Refugee Convention*, art 33. See also, generally, James C Hathaway, *The Rights of Refugees under International Law* (Cambridge University Press, 2005), 307–335.

124 *M61* [2010] HCA 41, [42].

125 Ibid [3].

126 Ibid.

127 Ibid [16].

128 *Bodruddaza v Minister for Immigration and Multicultural Affairs* (2007) 228 CLR 651, 668–9 [46] (Gleeson CJ, Gummow, Kirby, Hayne, Heydon and Crennan JJ).

129 Ibid.

130 *M61*[2010] HCA 41, [54].

131 Ibid [57].

132 Ibid [4].

133 Ibid [21].

134 Ibid [23].

135 In illustrating this conclusion, the Court provided an illuminating summation of the many changes made to the Act since 2001 and as a result of the so called 'Pacific Strategy': see *M61* [2010] HCA 41*,* [29]–[36]. For a similar useful history, see Mary Crock and Daniel Ghezelbash 'Due Process and Rule of Law as Human Rights: The High Court and the "Offshore" Processing of Asylum Seekers' (2011) 18 *Australian Journal of Administrative Law* 101, 104–106. For a concise history spanning from Federation to the present day, see: Stephen Gageler 'Impact of Migration Law on the Development of Australian Administrative Law' (2010) 17 *Australian Journal of Administrative Law* 92.

136 *M61* [2010] HCA 41, [15].

137 Ibid [16].

138 Ibid [66].

139 Ibid [65].

140 Ibid [66].

141 Ibid [71].

142 Ibid [70].

143 *Carltona Ltd v Commissioners of Works* [1943] 2 All ER 560.

144 *M61* [2010] HCA 41, [69].

145 Ibid [74].

146 (1985) 159 CLR 550, 611 (Brennan J); cf 582 (Mason J).

147 *M61* [2010] HCA 41, [76].

148 Ibid [75].

149 (1990) 170 CLR 596, 598 (Mason CJ, Deane and McHugh JJ).

150 For an enlightening perspective on the link between legitimate expectations and the doctrinal question of whether natural justice is sustained by the common law or a product of statutory construction see: Stephen Gageler 'Legitimate Expectation: Comment on the Article by the Hon Sir Anthony Mason AC KBE' (2005) 12 *Australian Journal of Administrative Law* 111.

151 *M61* [2010] HCA 41, [8].

152 Ibid [91], [93]–[96].

153 Ibid [87]–[88], [97]. Despite this result, it seems that some *Departmental materials* continue to misleadingly describe the process as 'non-statutory' and as being 'not bound by the *Migration Act 1958'. See:* http://www.immi.gov.au/media/fact-sheets/75processing-unlawful-boat-arrivals.htm#d.

154 (2003) 216 CLR 277.

155 *M61* [2010] HCA 41, [99].

156 Ibid [100], citing *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicants S134/2002* (2003) 211 CLR 441, 461 [48].

157 See the discussion of this point in, for example, *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564, 580–581 (Mason CJ, Dawson, Toohey, and Gaudron JJ), 595 (Brennan J). The outcomes of the RSA and IMR process are not mandatory relevant considerations for the Minister when exercising the power to lift the bar: see *M61* [2010] HCA 41, [100].

158 See Mary Crock and Daniel Ghezelbash 'Due Process and Rule of Law as Human Rights: The High Court and the "Offshore" Processing of Asylum Seekers' (2011) 18 *Australian Journal of Administrative Law* 101, 105–106.

159 The consideration of this section by the court in *M61* is dealt with above.

160 The provision in full provides that the Minister may: '(a) declare in writing that a specified country: (i) provides access, for persons seeking asylum, to effective procedures for assessing their need for

protection; and (ii) provides protection for persons seeking asylum, pending determination of their refugee status; and (iii) provides protection to persons who are given refugee status, pending their voluntary repatriation to their country of origin or resettlement in another country; and (iv) meets relevant human rights standards in providing that protection; and (b) in writing, revoke a declaration made under paragraph (a).'

161 *Plaintiff M70* [2011] HCA 32, [2] (citations omitted).

162 See, eg, ,ibid [76].

163 French CJ and Kiefel J delivered separate judgments, and Heydon J dissented.

164 Cf *Plaintiff M70* [2011] HCA 32, [49] (French CJ).

165 Ibid [90]–[91], referring in part to statements in *M61/2010E v Commonwealth* [2010] HCA 41.

166 Ibid [94], [98].

167 Ibid [94]–[95].

168 Ibid [96]–[97].

169 Ibid [54]–[55]. Cf also [237]ff (Kiefel J).

170 Ibid [103].

171 Ibid [106].

172 See generally the earlier discussion of the decision in *SZMDS* (2010) 240 CLR 611.

173 *Plaintiff* M70 [2011] HCA 32, [109].

174 Ibid [116]–[118].

175 Ibid [119].

176 See, eg, *Al-Zafiry v Minister for Immigration and Multicultural Affairs* [1999] FCA 443; *Patto v Minister for Immigration and Multicultural Affairs* [2000] FCA 1554. Contrast the view of Heydon J: *Plaintiff M70*, [165]ff.

177 *Plaintiff M70* [2011] HCA 32,[122]ff. See further the discussion of the Howard Government's Nauru arrangements below.

178 Cf ibid [240]ff (Kiefel J).

179 Ibid [61]ff.

180 Ibid [66]. His Honour was referring particularly to the offences created by the Malaysian *Immigration Act 1959*, the status of 'exemption orders' thereunder, and the consequent risks to transferees (see also [30]ff).

181 Ibid [67].

182 Ibid [142]ff.

183 Ibid [146].

184 Ibid [69], [257]. Contrast Heydon J.

185 See also the discussion of this history in the judgment of French CJ: ibid [13]ff.

186 Ibid [13].

187 Ibid [15]–[126].

188 SG No 21 of 2011: http://www.minister.immi.gov.au/media/cb/2011/cb171319.htm.

189 Cf *Plaintiff M70* [2011] HCA 32, [255] (Kiefel J); contrast [161]ff (Heydon J).

190 Ibid [124].

191 See generally the earlier discussion of the decision in *SZMDS* (2010) 240 CLR 611.

192 *Plaintiff M70* [2011] HCA 32, [135].

193 Ibid [56]ff.

194 *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323; cf *Craig v South Australia* (1995) 184 CLR 163.

195 *Plaintiff M70* [2011] HCA 32, [58]ff.

196 Ibid [114].

197 Cf the alternative arguments put forward by the plaintiffs: see, eg ibid [16] (French CJ).

198 See esp *Minister for Immigration and Multicultural Affairs v Lat* (2006) 151 FCR 214 ('*Lay Lat*').

199 See, eg, *South Australia v Totani* (2010) 242 CLR 1, especially 43 [62] (French CJ); *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319, especially 354–5 [55] (French CJ), 366–7 [97]–[98] (Gummow and Bell JJ).

200 See *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1 ('*Lam*').

FUTURE DIRECTIONS IN ADMINISTRATIVE LAW
Part 1

Justice Garry Downes*

This is the fifth time I have addressed the graveyard session of the biennial Canberra Conference of the Institute, on Future Directions. You can follow my thinking as it has developed since 2003 on the Administrative Appeals Tribunal Website.

With the papers from this Conference you will find my paper on Future Directions. It deals with the way the Administrative Appeals Tribunal is handling its present and future directions. It refers to some of its present and proposed innovations. I will not, however, this afternoon, be directly covering that ground. What I want to do is to talk about three specific matters in the context of future directions. If there is a common theme in what I will be saying it is to do with the exercise of discretions in administrative decision-making.

Technology

The first matter will, I apprehend, be one of the most significant influences on government administration in the foreseeable future – namely the use of technology as an aid to decision-making.

The Administrative Review Council recognised the importance of the issue in 2004 when it released its report on Automated Decision-Making. It recently resolved that the report should be brought up to date.

What the future holds is increasing use of automated decision-making techniques. To date, the process has halted at the exercise of discretion. That has been the step too far. Yet, discretionary decision-making is ultimately no more than isolating factors, evaluating each of them and drawing a conclusion after a process of final evaluation.

This is exactly what computers are very good at. There is no process of balancing considerations and selecting a result which is not, theoretically at least, capable of being undertaken by a computer programme. So I think that we should prepare for automated decision-making to intrude, in the future, into many areas of administration.

The difficult issues are, first, ensuring that the relevant computer program correctly identifies and properly processes the necessary components and, secondly, making sure that the values entered into the computer correctly record the facts of the individual case. These problems are present now. They are amongst the issues addressed by the Administrative Review Council. The consequences of failure at any step will become more serious, however, as the significance of the subject matter of automated decisions is increased.

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* *The Hon. Justice Garry Downes AM is President of the Administrative Appeals Tribunal. This is his oral presentation made at the AIAL 2011 National Administrative Law Conference, Canberra, 22 July 2011.*

Put simply, the questions are whether the computer is correctly programmed and whether the correct data is entered. Both of these requirements create difficult problems at both a theoretical and practical level. How are the factors and the weight they should be accorded, to be determined? How can we be sure that the program correctly reflects the determination, once made? What method is to be employed to ensure that the correct data is entered? This is easy if the decision-maker keeps a worksheet, but worksheets do not go with computers. Indeed, one of their virtues is said to be the obviation of the need for paper records.

What we must do is devise methods of auditing and checking both decision-making programs and the data that is entered up into them. Julian Disney gave an example at this Conference last year of an agency program with a pop up menu which gave the opposite effect to data entered, to that which the legislation required. How is a complicated social security calculation to be verified in a merits review application if the only material available is the result provided by a computer?

For the future, however, more difficult problems may arise. What if there was a proposal that criminal deportation decisions should be largely determined by an automated process. There would be a program which determined whether the resident failed the character test. That might not be impossible. The range and nature of offences could be dealt with by a program. But what if the program went further and sought to undertake the balancing process – sought to identify and assign values to matters tending for and against deportation – matters such as family ties, other links with Australia and so on? This kind of system may even be less complicated and may have less difficulty in assigning values to factors than the economic computer models which are now regularly used by the Treasury and so-called economic think tanks. Such a system, if it could be developed, would not be all bad. It would have the great benefit of consistency, provided it could also be fair and just.

In coming years we should be alert to the possibility of advanced automative decision-making developing, to ensure that proposals are properly scrutinised. After all, there will not be a sudden step which automatically signals a warning. Such systems will develop incrementally and slowly. The guidelines or directions issued in criminal deportation cases, to which I will refer shortly, may be an early part of such a process.

Participation

The second matter I want to mention takes up one of the themes of the conference – participation. That is an essential quality which should be present in all merits review – participation in the sense of entitlement to seek review and participation in the sense of entitlement to take part in the process.

Over many years the Tribunal has developed a sophisticated system to deal with the second sense. It is dealt with in the written paper. There are two very different aspects of the first sense which will occupy the Administrative Appeals Tribunal in the immediate future. They are both associated with the Government's commitment to advancing regional Australia.

The Tribunal has an extensive outreach program to applicants, but it does not have a program to make its facilities known to potential claimants. To date that has been achieved by notification of the right of review as part of notification of the reviewable decision.

It is noticeable fact, however, that not many applications are made to the Tribunal by indigenous Australians. The numbers are less than the population would suggest. The Tribunal has recently decided, therefore, to institute a program to seek to remedy this situation. The process is only just beginning, but will develop in coming months. Hopefully, the result will be a further participation in the resources of the Tribunal by indigenous Australians in the future.

The other advance in participation relates to a new jurisdiction which is to be given to the Tribunal. This is a domestic jurisdiction relating to Norfolk Island. It will be like the jurisdiction the Tribunal used to have in the Australian Capital Territory. The legislation has been passed, but enabling regulations still have to be promulgated. The Tribunal, along with the Ombudsman and the Information Commissioner, will become part of the Government's program, supported by the Norfolk Island Government, of introducing modernising reforms to the process of government and administration on the island.

Community standards

The final matter I want to deal with is a very important matter going to the essence of merits review which may begin to occupy us more in the future.

There have recently been a number of newspaper articles and at least one television program which have been critical of decisions of the Tribunal. They focus primarily on criminal deportation cases. You know the kind of article I mean. The headline reads: "Tribunal overrules Minister and allows pedophile rapist murderer to stay in Australia".

The problem with this kind of reporting is that it focuses almost exclusively, on one, *albeit* the most important, of the many factors that need to be identified and assessed in accordance with the legislation and the Minister's guidelines or directions. The report generally highlights the offence, but not the resident's association with Australia.

The result is, as it is with criminal sentencing, that an unfair impression can be given of cases which are unexceptionable when read in full. It is unfortunate that some media appear prepared to present a false view of decision-making in the Tribunal when the truth is that Tribunal decisions are fair and balanced and ultimately underpin the substantial reputation which the Tribunal has in the community.

Since the 1970s when Bowen CJ and Deane J coined it in *Drake v Minister for Immigration and Ethnic Affairs* (1979) 2 ALD 60 [at 68], the phrase "correct or preferable decision" has regularly been used to describe decision-making in the Tribunal. Correct, if there is only one decision. Preferable, if there is more than one possible result; in other words if the decision-maker has a discretion. This, of course, is what makes the Tribunal and merits review different. It is what sets the process apart from curial adjudication.

It must be recognised, however, that the difference implies that the administrative decision-maker undertaking merits review has greater power than the judge undertaking judicial review. Moreover, the difference means that the merits reviewer will be involved with policy and value judgments which are generally not part of the roles of courts. This extra power is less directed than judicial decision-making and may even be undirected. It is accordingly to be seen as an important trust conferred on Tribunal members.

It is surprising, therefore, that little has been written about the meaning and content of the concept of the preferable decision. Plainly it implies that the decision will be that alternative which best achieves individual justice in the particular case, in accordance with the legislation, and which is generally consistent with policy. But what yardstick should inform the evaluation which leads to the decision.

Sir Anthony Mason, writing ex judicially, has said that one of the characteristics of merits review is to place an emphasis on individual justice, at the expense of public policy, that was not necessarily present in departmental and agency decision-making. (A. Mason *Administrative Review: The experience of the First Twelve Years* (1989) 18 Fed L Res 122 at 130). In saying this he was building on Sir Gerard Brennan's early decision in the Tribunal

that although the Tribunal would give significant weight to Government policy, it was not bound by it (*Re Drake v Minister for Immigration and Ethnic Affairs (No. 2)* (1979) 2 ALD 634 at 635). More than two decades later it may no longer be so true to say that individual justice plays a more significant role in Tribunal decision-making, than it does in departmental and agency decision-making, because the body of principles now established by the Federal Court and the Tribunal has largely been taken up within government.

Yet these matters still do not always provide a touchstone or test against which the preferable decision can be measured. In many cases the preferable decision will be capable of being determined solely by reference to statutory criteria. But this will not always be the case. A value judgment, pure and simple, will be called for. In these cases the touchstone cannot be the personal values of the decision-maker, however hard it is for decision-makers to ignore personal beliefs and prejudices. The touchstone must be community standards or values. They must be the yardstick for evaluation. It is surprising, however, that this is rarely referred to. Perhaps it is because it is obvious. But it remains surprising to me that some reference to it does not appear in decisions.

The question I wish to raise today is whether for the future Tribunals should begin to address directly, when coming to the final assessment of what is the preferable decision, whether that assessment is based on the decision-makers belief of what the community standard is. It is interesting, to take the case of criminal deportations, that the expectations of the Australian community were a standard under previous directions of the Minister, but are no longer included in the present direction. Even so, the former direction was addressing a factor for consideration and not an overall assessment of all the factors.

The problem with this whole area is the problem of ascertaining what community standards are. This cannot be the subject of evidence. It is something that is sometimes said, of judges, to be *in gremio judicis* (in the judge's bosom). So, the problem of identifying community standards is probably the reason it generally is left unaddressed. It is too difficult. Nevertheless it is, in my opinion, important for decision-makers to remind themselves that when they are administering individual justice, when they are making the preferable decision, they are doing so in the context of community standards, not personal standards, and that when community standards differ from the decision-makers personal standards the former must prevail. However difficult it may be, it is for decision-makers to do their best, from their experience and exposure to the community, to identify and apply what they find to be its standards. This will not adopt the standards of the popular press, but it should take into account genuine community concerns as well as broader considerations of fairness and justice.

If Tribunal members explain, in appropriate cases, how their decisions reflect community standards then their decisions may be less likely to provoke newspaper criticism than if they leave this element to be assumed.

FUTURE DIRECTIONS IN ADMINISTRATIVE LAW
Part 2

Justice Garry Downes*

The theme of this 2011 AIAL conference is 'democracy, participation and administrative law' and this plenary session addresses the topic of 'future directions'. My topic is two trends in government service provision that are influencing the institutions of administrative law.

The first is the trend to enhance the accessibility of government services. The second is the need to provide government services more efficiently while maintaining the quality of those services.

I will discuss the impact of these trends on the Administrative Appeals Tribunal, because the Tribunal is the institution with which I am the most familiar. I have little doubt that other institutions are also dealing with these issues.

Increasing public access and participation

A trend that will be apparent to many who work in government and in the field of administrative law is that public expectations are increasing in relation to the ways in which, and the ease with which, the public should be able to access government services and information. Government departments and agencies are exploring how to improve access in various ways.

Regional, indigenous and multicultural Australia

Historically, certain sectors of society have been more restricted in their ability to access government and its services. Changes are occurring in this area with a view to making government more accessible to more people.

People living in regional areas of Australia cannot easily attend the offices of government institutions, such as the Tribunal, which are based in capital cities. The Tribunal conducts many of its alternative dispute resolution processes and some hearings by telephone. It also travels to regional areas to conduct hearings.

Improvements in telecommunications and technology, including the roll-out of the National Broadband Network, offer additional options for communicating with people in regional areas and, in particular, will help to facilitate more face-to-face communication. I expect that, over time, web-based conferencing will come to be used extensively by the Tribunal, facilitated by faster data transfer speeds.

The *Territories Law Reform Act 2011* has recently implemented arrangements for the Tribunal's jurisdiction to be extended to decisions made under Norfolk Island enactments. Norfolk Island residents will have access to the administrative law mechanisms that are

* *The Hon. Justice Garry Downes AM is President of the Administrative Appeals Tribunal. This paper is an extension of the oral presentation made at the AIAL 2011 National Administrative Law Conference, Canberra, 22 July 2011.*

available to residents on the mainland. The Norfolk Island enactments which will be subject to review will be specified in regulations which are yet to be made. Developments in relation to the ways in which the Tribunal can deliver its services will assist the Tribunal to provide high quality review to Norfolk Island residents.

Indigenous Australians are another group who can experience difficulties accessing government services. The Tribunal has recently commenced a project to examine indigenous access to the Tribunal.

Access for people from diverse cultural and linguistic backgrounds has also been an area of focus. The Tribunal has had a policy in place for many years that it will engage an interpreter where a party requires this assistance. The cost is borne by the Tribunal. The Tribunal has recently re-published its brochures and fact sheets in a range of languages other than English.

Simplification

Access to government services is facilitated by an understanding of government processes. Government is striving to make its processes more transparent and its decisions more understandable to the people affected by those decisions. It does this, in part, through encouraging the use of plain language.

In the court and tribunal context, simplifying processes increases access for self-represented persons. This is particularly important for tribunals with a statutory objective which includes the need to provide a mechanism of review that is economical and informal.

A commitment to simple processes manifests itself in a number of ways. While an application to the Administrative Appeals Tribunal must be in writing, there is no requirement to complete a form. A letter will suffice.

At an early point in the review process, the Tribunal conducts an outreach call to a self-represented party to explain its processes and to facilitate their participation in the review. A conference, the first event in most cases, offers an informal environment for the parties to discuss the case, understand the issues, explore the possibility of agreed resolution and determine what will happen next. Hearings are modified to meet the needs of self-represented parties.

The Tribunal also offers training to its members in decision-writing which encourages the preparation of reasons for decision that are clear and to the point.

Another area where there has been an increase in complexity over time is judicial review of administrative decisions. The Administrative Review Council is currently conducting an inquiry into judicial review in Australia, part of which involves considering whether the system for review could be simplified.

Public consultation

The ARC's inquiry is an example of another way in which government seeks to promote engagement and participation – through public consultation.

The Tribunal works at a local and national level by meeting with stakeholders such as government agencies and applicant advocacy groups in liaison meetings and other forums. We use these consultations to help identify ways we can improve our operations in different jurisdictions.

Open government

Members of the public are also increasingly aware of their rights to access government information. One of the most significant recent changes to the Australian administrative law landscape has been the amendments to the *Freedom of Information Act 1982* (Cth), aimed at promoting a culture of openness in government. The amendments changed the objects of that Act and the exemptions under it.

In addition to those changes, amendments which came into force in May introduced the information publication scheme, requiring government agencies to proactively publish information. The Tribunal's contribution to the Information Publication Scheme can be seen on our website.

Publishing more public sector information increases the ability of interested persons to scrutinise and comment on that information. It enhances participation and the functioning of our democratic system of government, key themes of this conference.

Increasing quality and efficiency

Government departments and agencies, including courts and tribunals, have operated for some time in a tight fiscal environment. A range of mechanisms such as the efficiency dividend are used to encourage agencies to undertake their work more efficiently.

This environment challenges institutions such as the Tribunal to work smarter: identifying ways in which its services can be provided more efficiently, without compromising on the fairness and justice of the review process, key elements of the Tribunal's statutory objective.

Appropriate dispute resolution

The Attorney-General's Department's *2009 Access to Justice Report* emphasised that disputes should be resolved at the appropriate level, and that excessive amounts should not be spent on cases where it is not warranted. Appropriate use of resources means that greater access can be provided to more people.

As a generalist tribunal, the Administrative Appeals Tribunal has learned to be flexible, adjusting its procedures to suit each particular case. A hearing with a self-represented social security applicant looks very different from a multi-million dollar taxation hearing with counsel on both sides.

Making the best use of alternative dispute resolution is an important part of this drive for the appropriate use of resources in resolving disputes.

ADR is a core component of the work undertaken by the Tribunal and is one of our greatest successes. Over the years, the trend has been that only around 20 per cent of applications proceed to a hearing and determination by the Tribunal. The remaining 80 per cent are finalised without a decision on the merits, many resolved by agreement of the parties or withdrawn. Preliminary calculations have these figures at around 19 per cent and 81 per cent for the 2010-11 reporting year.

ADR processes can increase people's sense of engagement and participation, with individuals feeling they have more of a stake in and influence over the decision than is the norm in adversarial litigation.

The hearing and determination of cases remains critical to the development of jurisprudence and the role of the Tribunal in guiding administrative decision-makers on the proper

application of the law. ADR can assist to ensure that hearings are focused on the genuine issues in dispute.

Quality of service

The Tribunal has recently undertaken a number of initiatives aimed at enhancing the quality of service we provide.

We are in the process of developing a professional development program for our conference registrars, to complement the program that is in place for Tribunal members. It is based on a framework of competencies and comprises a coordinated program of induction, mentoring, peer review, appraisal and continuing professional development.

We have also developed a Practice Manual relating to our major jurisdictions which will be a valuable resource for members and registrars at the Tribunal. The Practice Manual provides a readily accessible overview of law and practice in areas such as practice and procedure, immigration, social security, tax, veterans' affairs and workers' compensation. It includes references to legislation and policy, case law and other resources.

I recently approved a proposal to restructure the Tribunal's principal registry, which included integrating our legal, policy, research and library functions. These areas of the Tribunal are responsible for compiling and disseminating information used by members and staff in their work. We hope to enhance the coordination of these efforts and thereby harness the extensive information that is available, while also allowing Tribunal staff to develop a wider range of skills.

Technology

The rapid advance of technological innovation also brings great potential for increasing efficiency and reducing costs.

Electronic communication is now the norm for many people, and will be further facilitated by improved channels of communication. Courts and tribunals here and around the world are offering electronic lodgement options. For some of these institutions, electronic files have become the official record. The days of firms wheeling trolleys loaded with documents through the city may soon be over.

Digitisation of information has many advantages, reducing costs in printing, copying, storing and transporting information. In addition to saving money, there are savings for the environment. There is also an enhanced ability to search for relevant information in electronic documents.

Computers can also be used to assist in decision-making. This is occurring more and more at all levels of government. Many decisions relating to social security payments and veterans' entitlements are computer assisted. Immigration decisions are frequently computer aided. More and more decisions are effectively made by a computer acting on data.

While this technology can greatly increase efficiency, it also has its dangers. Some of these were highlighted in the Administrative Review Council's report No 46 *Automated Assistance in Administrative Decision-making* (2004).

The Council's report cautioned against the use of automated systems in decision-making when a discretion is involved. Discretionary decision-making is applying a value judgment, which involves giving weight to complex factors.

Even in less discretionary areas, problems can arise, for example, where the computer is incorrectly programmed. The likelihood of this occurring increases where the question posed by a statute or regulation is complex and involves multiple layers of alternatives. There may be computer programmers who have a good understanding of statutory construction, but I do not think there are many. Difficult problems arise when instructions are being given to the person writing the program. Even more difficult problems arise in later verifying that the program, as written, correctly records the statutory rules.

This major issue is matched by an operational one – namely, ensuring correct data entry. That may seem simple and computers can be programmed to put up a screen to enable a check, but there is nothing like doing a calculation yourself to know if the figures are correct. The more significant problem is checking data after it has been entered and verified and the calculation made. This is, of course, relevant to review, both internal and external. The absence of all the entries on paper makes verification difficult. Systems are required to enable verification that data has been entered correctly and to reproduce records of the processing of the data.

It is inevitable that the use of computers in government decision-making will increase, but we must ensure that it does not compromise good decision-making or impede fairness or transparency.

In this environment of rapid technological change, it is important to try to think ahead as much as possible. The Tribunal has developed an e-services strategy – a comprehensive program to guide the Tribunal towards a suite of integrated technology systems and online services consistent with our objective of providing fair, just, economical and informal review.

The program is currently in its foundation phase and I am very pleased with the direction that we are heading. The kinds of things contemplated in the program include electronic forms, electronic lodgement of documents and an online search facility for information about cases before the Tribunal.

The Tribunal reviews decisions from many parts of the Australian Government. Whole-of-government cooperation on the move to greater use of electronic documents will maximise benefits to government and citizens.

Conclusion

The trend to improving public access to services and participation will undoubtedly continue into the future. It is what people expect from government in our democratic society. Similarly, people expect government to be increasingly more efficient and to provide the best levels of service, and this trend will also continue into the future.

These trends provide challenges for government, including administrative law institutions. These are, however, challenges that institutions like the Tribunal will meet.

SPECULATION ON THE FUTURE OF ADMINISTRATIVE LAW

Elizabeth Kelly*

The current Administrative Review Council ('ARC') consultation on judicial review is about taking stock of how Commonwealth law stands in relation to judicial review and working out how it should be shaped for the future. What has changed since the legislative innovations of the late 1970s and early 1980s? With the rise in importance of the Constitutional writs as a means to achieve judicial review of administrative decisions, what role is there for legislation and what should it be seeking to achieve?

There are some themes relating to judicial review that will be important considerations for policy makers looking towards the future.

Judicial review is central to maintenance of the rule of law. It is the means by which the judiciary ensures that executive action remains within lawful boundaries. A quote from the judgment of Brennan J in *Church of Scientology v Woodward* is particularly relevant for administrative decision makers:

> Judicial review is neither more nor less than the enforcement of the rule of law over executive action; it is the means by which executive action is prevented from exceeding the powers and functions assigned to the executive by law and the interests of the individual are protected accordingly.[1]

A great deal of Executive power is exercised by administrative decision makers. Some are significant decisions, made at a high level after consultation and discussion; others are relatively minor, made in a routine way at a junior level. For all these decisions, judicial review exists to ensure that decision makers do not do things that are beyond their power – that they do not affect individuals in a way that they do not have power to do.

In looking to the future we need to consider how best judicial review can ensure that people making administrative decisions on behalf of the Commonwealth take action that is lawful because it does not go beyond its lawful limits. One way to optimise the benefits of judicial review is to ensure that statutory rights mesh effectively with rights to judicial review under the *Constitution* in a way that ensures accessibility.

Statements of reasons

One of the innovations that the *Administrative Decisions (Judicial Review) Act 1977* (Cth) ('*ADJR Act*') provided for administrative justice in Australia was a statutory right to a statement of reasons for an administrative decision. At common law there is no general duty to give reasons for a decision.

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* *Elizabeth Kelly is Deputy Secretary, Attorney-General's Department.* *This paper was presented at the AIAL 2011 National Forum, Canberra, 22 July 2011. The views expressed are her own and do not represent departmental views or policy.*

The intersection between statements of reasons and judicial review is canvassed in the Administrative Review Council discussion paper. This is an area in which I think there is potential to enhance administrative decision making and to improve access to justice.

Section 13 of the *ADJR Act* provides that a statement of reasons must be given on request to a person who has the right to apply for judicial review of a decision by the Federal Court or the Federal Magistrates Court.

Section 28 of the *Administrative Appeals Tribunal Act 1975* (Cth) ('*AAT Act*') provides that a statement of reasons must be given on request to a person who has a right to apply for merits review of a decision by the AAT.

Other statutes include a requirement for decision makers to provide a statement of reasons in relation to specific discretionary powers. As a result, many, though not all, Commonwealth administrative decisions have an associated right to request a statement of reasons.

Sir Anthony Mason noted, in his review of the first 12 years of the *ADJR Act*, that, '...the absence of a general duty to give reasons meant that the administrator could, and at times did, frustrate judicial review of a decision by refusing to give reasons.'[2] He went on to say, 'it is tempting to think that reasoned and principled administrative decisions are an indispensible element in a modern democracy.'[3]

Although there are notable limitations to the regime provided by section 13 of the *ADJR Act* and section 28 of the *AAT Act*, it is clear that these statutory rights to ask for reasons for a decision have brought about a change in the way Commonwealth government agencies approach administrative decision making. Agencies understand that they may be asked for reasons for a decision. Consequently, they have processes for recording them and sometimes for providing reasons for decisions at the same time as they are communicated to the person affected.

Mark Elliott in his recent article '*Has the Common Law Duty to Give Reasons Come of Age Yet?*'[4], explores arguments that a common law duty to give reasons should be part of the requirement for application of principles of good administration to support lawful decisions. He argues that if the law recognises duties to act fairly and reasonably in administrative decision-making, it should also recognise the duty to provide a contemporaneous record of the reasons why the decision maker reached the particular decision.

The view that a requirement to provide reasons supports and is part of good administrative decision-making practise is widely supported. For example: the ARC *Best Practise Guide 4 – Decision Making: Reasons* says, "Providing reasons for a decision should not be treated as an obligation that is separate from other principles of good decision making."[5]

An obligation to describe the reasoning process can ensure that decision makers think more carefully about their task. Irrelevant or unreasonable elements may also thereby become more obvious to the decision maker or to an internal quality assurance or review process.

So, an obligation to provide reasons is likely to lead to better primary decision making – which is one reason for it to be embraced by government and administrators. Better primary decision making leads to a reduced number of complaints and less review applications, with corresponding savings in resources.

Providing reasons also gives the person affected by the decision information to make a properly informed decision about whether to request review. Without knowing the basis for the decision, it is difficult to form a view about whether incorrect facts, irrelevant

considerations or a misunderstanding about the scope of the power available to the decision maker were involved.

It can avoid unnecessary challenges. As Woodward J said in *Ansett Transport Industries (Operations) Pty Ltd v Wraith*:

> … my view [is[that s 13(1) of the *Judicial Review Act* requires the decision-maker to explain his decision in a way which will enable a person aggrieved to say, in effect: "Even though I may not agree with it, I now understand why the decision went against me. I am now in a position to decide whether that decision has involved an unwarranted finding of fact, or an error of law, which is worth challenging.[6]

At a time when we are focussing on resolving disputes as early as possible with the lowest possible level of escalation, statements of reasons can be an important component in an agency's dispute management process, one purpose of which is likely to be reduction in the number of litigated disputes.[7]

With all these benefits to good administration, the question we need to ask is whether we should consider imposing a general statutory obligation to provide a statement of reasons for all administrative decisions. Would there be value in requiring decision makers to provide reasons regardless of whether review was possible under the *ADJR Act*, under the *AAT Act*, under a specific statutory provision or by way of the Constitutional writs?

Mark Elliott argues that a general duty to provide reasons is part of a process of fair decision making that enhances the quality of the decision making, supports the legitimacy of government and recognises the dignity of the individual affected.[8] He also suggests that the right to a statement of reasons should not be confined to those who are directly affected by the decision but should be extended to others who are indirectly affected or who have an interest in upholding the rule of law by ensuring that decision makers act only within the scope of their power.[9]

Using these arguments, would a general statutory right to reasons serve not only the practical aims of better primary decision making, reduction in unnecessary challenges and better informed dispute management but also the principled aims of strengthening the rule of law, enhancing the legitimacy of government action and improving access to justice?

Considered in this light, a general right to a statement of reasons is appropriately linked to judicial review. This is not in the sense that a right to reasons should only be available where judicial review is available – but in the sense that it is a mechanism for checking the potential for misuse of public power.

This might lead us to consider whether, as is canvassed in the ARC discussion paper, the provisions in section 13 of the *ADJR Act* should be widened to provide a more general right to reasons or whether the right should be located in a general statute, such as the *Acts Interpretation Act 1901* (Cth), or the *Freedom of Information Act 1982* (Cth). At the same time we might consider whether the right to request a statement of reasons for a decision should be open to people who are not directly affected. Perhaps, as for FOI requests, entitlement to transparency on government decision making should be available to all citizens.

Proportionate use of resources

If a person is entitled to know the reasons for a decision that affects them, should they also be entitled to know those reasons at the same time as they find out about the decision? All the grounds supporting a general right to a statement of reasons will, as pointed out in the

ARC discussion paper[10], support an argument for provision of reasons at the time that the decision is made.

Contemporaneous reasons are more likely to reflect the actual thought processes of the decision maker. Insistence on preparation of reasons as an integral part of the decision making process places provision of reasons as of equal importance with other elements of good administration, such as procedural fairness or natural justice.

In a practical sense, contemporaneous preparation of reasons is likely to be part of an agency's dispute management plan, allowing it to be ready to deal effectively with potential disputes at an early stage. Once an agency has recognised the utility in terms of quality primary decision making and effective dispute management of contemporaneous preparation of reasons, what significant barriers would then prevent those reasons being supplied at the same time as the decision is notified?

This may be part of future recognition that routine provision of statements of reasons at the time of notification of decisions is not a burden on resources or an additional work load for hard pressed administrative staff but is part of a strategy aimed at proportionate dispute resolution.

In the absence of significant barriers, a business case for routine provision of statements of reasons at the time of notification would, of course, need to consider whether there was evidence to support the proposition that it would reduce the number or seriousness of disputes for an agency. Any evidence that it tended to increase the number or scope of formal review processes would be a factor in a balanced business case.

Robin Creyke and Matthew Groves have commented that, 'The reduced emphasis on adjudication has led to an increased focus on getting decisions right the first time.'[11] They foresaw an increasing emphasis on proportionate dispute resolution and a corresponding increase in the use of methods other than litigation to resolve disputes about government decisions.[12]

In a recent decision, the UK Supreme Court (in *Cart)* considered whether unappealable decisions of the Upper Tribunal are subject to judicial review by the High Court. It concluded that they are – but only where there is an important point of principle or practice or some other compelling reason for the case to be reviewed.[13]

The Court noted that the object of judicial review is to maintain the rule of law and, therefore it had to consider:

- what machinery is necessary and proportionate to keep mistakes of law to a minimum ?
- what level of independent scrutiny outside the tribunal structure is required by the rule of law?[14]

The issue of proportionality was a significant factor in the Supreme Court's decision. On the one hand, it considered judicial review to be a matter of principle, not discretion. On the other hand, judicial review had always been a remedy of last resort.[15] The Court considered that judicial review could change to keep pace with other changes. There was a limit to the resources that the legal system could devote to trying to get a particular decision right.

The Court took into consideration that statutory appeal rights had been introduced in immigration and asylum cases because the limited resources of the High Court and the Court of Appeal had been overwhelmed by judicial review applications.[16]

The issue of proportionate allocation of limited judicial resources is a crucial one for government. Mechanisms such as clear contemporaneous statements of reasons and appropriately tailored statutory review rights are likely to reduce the need to use judicial resources by helping to ensure that the right decision is made in the first place and that any dispute about the decision is resolved at an early stage.

Agencies may feel that routine preparation of statements of reasons for decisions simply adds to their work load – but against this must be weighed the additional resource burden on government that flows from litigation, particularly protracted litigation.

Additional resources put into developing statements of reasons that are overly technical or defensive – perhaps by having 'draft' statements cleared through agency hierarchies or settled by lawyers – is also not a proportionate use of resources.

Peter Anderson, providing a business perspective on administrative law, comments that, *'Decisions that are too technical diminish the precedent value of a decision by reducing the business's capacity to understand and apply the decision more broadly.'*[17]

Stephen Lloyd and Donald Mitchell also comment that practices that lead to a statement of reasons not reflecting the original decision maker's reasons detract from the utility of the process and, where judicial review is involved, present a threat to the rule of law.[18]

Resources might more appropriately be channelled into educating and supporting primary decision makers to understand the requirements for lawful exercise of power and giving them confidence to prepare genuine statements of reasons.

Increased transparency – one of the objectives of a requirement for statements of reasons – could be achieved by making relevant background material, such as internal policy documents[19] and explanations of the legal basis for decisions, available on agency websites. This could provide context for reasons while reducing the need to include explanatory material each time reasons are provided on high volume decisions.

Better proportionality might also be achieved by allocating resources to education of affected community groups – again perhaps by providing quality online information – about the purpose of judicial review.

Andrew Metcalf, Secretary of the Department of Immigration and Citizenship, has commented: '*Some of our clients seem to feel that they must take every available step in the review process in order to achieve administrative justice. Because the judicial review process is concerned with the lawfulness of decisions rather than their merits, however, this course of action might not actually resolve the matter at the forefront of applicants' minds. Educating individuals about the review process might help to remedy this.*'[20]

Conclusion

Looking to the future, the current reflection on the role of judicial review in our administrative justice system presents exciting opportunities:

- the opportunity to embrace judicial review as a means of guidance on the lawful boundaries of our decision making; and
- an opportunity to consider enhancements to existing statutory rights to statements of reasons, which could be used as a tool to achieve better decision making, reduced levels of disputes and, as a consequence, more proportionate use of judicial resources.

Endnotes

1 (1982) 154 CLR 25, 70.

2 Sir Anthony Mason, 'Administrative Review: the Experience of the First Twelve Years', (1989) 18 *Federal Law Review* 122.

3 Ibid.

4 [2011] *Public Law* 56

5 Administrative Review Council, *Decision Making: reasons,* Best-Practice Guide 4, Commonwealth of Australia, 2007, 1.

6 (1983) 48 ALR 500 at 507

7 NADRAC, *Managing Disputes in Federal Government Agencies: Essential Elements of a Dispute Management Plan*, September 2010,

http://www.nadrac.gov.au/www/nadrac/rwpattach.nsf/VAP/(9A5D88DBA63D32A661E6369859739356)~FINAL++Managing+Disputes+in+Federal+Government+Agencies++Essential+Elements+of+a+Dispute+Management+Plan.PDF/$file/FINAL++Managing+Disputes+in+Federal+Government+Agencies++Essential+Elements+of+a+Dispute+Management+Plan.PDF

8 Mark Elliott, 'Has the Common Law Duty to Give Reasons Come of Age Yet*',* [2011] *Public Law* 56, 63.

9 Ibid, 59.

10 Administrative Review Council, consultation paper, *Judicial Review in Australia,* April 2011, http://www.ag.gov.au/agd/WWW/arcHome.nsf/Page/Latest_News_Current_Projects_Consultation_paper_-_Judicial_Review_in_Australia

11 Robin Creyke and Matthew Groves, 'Administrative Law Evolution: an Academic Perspective*', Administrative Review* (59) May 2010, 33.

12 Ibid, 34-35

13 *R (on the application of Cart) (Appellant) v The Upper Tribunal (Respondent); R (on the application of MR (Pakistan)) (FC) (Appellant) v The Upper Tribunal (Immigration & Asylum Chamber) and Secretary of State for the Home Department (Respondent)* [2011] UKSC 28, 22/6/2011.

14 Lady Hale, *R (on the application of Cart) (Appellant) v The Upper Tribunal (Respondent); R(on the application of MR (Pakistan)) (FC) (Appellant) v The Upper Tribunal (Immigration & Asylum Chamber) and Secretary of State for the Home Department (Respondent)* [2011] UKSC 28, 15,[37].

15 Lady Hale, ibid, 13, [33]

16 Lady Hale, ibid, 18-19, [47].

17 Peter Anderson, 'Administrative Law Evolution: Thoughts from a Business Perspective*'*, *Administrative Review* (59) May 2010 70, 73.

18 Stephen Lloyd and Donald Mitchell, 'Current Topics: Statements of the Decision Maker's Actual Reasons', *Administrative Review* (59) May 2010 73, 77

19 Anderson, above n15, 72.

20 Andrew Metcalf, 'Administrative Law Evolution: an Administrator's Point of View', *Administrative Review* (59) May 2010 59, 65.

PROMISES, PROSPECTS AND PERFORMANCE IN PUBLIC ADMINISTRATION

Allan Asher*

It is vital that government agencies place a greater emphasis on social inclusion when approaching policy and service delivery. Central to this is improving the way government agencies communicate with people. At the moment, a good deal of government communication lacks clarity and is not accessible to those in the community who need it most.

Happiness and wellbeing

The idea that it is the fundamental role of government to enhance the wellbeing and happiness of its people is gaining currency around the world. Economic indices based on wellbeing were announced by the French and the British governments in 2009 and 2010 respectively, and are seen by economists such as Nobel laureate Professor Joseph Stiglitz as better measures of economic progress than gross domestic product.

It is articulated too in US President Barack Obama's Executive Order for improving the US Government, which was issued in April. Titled *Streamlining Service Delivery and Improving Customer Service*, it pushes for better customer service activities as well as finding ways to use innovative technologies to deliver them.

In Australia, the Treasury Department has enshrined a Wellbeing Framework[1] in its strategic objectives[2], which outline the department's values, role and key policy responsibilities. Foremost among the five elements of this is:

> The opportunity and freedom that allows individuals to lead lives of real value to them … that human development is measured by the extent to which individuals have the capabilities necessary to choose to lead a life they have reason to value.

Treasury staff are encouraged to assess new and existing public policy against the wellbeing framework, which requires a qualitative, long-term approach to measuring the health of the economy. One way the department does this is by routinely issuing its *Intergenerational Report*, which focuses on things such as environmental challenges, social sustainability and the fiscal and economic challenges of an ageing population.

Of particular importance to any agency aiming to focus better on the needs of people is *Ahead of the Game: Blueprint for the Reform of Australian Government Administration*[3], which can be summed up as: talk to the people in ways they understand and communicate between themselves, get their views and feed them back into better performance.

Wellbeing is an issue I've raised before[4]; it is close to my heart because, during the 40 years I have spent advocating for consumers, I have seen time and again the sometimes dire consequences of an organisational culture that puts the wellbeing of clients pretty much last.

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* *Allan Asher is the Commonwealth Ombudsman, this paper was presented at the AIAL 2011 National Administrative Law Forum, Canberra, 22 July 2011.*

For instance, the habit British energy companies had a few years ago of using thugs to push into people's homes and bully them into signing unconscionable contracts, or cutting off customers' power during that country's freezing winters.

Social inclusion: the challenge for government

Social inclusion should be a major issue for anyone involved or professionally interested in public administration.

Agencies face challenges in being and keeping in touch with those who are often most in need of adequate government services.

The Australian Government has defined a socially inclusive society as one in which all Australians feel valued and have the opportunity to participate fully[5].This means ensuring that people who are currently marginalised become fully engaged – people such as newly arrived immigrants, the elderly, people with disabilities, mental illness or problems with addiction, many indigenous people, whistle-blowers, children, the illiterate, those who are impoverished (particularly the homeless), and many others.

Of particular concern are those who are newly socially excluded – for instance, the recently unemployed or homeless, immigration detention centre detainees or newly arrived and vulnerable immigrants – who are less likely to be aware of their opportunities to have a voice.

It is heartening that the phrase 'social inclusion' is appearing more often in government and public sector discussion, and in initiatives such as the *National Compact*[6], which seeks to strengthen relations between Government and the not-for-profit sector.

Social inclusion, or the lack of it, is a huge issue for my office. Last financial year, we received around 39,000 approaches, of which we chose to investigate more than 4,000. However, I suspect that for every complaint we receive, there are maybe 10 we don't, and these are likely to be from those members of our community who are the most marginalised and disadvantaged.

If only 10 per cent of people who <u>should be</u> complaining <u>are</u> complaining, the remaining 90 per cent cannot be said to be fully enfranchised in any meaningful sense. How can we provide accurate feedback and recommendations to agencies, and how can the agencies themselves get direct feedback, if we are not hearing from most of the people who have real problems?

There are a number of reasons why complaints aren't made. A person could be unaware of the existence of the Commonwealth Ombudsman's Office, or have heard of the Office but doesn't realise that it takes complaints from the public, or knows all of this but doesn't think we can do anything about the particular complaint. Perhaps the person has cultural or language issues, or concerns about the implications of making a complaint, or a disability, such as cognitive impairment.

A recent public awareness survey carried out by the Office, showed that less than one third of people under the age of 35, and a similar number of people who speak a language other than English, have heard of my office. More surprisingly, only 60 per cent of women are aware we exist versus 72 per cent of men.

While my office addresses some of these issues through its outreach and education programs, as well as its broader publicity, it is clearly our responsibility to find innovative ways to tackle this. With that in mind, I am keen to raise the profile of my office wherever

appropriate, including in social media forums. We are currently using Twitter and very soon we will establish Facebook sites – initially for the Commonwealth and ACT Ombudsman roles – and later for the Overseas Students Ombudsman. We will also post material on YouTube.

That such a large proportion of the community is unaware of us, or precisely what we do, points not just to the communication imperatives of my office but highlights a degree of ignorance of the complaint-handling process in general and, indeed, the need for it. After all, our survey also found that a substantial number of people under 35 (around 14 per cent) weren't even sure whether they had ever been treated unfairly by a government agency.

Connecting with the indigenous community poses a unique set of challenges. Prior to the introduction of my office's indigenous outreach programs, virtually no indigenous people complained to us – as far as we are aware – and it hardly needs saying that this is not because they had little about which to complain.

A report[7] based on research commissioned by the Office in 2010 revealed that indigenous people are unlikely to complain because:

- they do not know it is possible or acceptable to complain, or to whom to complain;
- they believe they must accept their lot in life;
- they fear reprisals;
- they dislike confrontation;
- there are language issues;
- complaining brings with it a sense of shame;
- they have poor self-esteem; and
- they believe that complaining won't change anything.

The research also found that many indigenous people prefer to use an intermediary whom they know to discuss problems or issues, preferably face-to-face in a familiar location, and only after they have come to trust the impartiality and effectiveness of the complaint-handling process.

That is, presumably, why our outreach teams are effective in gathering complaints from indigenous people. It is perhaps significant that we have occasionally drawn criticism from within the Public Service for using such methods to, supposedly, 'drum up' business.

It is worth highlighting that some government departments, such as Centrelink, are also taking active steps to engage with indigenous communities in this way, by sending remote access teams into indigenous communities.

The research agency which produced the report also recommended the use of printed materials with simple messages and illustrations that tell a story, as well as community forums and indigenous radio and TV to convey information.

One of the reasons some people don't make contact with us, or fully engage with other government agencies, is lack of access. This is particularly true of socially marginalised people in remote areas. How do you contact an agency, including my office, if you don't have a landline, or if the local payphone doesn't work? Perhaps you have a mobile phone, but not enough credit to make calls to 1800 and 1300 numbers, which are only free or

charged at a local rate if you are using a landline. It is often the most disadvantaged who do not have landlines but are most in need of free phone services.

I highlighted my concerns about this issue in a letter to Chris Chapman, Chairman of the Australian Communications and Media Authority, in April this year. The Authority's own research has found that the number of people without a landline is increasing; indeed, 14 per cent of the population is mobile-only users[8]. There has also been a decrease in the number of payphones available to the public[9].

One complainant to our office found himself in the somewhat absurd position of calling Centrelink to advise them of his income so that he would receive his fortnightly payment. His pre-paid credit ran out before he had completed the call and he did not have enough money to top it up. This required him to miss a day of classes to visit the Centrelink office in person.

Only around half the population have functional access to the Internet. This digital divide must always be borne in mind when an agency seeks to engage meaningfully with its more marginalised clients. In addition, not all agency websites are equally accessible.

It should also be remembered that a website, even an accessible one, is no panacea in itself. Online information should complement, not displace, other communication channels.

So, effective, two-way communication between agencies and all members of the community is at the heart of any attempt to improve social inclusion. It is crucial that government departments and oversight agencies take this approach because it is fundamental to any claim a government may make about its level of accountability.

Helping government to improve services to constituents through socially inclusive activities, not simply finding fault, is a key feature of the work my office.

How government communicates with people

Many of the complaints my office receives about government agencies arise from poor communication. Partly, I suspect, because many agencies see the way they communicate as a side issue to the services they provide, whereas the two are inextricably linked or indeed the same thing.

Some common examples of poor, or even lazy, communication include:

- computer-generated form letters, or letters that cut and paste great tracts of impenetrable legislation, or refer to websites to which their clients may not have access;
- sending people too much correspondence, or too little, or none at all;
- call centre staff who don't have enough information themselves, or don't have the authority to make proper decisions;
- failing to provide key information, such as the right to review, and how to complain;
- writing in 'bureaucratese' rather than plain language, using jargon, acronyms and abbreviations;
- failing to provide simple explanations for people with cognitive impairment;
- taking an officious tone;
- not providing translations or interpreters;

- having no single point of contact, so that people have to repeat their concerns over and over again.

Poor communication is overwhelmingly the main source of complaints to my office from indigenous people in the Northern Territory, where our outreach programs currently operate. For instance, there is often confusion about how people are affected by government programs, due to insufficient communication, or communication that is at too high a level, or has been over-simplified to the point of excluding important information, or doesn't explain how government initiatives will affect lives.

A report[10] published by this Office in April 2011 followed a series of complaints about interpreters not being used when they should have been, either because they were not available, or because they were not deemed necessary.

One case study used in the report relates to the Strategic Indigenous Housing and Infrastructure Program, which is jointly run by the Northern Territory Government and the Department of Families, Housing, Community Services and Indigenous Affairs.

A resident of a remote indigenous community complained to my office that Northern Territory Government staff and building contractors had not used interpreters when they met with residents to discuss housing plans in that community.

As a result, some residents did not understand the nature of the work that was planned, where they would live while work was being done, and whether they would be re-allocated the same house when the work had been completed.

When this matter was raised with the Department, it organised two meetings with residents, which were attended by an indigenous language interpreter, at which the housing program and other housing-related matters were properly explained. The complainant later told us that the community felt that this addressed the issue.

Communicating with people who are socially excluded is obviously a particular issue for frontline agencies such as Centrelink. Those of my staff who deal with Centrelink are of the view that it has a culture geared towards improving service delivery to the disadvantaged, and it is encouraging to see that its 10-year service delivery reform plan places a strong emphasis on this. In March this year this Office accepted an invitation from Centrelink to work with them on the design and review of their internal review process.[11]

However, by virtue of the size of the agency and the sheer number of its customers, problems do arise. Among these are:

- a failure to provide reasons for decisions;
- a flurry of letters sometimes sent to customers that contain conflicting information; and
- not tailoring communication to individual circumstances, such as hearing, vision or cognitive impairment.

In September 2010, my office published a report[12] looking at how three agencies involved in social security deal with clients with mental illnesses.

In one case study, a Mr E complained to my office that despite first contacting Centrelink to enquire about claiming a Disability Support Pension in 2006, he was not granted payment until 2008. Mr E had lodged a claim for compensation from Centrelink for this loss of entitlement but his claim was refused. Following an investigation we asked Centrelink to

reconsider Mr E's claim on the basis that, despite being told Mr E had a mental illness and was clearly having difficulty with the claim process, Centrelink staff did not try to help him complete his claim. Centrelink accepted our view, and agreed to pay Mr E compensation equivalent to his lost entitlement.

Our investigation showed that it is clear that the agencies involved do focus, wherever possible, on providing discretion for staff to adjust to the requirements of customers who require flexibility as a result of a mental illness. However, the report made the following recommendations:

- greater consideration of a customer's barriers to communication;
- more training for staff to identify customers with a mental illness;
- encouraging customers to disclose a mental illness; and
- better recording of information about a customer's illness or barriers to engagement.

Poor communication creates a wall between agencies and the people they serve. Helping government to remove this wall by seeking to change the culture of poor communication is one of the things this Office will be looking at over the next three to five years.

I am in discussion with the Plain English Foundation as to what measures are required to make this happen.

It is important to emphasise that while these communication problems are widespread throughout the public sector, many agencies are very responsive to our recommendations.

Improving performance

Some individual agencies are performing well but it is vital that there is a unified, consistent approach from government. This is of particular importance when someone must deal with more than one agency in relation to a particular issue

All three tiers of government must work cooperatively, and in partnership with the business and community sectors, to achieve improved outcomes for vulnerable and disadvantaged Australians. Agencies within each tier must also work seamlessly.

Ahead of the Game reinforces the need for greater flexibility, collaboration and innovation by governments if the challenges they face in delivering more citizen-centric outcomes for the Australian community are to be met. In my view, this especially applies to National Funding Agreements and National Partnership Agreements that come under the Council of Australian Government's reforms.

One of the recommendations of *Ahead of the Game* is that service delivery be simplified to make access to government services more convenient through automation, integration and better information sharing. Over time this would lead to:

- a 'tell us once' approach;
- a service delivery portal that guides citizens through interaction with government; and
- physical locations where citizens can access multiple services.

This would be grounded in a view of policy and service delivery that places the interests of citizens first.

One way in which agencies can make this happen is to shift their own attitude towards complaints. Many within the private sector still view their complaints areas as punishment details for errant executives rather than as a strategic resource. Increasingly, the result of this approach is that these businesses are the first to go out of business. There is no such inducement for senior officers in the public sector, but perhaps there ought to be.

The reality is that, apart from being a way of measuring how socially inclusive an agency is, complaints are rivers of gold: an almost limitless source of free advice.

Approaching complaints in this way was something I drew to the attention of the ACT Government last month, when I suggested they draw on this resource rather than invest significant sums of money contracting consultants to review their business performance.

This means making it easy for people to make complaints and ensuring that complaint-handling processes are not only set up to effectively resolve issues for individuals but to help identify systemic administrative problems as, or ideally before, they arise. More prevention, less cure.

I would also like to highlight the importance of providing reasons for administrative decision making. This formed part of a submission the Office recently made in response to the Administrative Review Council's consultation paper on Judicial Review in Australia.

A common cause of complaints made to my office is the adequacy of reasons provided by agencies.

Often, an agency may make a decision that is perfectly appropriate but badly explained. Even when the agency does not alter its decision, a proper explanation can reduce a person's concerns and reassure them that the correct process was followed and their views were taken into consideration. Sometimes a lengthy complaint process can be remedied with a simple apology.

It is my view that statements of reasons should always be in writing, set out in plain language, and should include the relevant facts and material considerations that the decision-maker relied upon in making the final decision. Statements of reasons should also provide relevant information about rights of review, including internal review and statutory review mechanisms, where applicable.

Expanding the scope of the Commonwealth Ombudsman

The responsibilities of my office are continuing to expand. They now include the recently launched Overseas Students Ombudsman, and we are soon to become the Norfolk Island Ombudsman. The Office is to take responsibility for the Government's Public Interest Disclosure scheme, probably the end of 2011.

To fulfil these individual responsibilities, and better perform our bread-and-butter work of investigating and remedying complaints, my office will be seeking to forge stronger, long-term partnerships with other integrity agencies in order to better define our combined role as the fourth branch of government.

This approach will be particularly important in helping to tackle government corruption, which, given the somewhat disjointed arrangements Australia currently has in place, still tends to find its way through the cracks.

We will be examining these, and similar issues, at the Commonwealth Ombudsman National Conference in November. The conference will look at the role of integrity agencies in helping

government and government agencies achieve better inclusion, community-focused service delivery and integrity of government.

Improving social inclusion and service delivery as a whole are colossal tasks. Effecting the cultural change within single agencies is difficult but doing so across government can seem daunting.

However, in a country facing significant social, economic and environmental issues over coming decades the consequences of not doing so are dire. For any and all agencies, it means going back to first principles and asking:

- are we placing the needs and wellbeing of the Australian community first, and does our service delivery reflect this in terms of improving social inclusion?
- are we communicating with people in a clear manner?
- do we have effective complaint-handling processes that enable us to learn from our mistakes and improve service outcomes?

Endnotes

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THE MERITS OF "MERITS REVIEW": A COMPARATIVE LOOK AT THE AUSTRALIAN ADMINISTRATIVE APPEALS TRIBUNAL

Michael Asimow and Jeffrey S Lubbers*

Modern governments have to decide many disputes arising out of regulation or benefit schemes. There are various models of administrative dispute resolution available. The disputes can be adjudicated by a national court system or within the agency that made the initial decision but subject to judicial review. A third way is adjudication by specialized courts or tribunals. The US relies heavily, but not exclusively, on adjudication within its agencies, while Australia and the UK rely on national administrative appeal tribunals. This article discusses these different approaches.

US, Australian, and UK approaches to administrative adjudication

Administrative adjudication in the US

At the federal level, the US has generally avoided establishing specialized courts, although a few have been created and some continue to exist.[1] Most disputes involving the government are resolved within regulatory and benefit agencies, not by courts. The US Supreme Court upheld administrative adjudication in 1932,[2] and in 1946 Congress responded by enacting the *Administrative Procedure Act* ('*APA*'). At that time, administrative adjudication was viewed largely as the vehicle for agency implementation of regulatory statutes such as those relating to energy, transportation, communication, labor law or securities law. Such policy-oriented adjudication still continues, although most of it has been supplanted by agency rules that resolve the issues across-the-board rather than through case-by-case decisionmaking. Today, the great majority of federal agency adjudication relates to benefit statutes such as social security.

The *APA* contains provisions for trial-type procedures for agency hearings required by statute. Specially qualified quasi-independent adjudicators, who are now called administrative law judges ('ALJs'), preside over these formal adjudications.[3] The *APA* calls for separation of functions between decisionmakers and agency prosecutors or investigators. Although the rules of evidence are relaxed and cross-examination may be limited, these hearings resemble courtroom trials. The ALJ writes the initial decision in the case but there may be internal agency appellate review (by the agency head or a delegate of the agency head). Judicial review (on legal, factual, and discretionary issues) is available in the federal courts, but such review is deferential and is based on the administrative record, not on a new record made in court. In this manner, a fair hearing is provided *inside* the agency.

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* *Michael Asimow is Visiting Professor, Stanford Law School; Professor of Law Emeritus, UCLA School of Law. Jeffrey S Lubbers is Professor of Practice in Administrative Law, Washington College of Law, American University.* *The authors acknowledge with appreciation the suggestions made by their colleagues at the Laval Conference on Comparative Administrative Law in Quebec City and by Professors Margaret Allars and Robin Creyke. This is a slightly revised version of the article previously published in Vol. 28, p. 261 of the Windsor Yearbook of Access to Justice (2010). It is reprinted here with the gracious permission of WYAJ*

Federal agencies conduct a vast range of adjudication that is not governed by the *APA*. Some of it (such as immigration disputes) entails relatively formal trial-type hearings that are presided over by an administrative judge ('AJ'), rather than an ALJ. Even in informal adjudication, agencies generally craft "some kind of hearing"[4] and judicial review proceeds in a similar way.

Administrative adjudication in Australia

Internal review

In Australia, adjudication by Commonwealth ministries and agencies is not governed by an APA-like code, but instead by provisions in individual statutes and by the common law principles of "natural justice," roughly similar to US due process. As with US informal adjudication, the variety of first-level decisions is so great that it makes any generalization about the application of natural justice principles difficult.

Commonwealth agencies maintain a variety of different systems of internal review of decisions unfavorable to private parties under regulatory or benefit statutes.[5] Most (but not all) of the internal review systems are provided for by statute. Generally, agencies provide an opportunity for an internal merits review by an official who was not involved in the initial decision. The review process often furnishes an opportunity for written submission and sometimes involves an opportunity for an oral contact in person or over the phone between the private party and the reviewer, although not a hearing. In addition, reviewers usually contact the primary decisionmaker to discuss the facts and reasons for the decision. Reviewers will inform the private party of the outcome of the review decision and of the availability of external review. In many cases, it is necessary for the private party to exhaust the internal review process before seeking external review before a tribunal.

For example, in Social Security cases, clients are encouraged (but not required) to request reconsideration from the primary decisionmaker. If that fails, they must seek review of the disputed decision by the Authorized Review Officer ('ARO') before proceeding to the Social Security Appeals Tribunal. Review by the ARO generally involves a meeting (or at least a phone conversation) with the applicant, the opportunity to submit additional evidence, and a statement of the reasons why the ARO has refused to change the decision.

External review in tribunals[6]

Australian administrative tribunals at the federal level are independent of the primary decisionmaker. Their task in conducting "merits review" is to "examin[e] whether a decision is substantively correct, after consideration of all relevant issues of law, fact, policy and discretion."[7] Merits review means that the tribunal "stands in the shoes" [8] of the department and is empowered to substitute the "correct or preferable"[9] decision for that of the agency. Its power extends to substituting decisions on issues of fact, law, and discretion. "Correct" in this formula refers to situations in which the Administrative Appeals Tribunal ('AAT') considers that there is only one acceptable decision, and "preferable" refers to situations where it considers that there is more than one acceptable decision."[10] Tribunal review often entails creation of a fresh evidentiary record including evidence of facts arising after the original agency decision and it allows the AAT to reweigh the relevant factors in exercising discretion.[11]

At the federal level, the "peak" merits review tribunal is the AAT created in 1976.[12] However, there are more specialized tribunals in the area of benefits and immigration, including the Social Security Appeals Tribunal ('SSAT'), the Migration Review Tribunal ('MRT'), the Refugee Review Tribunal ('RRT'), and the Veterans' Review Board ('VRB').[13] In addition, in the economic regulatory area, the Takeovers Panel reviews decisions by the Australian

Securities and Investments Commission involving corporate takeovers[14] and the Australian Competition Tribunal ('the ACT', formerly the Trade Practices Tribunal) reviews decisions of the Australian Competition and Consumer Commission.[15]

The AAT "falls within the portfolio of the Attorney General,"[16] while the specialized tribunals are within that of the relevant department minister. Most of the states and territories have an AAT-counterpart and some specialized tribunals as well.[17]

a. The AAT

As of January 27, 2010, there were 89 "Members" of the AAT, representing a mix of part-time and full time judges, lawyers and lay members with "expertise in a range of areas, including accountancy, aviation, engineering, law, medicine, pharmacology, military affairs, public administration and taxation."[18] There were 154 staff persons serving the AAT as of June 30, 2009. The AAT President must be a judge of the Federal Court. There are nineteen other part-time "Presidential Members"—eight Federal Court judges and five judges of the Family Court of Australia, and six full-time Deputy Presidents who must have been enrolled as legal practitioners for at least five years. There were 63 other members, some of whom were senior members and most of whom were part time. Not all of the non-judicial members need be lawyers.

Appointments to the AAT are made by the Governor-General (the Queen's representative in Australia), on the advice of the Attorney General.[19] The appointments process is based primarily on informal and largely unregulated consultation within government and between departments and tribunals. Federal tribunal members serve for fixed terms of three, five or seven years with possibility of reappointment. The informal appointments process and the relative shortness of terms have a bearing on the independence of the tribunals. AAT members may be removed by Parliament, "for 'proved misbehaviour or incapacity' and must be dismissed for bankruptcy" and salaries are set "by an independent remuneration tribunal." This mix of provisions leads Professor Cane to conclude that although the independence of the members of the AAT is better protected than that of members of the specialist federal merits review tribunals, it is much less well protected than that of court judges.[20] AAT members are also less well protected than US ALJs, although better protected than most US AJs.

The AAT can only review a decision if a statute so provides but there are over 400 such enactments.[21] The AAT received 6,226 applications for review in the 2008-09 year.[22] During that period, it provided 1,393 hearings. Of these, 390 decisions set aside the decision appealed from, 96 varied the decision, and 907 affirmed the decision.[23] The most important of the AAT's jurisdictions are second-tier hearings in social security and veterans' benefits cases (after such matters were heard initially in the SSAT and the VRB) as well as workers' compensation and tax disputes.[24]

The AAT achieves some specialization because it is split into four divisions.[25] There are a number of specialized adjudicatory tribunals whose decisions cannot be reviewed by the AAT (including the MRT, RRT, and the National Native Title Tribunal).[26] In addition, the AAT does not review decisions by the Takeovers Panel or the ACT.

Although not a court, the AAT functions like one with a full array of prehearing, alternative dispute resolution ('ADR') and, if necessary, hearing processes.[27] At the "hearing" stage, while the parties can agree to a decision "on the papers," there is a right to a formal adversarial proceeding, with testimony under oath and a right to be represented by lawyers. While the tribunal may perform some research on legal issues, it relies on the parties to elicit the facts, rather than on its own research.[28] However, the ordinary rules of evidence do not apply, neither party bears the burden of proof, and the respondent agency must forward a

statement of reasons and all relevant documents to the tribunal. Decisions are supposed to be based on the civil standard "the balance of probability," similar to the preponderance-of-the-evidence standard in the US[29] The AAT can set decisions aside for error of law (subject to judicial review). Tribunal decisions on legal issues do not constitute binding precedent in subsequent tribunal cases. However, the managerial staff of tribunals circulate such decisions and strive for consistency.[30] On the other hand, with respect to fact finding, issue estoppel may apply if an earlier court or tribunal made a final ruling on an issue of fact.[31]

Finally, section 44 of the AAT Act specifies that "A party to a proceeding before the Tribunal may appeal to the Federal Court of Australia, on a question of law, from any decision of the Tribunal in that proceeding."[32] This means, of course, that either party may appeal. Since 1999, some of these cases may be transferred first to the lower Federal Magistrates Court.[33] A further appeal is possible to the High Court if special leave is granted.[34]

b. The SSAT

The largest specialized Commonwealth tribunal is the SSAT, a statutory body that conducts merits review of administrative decisions made under social security law, family assistance law and various other pieces of legislation.[35] The SSAT operates as the first tier of external merits review in the social security appeals system. Further rights of appeal for all parties to a social security appeal include a full merits review by the AAT as well as judicial review.[36]

On June 30, 2009, the Tribunal had 230 members (41 full-time and 189 part-time).[37] Most hearing panels consist of two members depending on the nature and complexity of the application. "The SSAT is 'inquisitorial' in its approach. Each SSAT panel takes a fresh look at the matter, including the consideration of events which might have occurred since the decision being appealed was made."

Applications to the SSAT in 2008-09 totaled 16,319 lodged and 16,668 finalized. About 25-30% of all appeals led to a reversal or change. The average time for publishing a decision was about 10 weeks. Appeals to the SSAT are free and travel and accommodation costs are borne by the Tribunal, with a total average cost per applicant of nearly AUS $32,700.

Contrast to the US

There is a sharp contrast between the US and Australian systems of administrative adjudication. The US generally provides a hearing inside the agency that made the initial determination, often but not always before an ALJ. The final administrative decision is usually reserved to the head of the agency or to an appellate body within the agency. In contrast, Australian adjudication is provided by an internal review procedure, followed by a merits review consisting of a trial-type hearing provided outside the adjudicating agency. Most such hearings are provided by the VRB, the SSAT, the RRT, the MRT, or the AAT. The AAT is a centralized administrative tribunal providing review of the decisions of hundreds of agencies (and which provides a second tier review of SSAT and VRB decisions). Both countries provide for judicial review of agency or tribunal adjudicatory decisions, but in Australia judicial review is generally limited to questions of law.

Administrative adjudication in the UK

The design of the Australian tribunal system (prior to its redesign in 1976) closely resembled the UK tribunal system. Administrative tribunals date from the dawn of the British welfare state in the early years of the Twentieth Century (particularly the National Insurance Act of 1911).[38] Policymakers felt that resolution of the huge number of disputes arising out of this legislation should not be assigned to the courts, both because of the sheer number of cases and because the courts were perceived as being hostile to social legislation.[39] Instead, the

dispute resolution function was assigned to tribunals, meaning administrative units engaged exclusively in adjudication and outside the regular court system. These tribunals were often staffed with a mix of lawyers, specialists, and lay people and their proceedings tended to be quite informal.[40]

In general, British tribunals have always provided a form of merits review, meaning that they conduct a de novo hearing of a matter under dispute and issue a decision on the merits with little or no deference to the prior departmental decision (or lower level tribunal decision). Unsurprisingly, Australian lawyers, judges, and policymakers, who were steeped in British practice, followed suit when they came to organize their own system of administrative adjudication. It seemed most natural to them to follow the British practice by creating a new tribunal to deal with the adjudication generated by each new regulatory or welfare program.

This adaptation of existing British institutions illustrates the "path dependence" phenomenon in which institutions are built to resemble those already in existence.[41] It is often more natural and efficient to copy what already exists and seems to be working tolerably well than to redesign and rebuild institutions from scratch. This is true even if the older model evolved more or less serendipitously and the older model is decidedly suboptimal.

In most cases, the disputes adjudicated by British tribunals arose from the decisions of a specific department of government. Prior to the recent amendments discussed below, most tribunals were organizationally part of the department whose decisions they reviewed. The tribunals thus were reliant on that department for services and other resources. Nevertheless, tribunal members typically regarded themselves as independent of the department and they did not engage in functions other than adjudication.

Each new piece of welfare or regulatory legislation created a new tribunal. The result was a hodgepodge of different tribunals with varying jurisdictions, each with its own system of appointment of members and procedures. Especially after World War II, the number of specialized tribunals continued to increase rapidly with little attempt to achieve consistency either in the organization or procedures of the tribunals or in the details relating to judicial review of their decisions.[42]

In 1955, the Franks Committee took a fresh look at tribunals.[43] It recommended the establishment of a Council on Tribunals and also promoted a judicialized model of tribunal procedure as well as openness, fairness, and impartiality of tribunal decisionmaking. It recommended that tribunals be required to state reasons for their decisions and it favored appeal to a superior tribunal and judicial review on points of law. The *Tribunals and Inquiries Act 1958* implemented many of the recommendations of the Franks Committee; although it applied only to certain tribunals and left many unregulated, it improved tribunal procedure and adopted a requirement that tribunals give reasons for their decisions. The Council on Tribunals conducted studies of tribunal procedures and issued numerous recommendations. Meanwhile, the courts began to intensify judicial review of tribunal decisions.[44] This created a generally satisfactory situation which remained stable until the close of the century. Around 2000, the Social Security Tribunals were merged into an Appeals Service with common procedures and a single appeals structure.[45]

The enactment of the *Tribunals, Courts and Enforcement Act* 2007 ('*TCEA*')[46] is an epochal event in the history of British administrative law. The *TCEA* involves a radical upgrading and centralization of the tribunal function. The *TCEA* must have been significantly influenced by the successful Australian experiment with a single centralized administrative tribunal, although it did not go as far in that direction as the Australian model.

Under the *TCEA*, the existing tribunals were brought under a single Tribunals Service. The Tribunals Service provides the necessary resources (such as engaging staff and acquiring

property), thus breaking the long-standing pattern of dependence of tribunals on the departments whose decisions they reviewed.[47] The *TCEA* requires that the Judicial Appointments Commission recommend the appointment of judges and lay members of tribunals; the actual appointments are made by the Lord Chancellor. This appointment system thus supplants the prior practice under which appointments to tribunals were made by departments or ministers. The *TCEA* also protects the independence of tribunal members and provides for a Senior President of Tribunals, a position to be held by a judge who represents the views of tribunal members to Parliament and the various ministers responsible for specific departments. Also, The Senior President is empowered to promulgate practice directions.

The *TCEA* grouped the jurisdictions of many (though not all) of the formerly free-standing specialized tribunals into several "chambers." These chambers are referred to as "first-tier tribunals."[48] The first-tier tribunals adjudicate disputes between private parties and government under a wide range of regulatory and welfare statutes. First-tier tribunals can reconsider and correct their own decisions on their own initiative or on petition of a party.

The *TCEA* also provides for an Upper Tribunal (which is treated as a court of record) and is also divided into chambers. The Upper Tribunal provides for appeals on a point of law from first-tier tribunals (with leave from either the first-tier tribunal or the Upper Tribunal).[49] The Upper Tribunal can reconsider its own decisions and grant judicial review of tribunal decisions in the form of a prerogative writ. It can also award monetary damages.[50] The *TCEA* provides for a further appeal on an important point of principle from the Upper Tribunal to the Court of Appeal (but only if the Upper Tribunal or the Court of Appeal gives leave to appeal).[51]

The *TCEA* brings tribunals and courts into a single integrated adjudicatory system for the dispensation of procedural justice in administrative law. It has severed the connection between tribunals and the departments whose decisions they review. For all practical purposes, the *TCEA* seems to abolish any distinction between tribunals and courts. In this respect, the *TCEA* goes much further than Australia in integrating its tribunals into the judicial system; Australians would raise serious constitutional objections to such a move. On the other hand, the Australian AAT centralizes adjudicatory power into a single adjudicating entity (as opposed to the multiple chambers that remain under the *TCEA*).

Separation of powers under the Australian Constitution

Australia chose a tribunal model of adjudication, rather than a combined-function model, largely because it was heavily influenced by British practice. However, another reason for the development of the Australian tribunal system was the approach taken by the Australian High Court to constitutional separation of powers. The Australian constitution drew heavily on the separation-of-powers provisions of the US constitution (while preserving British-style parliamentary supremacy). For that reason, Australia might have chosen to follow the American "combined functions" model for administrative adjudication. However, Australia did not and could not adopt the combined-function model because it maintains a much stronger version of separation of powers than does the US. Under the Australian approach to separation of powers, the judicial branch cannot exercise executive functions (sometimes referred to as "administrative functions") and the executive branch cannot exercise judicial functions.[52] Of course, the terms "executive," "administrative," and "judicial" are hardly self-defining and the application of these vague criteria has caused much difficulty.

The American approach toward delegation of adjudicatory power to non-Article III judges

American constitutional law takes a more pragmatic approach to separation of powers than does Australian law. American doctrine tolerates statutory arrangements by which the powers of the three branches are shared with the others, but guards against statutes that enable Congress to broaden its own powers at the expense of other branches or that unduly impair the ability of other branches to carry out their assigned functions.

Thus it has long been clear that Congress can delegate judicial power to an administrative agency, at least with respect to so-called "public rights." Broadly speaking, "public rights" involve disputes between private parties and the United States.[53] Typical public rights disputes involve claims to government benefits or enforcement of the tax laws, as well as federal law enforcement against private parties and enforcement of the immigration laws.

In the leading case of *Crowell v Benson*,[54] the Supreme Court upheld the delegation to a federal agency to adjudicate a case of "private rights," meaning a private-versus-private dispute. *Crowell* involved an employee's claim against the employer for workers' compensation in a maritime dispute.[55] This was a statutory right of action as opposed to a traditional common law claim. It remained unclear whether Congress could assign the adjudication of such traditional tort or contract claims to a non-Article III adjudicator. In *Northern Pipeline,* the Court held that the adjudication of a traditional private-versus-private contract dispute could not be delegated to a non-Article III adjudicator.[56] Clearly, the Court was concerned that Congress might strip the federal courts of large portions of their traditional jurisdiction by assigning broad swatches of it to agencies or other non-Article III bodies and might even preclude judicial review of their determinations.

Northern Pipeline was swiftly undermined by later decisions. In *Thomas*,[57] the Court upheld a system of agency-operated binding arbitration of claims by a prior pesticide registrant for compensation arising out of the use by a later registrant of the prior registrant's data. The key was that the private right was newly created and closely integrated into a public regulatory scheme. Finally, in *Schor,* the Court approved a delegation to an agency of the power to decide a contract counterclaim that was ancillary to a statutory system of reparations in favor of customers who claimed that their brokers had violated the rules.[58] If the agency could not adjudicate the contract counterclaim asserted by the broker, the entire system of reparations would have collapsed. The language of the *Schor* decision stresses pragmatism and the balancing of all factors in determining whether the assignment of a particular type of private right claim is improper.[59]

Australian agencies cannot exercise judicial powers

In the remarkable *Wheat* case of 1915,[60] the High Court of Australia firmly committed the country to strict separation of judicial and executive powers. The Australian Constitution of 1900 provided for an Inter-State Commission (ISC) to regulate trade between the states and it explicitly provided that the ISC would have "such powers of adjudication and administration as the Parliament deems necessary."[61] The American Interstate Commerce Commission (created in 1887) was clearly one of the models for the ISC along with some British regulatory agencies. However, the High Court held that the ISC could not exercise judicial power. If an agency could not be given judicial powers by an *explicit constitutional provision*, Parliament certainly lacked authority to delegate such powers by a statute. The *Wheat* case sounded the death knell in Australia for the combined function approach to administrative adjudication.[62]

In the leading *Boilermakers'* case,[63] the Court made it clear that judicial and non-judicial powers could not be combined in the same body. The case concerned the Court of

Conciliation and Arbitration, a labor arbitration body created by Parliament under a specific constitutional authority.[64] The High Court held that the Court of Conciliation and Arbitration could render arbitral awards, as arbitration is not a judicial function.[65] However, that Court could not be given the power to *enforce* its own awards through an injunction or a contempt order, since enforcement of an arbitral award against a union is a judicial function.[66] Apparently the court that is called upon to enforce an arbitral award is not expected to retry the merits; the arbitral decision established the "factum" on which judicial enforcement depends.[67]

Wheat seemed to rule out adjudication by a combined-function agency and *Boilermakers* indicated that an agency could not be given power to enforce its own decisions. As a result, Australian policymakers designed specialized adjudicatory *tribunals* that are independent of the department that made the underlying disputed decision and that lack enforcement power. After *Boilermakers,* Australian courts had to decide precisely what executive agencies could not do. As *Boilermakers* suggests, an agency cannot have the power to enforce its own judgment through the normal process of judicial execution. The clearest authority to this effect is the *Brandy* case involving anti-discrimination law.[68] Under the law prior to 1992, the Human Rights and Equal Opportunity Commission ('HREOC') could adjudicate discrimination cases but its decisions were not legally enforceable. A victim of discrimination had to make a fresh application to the Federal Court which, after a rehearing, could make such orders as it thought fit. In 1992, Parliament amended the Act so that HREOC's determination could be "registered" with the Federal Court. If the losing party sought review, the court "may review all issues of fact and law" but no new evidence could be introduced. If the losing party did not seek judicial review (or if the Federal Court affirmed HREOC's decision), the HREOC decision (which might call for monetary damages or specific relief) became enforceable like any other judgment.

In *Brandy,* the High Court invalidated these amendments, holding that a proceeding is inevitably judicial if the tribunal that renders it has power to enforce it by execution or otherwise.[69] Consequently, the case would have to be retried in the federal court before the decision could be enforced. The *Brandy* decision immobilized Australian anti-discrimination law and, if it were read broadly, could have cast doubt on the constitutional validity of other administrative adjudicatory tribunals whose decisions are more or less self-enforcing.

To an American reader, the *Brandy* decision seems hopelessly formalistic. Given that *Boilermakers* accepted the idea that an executive arbitral decision could be the factum on which judicial enforcement rested, the rejection of HREOC's registration mechanism seems unfounded. The *Brandy* decision appears to reflect a judicial distaste for anti-discrimination law (or perhaps doubts about the impartiality of HREOC) and it may reflect judicial disinclination to part with jurisdiction over a type of case that resembles traditional tort litigation.

Both before and after *Brandy,* the High Court has repeatedly been forced to answer the question of whether a particular package of adjudicatory and enforcement powers delegated to a particular agency adds up to an exercise of judicial power.[70] This unfortunate result is inevitable, since the decisions are defending a distinction that does not exist. The realities of modern administration have forced the High Court to retreat steadily from the absolutist separation of powers rhetoric of cases like *Wheat, Boilermakers* and *Brandy.* In the contemporary world, government agencies are empowered to adjudicate a huge range of regulatory and welfare disputes between private parties or between private parties and government. Administrative adjudication of such disputes is clearly necessary to the functioning of modern society.[71] Courts could not possibly handle this enormous body of adjudicatory work. Administrative decisions are largely self-enforcing but the enforcement process sometimes requires judicial assistance. Given this array of administrative dispute

settlement and enforcement mechanisms, it is impossible to say which adjudicatory decisions are "administrative" and which are "judicial."

Notwithstanding cases like *Boilermakers* and *Brandy*, the High Court has in fact approved various administrative adjudication schemes that are largely self-enforcing. Some of these cases involve schemes in which the primary agency decision is in question; others involve merit review schemes. But all of them are enforceable (either against private parties or against government) without the need for de novo judicial consideration. Thus agencies can remove a trademark from the registry of trademarks.[72] They can adjudicate tax disputes.[73] They can adjudicate pension disputes.[74] They can establish child support obligations.[75] Most importantly, administrative tribunals can invalidate contracts or order relief against unfair business practices such as monopolization. Under the *Competition and Consumer Act 2010* as well as earlier legislation, the ACT can declare a contract unenforceable or restrain a practice if the contract or practice is "contrary to the public interest" and such decisions have the force of law.[76] The Takeovers Panel can invalidate a corporate acquisition. Courts are prohibited from affording judicial remedies but have jurisdiction to enforce the Panel's decisions.[77] At this point, an outside reader is baffled; how, if at all, are such responsibilities and enforcement powers different from those involved in *Brandy* or *Boilermakers*?

Australian courts cannot exercise executive power

As discussed above, Australian executive departments cannot exercise judicial power. Just as importantly, a federal court cannot exercise executive power. Providing merits review of the factual or the discretionary aspects of a government decision is considered an executive power. Consequently, a court is precluded from providing such review. Australians believe that it would be deeply improper for a court to interfere in the substance of executive decisionmaking by substituting its judgments about factual or discretionary matters for the judgment of an agency.[78] Yet it is plain that some form of merits review of the factual and discretionary basis of the adjudicatory decisions of government agencies must be provided. Since courts cannot supply merits review of factual or discretionary determinations because of separation of powers constraints, such review must occur within the executive branch.

The Kerr Committee report of 1971 explicitly determined that courts could not provide merits review of administrative decisions. Consequently, it recommended adoption of a peak merits review tribunal and creation of the AAT implemented that recommendation.[79]

The AAT in practice

The Australian AAT is an attractive model. It has attained a high degree of legitimacy in Australia, as shown by the spread of tribunals in both the Commonwealth and in the Australian states. Before considering whether the Australian model might be transplanted to the US, a more detailed examination of the pros and cons of the AAT is in order.

The AAT's procedures

The AAT's organic statute states that "In carrying out its functions, the Tribunal must pursue the objective of providing a mechanism of review that is fair, just, economical, informal and quick."[80] Of course, as Professor Creyke has pointed out, "[c]omplying with this litany of adjectives has created difficulties . . . not least because they are internally inconsistent."[81] The procedures are supposed to be "conducted with as little formality and technicality, and with as much expedition, as the requirements of this Act and of every other relevant enactment and a proper consideration of the matters before the Tribunal permit"; moreover, "the Tribunal is not bound by the rules of evidence but may inform itself on any matter in such manner as it thinks appropriate."[82] But as the famous *Mathews v Eldridge* balancing

test for measuring due process in the US implicitly acknowledges, accuracy, fairness and efficiency values are often at odds.[83]

AAT's mix of adversarial and inquisitorial procedures

As mentioned before, the AAT provides a blend of adversarial and inquisitorial process,[84] while the specialized tribunals tend to be closer to the inquisitorial end of the spectrum.[85]

a. Pro-activity in obtaining evidence

One issue is whether the AAT sufficiently uses its inquisitorial powers to require submission of material documents from the parties or even to gather other information, especially where the applicant is unrepresented.[86]

Professor Cane concludes that the AAT could do more: "on the whole . . . it seems that Australian merits tribunals rarely obtain information other than from or through the applicant and the decision-maker." In part, as he acknowledges, this is a resource issue, and without the availability of staff to find witnesses or information not produced by the parties, "the most that tribunals are likely to do is to invite, encourage, or perhaps, require, parties to provide additional evidence."[87] At any rate the law does not require more at this point: although Creyke and McMillan point to several tribunal decisions that have been held invalid for failing to consider whether additional evidence was needed, or seeking clarity on matters deemed unclear or obscure,[88] "the settled principle is . . . that there is no general legal duty on a tribunal to conduct inquiries."[89] A discussion paper for the Australian Law Reform Commission proposed an amendment to the AAT Act to require the tribunal to be take a more proactive investigative role in cases involving unrepresented parties, but the proposal was never formally recommended.[90]

b. Handling of expert evidence

Since it is not a court, the AAT can be more flexible in its receipt of expert evidence. Some tribunal members obviously have some expertise of their own, and "it is generally accepted that tribunal members should be freer than judges to draw on their own personal knowledge and to 'take notice' of information not presented by the parties."[91] However, parties need to be given a chance to object to the taking of official notice or information obtained from third parties.[92] This is no different from the APA's rules on ALJ hearings in the US[93] However, tribunals sometimes have been creative in arranging for concurrent presentation of expert evidence in so-called hot tubs; instead of experts presenting evidence individually, a number of experts are brought together in one session at which areas of agreement and difference can be explored and developed by discussion and questioning between the experts themselves.[94]

c. Other rules of evidence

The AAT Act states that "the Tribunal is not bound by the rules of evidence, but may inform itself in such manner as it thinks appropriate"[95]—a standard that is even more unrestrictive than that of the US APA.[96]

d. New evidence

It is commonplace for new evidence to arise during the period between the agency decision and the tribunal hearing. Merits review tribunals generally review the facts as they exist at the time of the review, not at the time of the agency decision.[97] This "contemporaneous review" presents its own set of problems. By the time of the review, the agency may have changed its "administrative outlook," but, in contrast to the US, the agency cannot revise its

decision, because it has already become the responsibility of the tribunal.[98] The facts may have changed and, in many cases, the applicant can produce new evidence that was not before the decisionmaker below. This "open record" concept also exists in US Social Security and veterans' benefit cases, and it has been criticized for creating incentives to hold back evidence. The same concerns have been raised about the tribunals' open record policy.[99] It should be noted that intervening changes in the *law* may or may not be applied by the tribunal, depending on whether the law itself states whether the change applies to pending proceedings.[100]

Role of the agency decisionmaker as a party before the AAT

The responding agency must provide a statement of findings and reasons for its decision and any other document that it has (or controls) that it is relevant to the review.[101] Somewhat surprisingly, its overall responsibility is to "assist the Tribunal to make its decision," not to act in an adversary fashion.[102] This is consistent with the AAT's merits review responsibility to make the "correct or preferable" decision, but it must be difficult for the agency representative to undergo this "attitudinal adjustment."

On the other hand, the Federal Court did overturn an AAT ruling in a workers' compensation case that a *subsequently discovered* agency video of the applicant should have been disclosed to the applicant prior to its introduction in the hearing so as to allow sufficient time to prepare for cross-examination.[103] Subsequent decisions of the AAT, however, have distinguished this decision, criticizing it as creating "litigation by ambush."[104]

Burden-of-proof considerations

Given the roles of the parties, how do burden of proof considerations factor into the AAT's decision? Even though, "as a practical matter . . . it is in the interest of a party to [present] evidence to persuade the tribunal,"[105] it seems to be the case that with respect to the tribunals, "it is not appropriate to talk in terms of a formal onus or burden of proof," unless an underlying statute contains one.[106] This is because "the AAT is required . . . to make its own decision in place of the administrator."[107]

This rationale tends to beg the question, and Professor Pearson explains that the question of how tribunals "proceed when left in a state of uncertainty" is that they generally "turn to the applicable legislation, which will usually be worded in terms requiring the decision-maker to reach a state of satisfaction on a particular issue. . . ."[108] Evaluating whether this requirement has been met obviously requires the tribunal to give careful attention to the findings and reasons provided by the decision maker; it can be especially difficult for the tribunal to "balance assessment of credibility based on oral evidence with what might at first appear to be more 'reliable' documentary material, such as . . . information prepared by government agencies."[109] In the end, the "balance of probability" standard is "ordinarily the appropriate standard to be applied by an administrative tribunal."[110]

Alternative dispute resolution ('ADR') techniques.

The AAT and other tribunals rely heavily on techniques to avoid formal hearings. To begin with, occasionally the tribunal may determine that the papers filed by the respondent agency allow for a favourable decision for the applicant "on the papers.[111]" The AAT may also decide to proceed on the papers with both parties' consent.[112]

Many cases also settle through party conferences with an AAT member, or through other ADR processes such as mediation.[113] In 2008-09, the AAT resolved 5,838 cases without a hearing and provided only 1,393 hearings.[114] Thus only 19% of the cases lodged in the AAT actually resulted in a hearing. However, the AAT must agree to the disposition because

"[o]nce an application for review has been made, the AAT alone can bring the proceedings to an end."[115] This also prevents an agency from trying to "pull back" an appeal.

Decisionmaking and opinion-writing

The AAT's decisions from 1976 to the present are available on line on the Australasian Legal Information Institute's website.[116] According to Professor Creyke, decisions of the AAT, because it is not a court, are not precedential.[117] However, issues of consistency and following precedent can occur with respect to prior tribunal rulings on both legal and factual questions. Although, of course, the AAT does not have the last word on legal interpretation questions, sometimes a case will involve a legal issue that has been decided in an earlier unappealed AAT case. The AAT's Deputy President has opined that, in that situation, the decision in the earlier case should be followed, especially if the decision was made by a presidential member, although the member deciding the later case could note his or her disagreement with the result.[118]

Generalized vs specialized expertise

Given that the AAT has jurisdiction over cases involving over 400 statutes, and that its members are a mix of lawyers and non lawyers, some full-time and some part-time, one might legitimately wonder whether the Tribunal can handle cases from agencies that present difficult and technical issues. Of course this objection has been leveled at federal judges in the United States who hear appeals from a multitude of agencies. The difference is that US judicial review of disputes about fact findings and exercises of discretion is limited to a "reasonableness" form of review (the 'substantial evidence' test for formal adjudication and the 'arbitrary and capricious' test for informal adjudication). Similarly, in the US, judicial review of questions of law is usually quite deferential to the agency's interpretation of statutes and of its own regulations.

The literature on Australia's tribunals does not appear to view this as a serious concern, even though AAT members are not provided with legal or technical assistance. Perhaps the AAT's ability to call on the decision making agency for additional documents and to call upon the agency's counsel to assist the tribunal in making the "correct or preferable" decision is regarded as giving AAT members the tools they need. In addition, the AAT does not review tribunal decisions relating to takeovers and trade practices that might present issues beyond the ken of many AAT members [119] or most decisions relating to immigration and refugee policy, which may reflect political considerations. Finally, it should be noted that several high volume specialized tribunals (the SSAT and VRB) siphon many cases away from the AAT (although the AAT provides merits review of challenged SSAT and VRB decisions that are unfavourable to the applicant).

Following governmental policy

Whether tribunals must follow agency policy presents an important and recurring issue. This is also a question that confronts US ALJs. In Australia, an influential AAT decision, *Drake No. 2*[120] held that the AAT should apply a presumption in favour of relevant government policies (assuming that the "policy" does not conflict with "hard law" such as a statute or regulation). The AAT should depart from policy only for "cogent reasons," such as injustice in an individual case, but not because it disagrees with the policy in general. One reason for deference to policy is to achieve consistency between unappealed decisions and AAT decisions.[121] Another is to keep the AAT out of politics and avoid clashes with government departments; its job is to adjudicate, not set government policy.[122]

These generalities leave open questions as to whether the tribunal's duty to depart from government policy only for cogent reasons is affected by the level of the policymaker

(ministerial, departmental, or lower) or the procedure used to issue the policy (after public consultation or without it). Andrew Edgar has focused on the distinction, often suggested by academic commentators and found in case law, between "high" and "low" policy. High policy comes from the minister, and is subject to "ministerial responsibility," and scrutinized by Parliament; *Drake 2* requires the AAT to follow high policy. Low policy, on the other hand, comes from soft law issued by the department. The AAT either ignores or considers but feels free to redetermine low policy. Edgar criticizes this distinction and suggests that the AAT should defer to both high and low policy, because the failure to defer to soft law results in inconsistent decisionmaking by different AAT panels and the substitution of a less informed for a more informed determination of appropriate policy.[123] He argues that the AAT lacks the relevant information to make proper judgments about policy because often the rationale for the policy is not articulated in the department's decision, which is specific to the facts of the case. Moreover, he contends that lack of deference produces an accountability problem because the AAT's decision on policy is not reviewable either in court or as a political matter (other than through parliamentary legislation).

Nor is Edgar any more enamoured of a distinction based on whether or not the policy was developed after public consultation. He observes that agencies can "cherry-pick" from among the comments that are "consistent with their pre-determined view and ignore other submissions," but tribunals would not know when this sort of "charade" had taken place.[124] He also opines that some agency policies promulgated without consultations (including interpretive rules) are quite legitimate and should be followed by tribunals.

Professor Cane takes a more positive view of tribunal review of policy that is spelled out in soft law. He believes that these policies are certainly relevant considerations for the tribunal, but they are not binding. In his view, the AAT is entitled to refuse to apply a lawful policy not only because the policy leads to injustice in the particular case but also because the AAT believes the policy is not sound or wise. Moreover, he goes on to say that the AAT would also be "entitled to enunciate a new policy, inconsistent with an existing policy, as the basis for varying a decision or making a substitute decision."[125] He bases this conclusion on the fact that the power to undertake merits review includes the power to substitute a correct or preferable decision, and that must encompass the power to act inconsistently with government policy. However, he tempers his point by suggesting that the differences between high and low policy or policies developed with and without consultation are appropriate factors for the Tribunal to consider.[126]

Would the Australian tribunal model work in the US?

Could the US borrow from the Australian experience? We believe that something like the Australian tribunal model might work in the area of federal benefits adjudication. These are mass justice systems in which decisionmakers must deal with a heavy caseload. Individual cases largely turn on medical and vocational issues and are not used as vehicles for the announcement of policy.

For the purposes of this article, we limit our proposal to an independent Social Security Tribunal ('SST') which would be similar to the Australian SSAT. However, we also believe that policymakers should consider whether the SST might be expanded to cover adjudication arising under some or all of the other federal benefit programs, including schemes administered by the Veterans' Administration and the Department of Labor. If that were to occur, the result would be a federal benefits tribunal of generalized jurisdiction, much like the AAT. Our discussion does not include the judicial review stage, but we also believe that policymakers should consider establishing a Social Security Court to review SST decisions.[127]

The hearing stage of the Social Security adjudication system has encountered problems. Most importantly, it struggles with an overwhelming caseload. A combative atmosphere between Social Security ALJs and the Social Security Administration ('SSA') has lingered for years. SSA must manage its ALJs to improve the efficiency, accuracy and consistency of the decision making process. In the past, however, some of these management decisions were explicitly (and wrongly) designed to reduce the number of people on the disability rolls and to reduce the percentages of ALJ decisions in favour of applicants.[128] This has given ALJs and lawyers who represent applicants a basis for condemning SSA management initiatives as subversive of ALJ independence.[129]

On the other hand, it must be recognized that many of the problems of SSA adjudication arise out of problems with the ALJ program itself. The general process by which ALJs are hired and managed has often been criticized.[130] Under the APA, ALJs are hired without a probationary period and receive indefinite tenure. Application of the veterans' preference effectively excludes many non-veterans and creates gender and racial disparities. The Office of Personnel Management ('OPM') runs the hiring process which is cumbersome and bureaucratic. The OPM has often neglected or mismanaged this task. The system requires an agency to choose from among the top three on the list offered to it by the OPM, thus foreclosing any exercise of judgment by the hiring agency. This rigid hiring system is circumvented by many agencies which cherry-pick from the judges already working for SSA. Alone among all federal civil servants, ALJs are exempt from performance evaluations and it is extremely difficult to discipline or discharge them, especially for low productivity.

The ALJ selection and disciplinary protections arise from explicit provisions of the APA. The APA struck many political compromises, one of which was to leave the judges housed within the agencies for which they decide cases while constructing a set of protections for their independence within that agency. However, if the ALJs functioned within a tribunal separate from the agency that made the decision under review, many of those protections would become unnecessary.[131]

An SST would be independent of the SSA.[132] Its judges could continue to provide informal, inquisitorial methods when that was appropriate. At present, the SSA is unrepresented in disability cases, so the ALJ wears multiple hats (making sure that both the SSA and applicant's position is properly presented, then deciding the case). Of course, the SST judges would be required to follow SSA regulations as well as properly issued soft law policy statements or interpretations propounded by the SSA. Decisions by the SST would be final administrative decisions.[133] The next step would be judicial review, possibly limited to questions of law. Of course, both the applicant for benefits and the SSA could seek judicial review of SSAT.

Creation of the SST would enable a reconsideration of the various management issues currently plaguing the system of Social Security hearings. Judges would work for the SST, not for the SSA. As a result, there would be no need for the APA's rigid controls on the hiring, supervision, compensation, evaluation, and discharge of ALJs. The SST could hire its own judges using a rational, judgment-based scheme to get the very best people available, as opposed to the wooden system now used by the OPM.[134] There could be probationary employment, to weed out unsuitable judges early in their career. Judges' terms would be lengthy but not indefinite and they could be removed only for good cause. There could be a series of grades, so judges could work toward promotion and higher compensation. More difficult cases could be assigned to more experienced judges. Some form of peer review might be instituted to evaluate the work product of the judges. The chief judge of the SST would manage the evaluation process. And if that evaluation established that judges fell below reasonable standards of productivity, misbehaved on the bench, or systematically ignored agency policies, appropriate remedial measures could be put in place from mentoring or performance agreements, including dismissal after an appropriate hearing.

This proposal presents important issues of scale. Obviously the SST would have a vastly larger corps of judges than the AAT (with its 89 members) or the SSAT (with its 230 members). Yet the judges who would staff the SST are already in place—the approximately 1,200[135] skilled, experienced and conscientious Social Security ALJs. They would be the nucleus of the SST.

The issue of consistency of decisions is always problematic in mass justice situations. As Mashaw pointed out long ago, the only way to achieve reasonable consistency of decisions among vast numbers of judges in a mass justice situation is through management initiatives, not through an appeals council or through judicial review of the procedure or the substance of such decisions.[136] Those management initiatives are far more practicable and acceptable to the judges when they come from an independent SST rather than from the SSA. For example, the SSA would have to issue more regulations and soft law pronouncements than it does today to furnish guidance to SST judges. In addition, the SST might designate important decisions by SST judges as precedent decisions that judges in later cases would be required to follow.

The political feasibility of this proposal can certainly be questioned. It is certainly possible that ALJ organizations will dig in their heels against it, opposing anything that might diminish their APA protections, or reduce the number of ALJs in their ranks. Yet many ALJs have favoured the creation of a federal central panel that would remove them from control of the agency that is party to the dispute. The SST would produce exactly that form of independence, but it could be achieved only if the ALJs were willing to accept a change to a new status as SST judges with whatever tailored protections seemed most salient to that position.

Needless to say, many practical issues would arise in so radically changing the structure of federal benefits adjudication, and there will be many compromises along the way. Of course, the hearing process is just one step in a complex state/federal process of disability claim adjudication and cannot be viewed in isolation from all the other stages. This briefly sketched proposal does not address the details or the entire process from state examiner scrutiny of a disability claim through federal court of appeals review. We seek only to point out the advantages of an independent tribunal structure in addressing some of the pathologies of the existing system of Social Security adjudication.

Conclusion

The Australian model shows that a generalized or specialized merits-review tribunal can work efficiently and achieve legitimacy. It can command the respect of all parties. It presents a successful alternative approach to the US system of embedded adjudicators. The fact that the UK has adopted a close variant of it is evidence of its success. Whether the tribunal system could be adapted to the US is obviously debatable. However, in the area of mass adjudication of social benefits programs, where policy matters rarely arise in individual cases, a centralized and independent tribunal provides an intriguing and possibly adaptable model. This experience should be carefully considered by American policymakers as they address the seemingly intractable problem of federal benefits adjudication.

Endnotes

1 *See* Paul R Verkuil & Jeffrey S Lubbers, 'Alternative Approaches to Judicial Review of Social Security Disability Cases' (2003) 55 *Administrative Law Review* 731, 744-48 (discussing past and existing specialized courts).

2 Crowell v. Benson, 285 US 22 (1932), discussed further at text accompanying notes 54-55.

3 As of September 2008, there were 1469 federal ALJs, 1219 of them employed by the Social Security Administration. Office of Personnel Management chart, 'Status Report as of September 2008', on file with authors.

4 *See Goss v. Lopez*, 419 US 565, 579 (1975) ("some kind of hearing" required before short-term suspension of student from school). A fair hearing is required by the due process clause of the Fifth Amendment whenever agency action deprives a person of life, liberty or property.

5 The material in this paragraph and the following one is drawn from Administrative Review Council, *Report to the Attorney General: Internal Review of Agency Decision Making* (Report No 44, Nov 2000).

6 For useful authorities see Peter Cane, *Administrative Tribunals and Adjudication* (Hart, 2009); Peter Cane, 'Understanding Administrative Adjudication' in *Administrative Law in a Changing State* 273-99 (Linda Pearson, Carol Harlow & Michael Taggart (eds) Hart, 2008) [hereinafter "Cane chapter"]; Linda Pearson, 'Fact-Finding in Administrative Tribunals' in *Administrative Law in a Changing State* 301-23 (Linda Pearson, Carol Harlow & Michael Taggart (eds) Hart, 2008); Robin Creyke, 'Administrative Tribunals' in *Australian Administrative Law: Fundamentals, Principles, and Doctrines* 77-99 (Matthew Groves & H P Lee (eds) Cambridge University Press, 2007); and Robin Creyke & John McMillan, *Control of Government Action: Text, Cases and Commentary* 114-179 (LexisNexis Butterworths, 2005). For an early description, see Mark Aronson & Nicola Franklin, *Review of Administrative Action* 221-240 (Law Book, 1987).

7 Creyke & McMillan, *supra*, at 114.

8 The oft-used "stands in the shoes" metaphor was expressed by Smithers, J. in an important Federal Court decision. *Minister for Immigration & Ethnic Affairs v Pochi* (1980) 31 ALR 666, 671.

9 *Drake v Minister for Immigration and Ethnic Affairs* (1979) 2 ALD 60; 24 ALR 577 (Bowen C J and Deane J) 149.

10 Cane, *supra* note 6, at 149.

11 *Shi v Migration Agents Registration Authority* (2008) 248 ALR 390, 397-403 (Kirby J), is typical of cases that spell out the principles of merits review. *Shi* was a professional license revocation case. It held that the AAT is permitted to consider new evidence and determine the "correct or preferable" result based on a fresh factual record including facts arising after the Authority's decision. Moreover, the AAT is empowered to exercise its discretion as to the appropriate sanction (rather than to remand to the Authority for reconsideration of the sanction). In *Shi* the AAT decided to "caution" the licensee rather than revoking his license. It also imposed a scheme of probation; the power to impose the probationary condition on the caution arose from an amendment to the statute enacted after the date the Authority acted but before the AAT acted. *Id.* at 403-07.

12 It was created by the *Administrative Appeals Tribunal Act 1975* (Cth), current version available at http://www.comlaw.gov.au/ComLaw/management.nsf/current/bytitle/54DB558856AEE672CA256F710006F886?OpenDocument.

13 *See* Creyke & McMillan, *supra* note 6, at 121. There is also a National Native Title Tribunal, whose function is to determine initial eligibility and then provide a forum for mediation of applications for native title that have been filed in federal court. If no agreement is reached, the application may have to be determined by the court following a trial. *See* http://www.nntt.gov.au/What-Is-Native-Title/Pages/Approaches-to-Native-Title.aspx.

14 *See* http://www.takeovers.gov.au/about.aspx#role; *Attorney-General v Alinta Ltd* (2007) 242 ALR 1, discussed at note 77, *infra*.

15 *See* http://www.competitiontribunal.gov.au/; Tasmanian Breweries decision, discussed in notes 70, 76, *infra*.

16 *See* "About the AAT," http://www.aat.gov.au/AboutTheAAT/IntroductionToTheAAT.htm.

17 Creyke & McMillan *supra* note 6, at 123-26. The definition of "tribunal" is open to debate. *See* Creyke, *supra* note 6, at 78-79 (providing numerous definitions).

18 The material in this paragraph is drawn from "About the AAT," *supra* note 16.

19 The material in this paragraph is drawn from Cane, *supra* note 6, at 100, 111-12.

20 Cane points out that originally immigration cases were in the bailiwick of the AAT, but "[g]overnment dissatisfaction with the patterns of immigration decision-making by the AAT in the 1980s" led to the creation of the two specialist immigration-related tribunals with no right of appeal to the AAT. Moreover, these tribunals are "more closely integrated into" the Department of Immigration, "a greater proportion of the members lack legal training than is the case in the AAT," and their work is "actively managed (by the imposition of performance targets, for instance) in a way that the work of the members of the AAT is not." Cane chapter, *supra* note 6, at 298-99.

21 *See* http://www.aat.gov.au/LegislationAndJurisdiction/JurisdictionList.htm.

22 AAT, 2008-09 Ann. Report, ch. 3,
http://www.aat.gov.au/CorporatePublications/annual/AnnualReport2009.htm.

23 *Id.*

24 Together these four areas comprise about 85% of the cases heard by the AAT. *Id.* Although the AAT provides hearings under about 400 different statutes, most of them give rise to very few actual cases lodged with the AAT.

25 The divisions are the General Administrative, Security Appeals, Taxation Appeals and Veterans' Appeals Divisions. Presidential members can exercise powers in any of the Tribunal's divisions, while other Senior Members and Members may only exercise powers in the division or divisions to which they have been assigned.

26 *See* note 13, *supra*.

27 *See* http://www.aat.gov.au/ApplyingToTheAAT/ApplicationProcess.htm. The vast majority of the cases lodged with the AAT are resolved without a hearing through a negotiated settlement or a successful ADR proceeding (usually a pre-hearing conference with the judge) or because the applicant chooses to discontinue them or the AAT dismisses the case. *See* text at notes 110-14, *infra*.

28 *See* Creyke & McMillan, *supra* note 6, at 156.

29 *See* text at notes 107-09.

30 *See* Creyke & McMillan, *supra* note 6, at 175.

31 *See id.* at 176.

32 *Administrative Appeals Tribunal Act 1975* (Cth) s 44(1) provides: "A party to a proceeding before the Tribunal may appeal to the Federal Court of Australia, on a question of law, from any decision of the Tribunal in that proceeding." Judicial review (as opposed to appeal) is also available under the *Administrative Decisions (Judicial Review) Act 1977* (Cth).

33 However, an amendment to the *Administrative Appeals Tribunal Act 1975* (Cth) s 44AA, provides that the Federal Court may not transfer an appeal from the AAT to the Federal Magistrates Court if the appeal is from a Tribunal decision by a member or a panel containing a member who was a Presidential Member. *See* http://www.fmc.gov.au/services/html/administrative.html.

34 The scope of judicial review is a complex issue that is far beyond the scope of the present article. Suffice it to say that review is usually limited to questions of law or violations of procedural norms; however, the entire absence of evidence to support the determination is considered to be an error of law as is a completely irrational decision. For an excellent discussion of these complexities, see Pearson, *supra* note 6.

35 *See* the SSAT's home page, http://www.ssat.gov.au.

36 Most SSAT appeals are now heard by the Federal Magistrates Court. *See* text at note 33, *supra*.

37 Material in this paragraph and the following one is drawn from Social Security Appeals Tribunal, *Annual Report* 2008-2009 This report is available at

http://www.ssat.gov.au/iNet/ssat.nsf/1a2f57b7c6453c8fca256cb6001c5def/cdc071f19d8533b3ca25770a000b9831/$FILE/SSAT%20AR%202008-09.pdf. This comprehensive report, along with those from previous years' are on the SSAT website, *supra* note 35.

38 *See* R E Wraith & P G Hutchesson, *Administrative Tribunals* 33-42 (1973); Paul Craig, *Administrative Law* 64-69 (6th ed. 2008). In fact, various forms of ad hoc tribunals have existed for centuries in British law. During the 1800s, some combined function agencies emerged, but they mostly evolved into tribunals whose only responsibility was to adjudicate disputes arising out of regulatory legislation. Wraith & Hutchesson, *supra* at 17-28. Yet some still remain that have administrative tasks along with adjudicatory ones. *See id.* at 61 (describing the Gaming Board which has substantial rulemaking and law enforcement functions along with adjudication of licensing disputes), and *id*. at 72 (describing the Civil Aviation Authority, which is mostly an administrative body but also adjudicates licensing issues).

39 The experience with assigning disputes over workers' compensation to the courts in the 1890s was quite unsuccessful. *See* Wraith & Hutchesson, *supra*, at 28.

40 *Id.* at 129-31.

41 *See generally* Oona A. Hathaway, 'Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System', 86 *Iowa Law Review* 601, 606-22 (2001). Path dependence is often referred to as the "qwerty" phenomenon. Although the traditional layout of the typewriter and now computer keyboard is undoubtedly suboptimal, the costs of switching to a new one outweigh the benefits of doing so. Moreover, someone who introduces a new and much superior keyboard will fail if customers refuse to adopt the innovation (because the existing keyboard works well enough) and other competitors make the rational decision to stick with the old keyboard on their products. *Id.* at 611-13.

42 *See* Wraith & Hutchesson, *supra* note 38, at 43-44.

43 *See* Craig, *supra* note 38, at 259-61.

44 *Id.* at 44-45.

45 *Id.* at 46.

46 Most of the important innovations of the TCEA were recommended by the Leggatt Report of 2000. *See* Craig, *supra* note 38, at 261-63. Craig provides an excellent and complete discussion of the TCEA reforms. *Id.* at 263-83.

47 The Tribunal Service maintains an excellent website, http://www.tribunals.gov.uk. Along with a wealth of information and updates, it contains the text of the TCEA. In 2010, Asylum and Immigration chambers were established at both the first-tier and Upper Tribunal levels, in place of the former Asylum and Immigration Tribunal. The Tribunal Service also administers the Employment Tribunals which are otherwise not within the first and upper tier structures.

48 There are, at present, five chambers (most consisting of several "jurisdictions"). *See* website, *supra*. The Upper Tribunal has four chambers.

49 The Upper Tribunal has first-instance jurisdiction in complex cases and cases raising issues of general significance. In British practice, the term "point of law" covers unreasonable applications of law to fact as well as procedural violations and, also, may well cover unfair and unreasonable factual and discretionary decisions. Craig, *supra* note 38, at 269-71; see also Sir William Wade & Christopher Forsyth, *Administrative Law* 793-800 (10th ed., 2009). Further explication of the scope of review by the upper Tribunal and by the courts is beyond the scope of this article.

50 *See* Craig, *supra*, at 271-73; Wade & Forsyth, *supra*, at 780.

51 *See* Timothy Endicott, *Administrative Law* 435-38, 451-52 (2009). In addition, there is the possibility of judicial review through prerogative writ in the High Court if appeal to the Court of Appeal is denied.

52 *R v Kirby; Ex Parte Boilermakers' Society of Australia*, 94 CLR 254, 271 (1956), aff'd by Privy Council, Attorney General (Commonwealth) v The Queen [1957] AC 288.

53 However, it may be that "public rights" include "a seemingly 'private' right that is so closely integrated into a public regulatory scheme as to be a matter appropriate for agency resolution with limited involvement by the Article III judiciary." *Granfinanciera, S.A. v Nordberg*, 492 US 33, 54 (1989).

54 *Supra* note 2.

55 *Crowell* also held that "jurisdictional" facts determined by the agency in a private-rights case were subject to de novo redetermination in federal court. Within short order, however, this portion of the *Crowell* decision was quietly abandoned, although it has never been formally overruled. *See* Reuel E. Schiller, 'The Era of Deference: Courts, Expertise, and the Emergence of New Deal Administrative Law', 106 *Michigan Law Review* 399, 410-12, 438-39 (2007).

56 *Northern Pipeline Construction Co. v Marathon Pipe Line Co*., 458 US 50 (1982). The statute assigned the trial of all issues in a bankruptcy case, including breach of contract issues, to bankruptcy judges who lack life tenure. Subsequently, the Court applied the *Northern Pipeline* ruling to a case challenging the constitutionality of bankruptcy court jurisdiction to adjudicate preferential transfer claims. *Granfinanciera, S.A. v Nordberg*, 492 US 33 (1989).

57 *Thomas v Union Carbide Agricultural Products Co*., 473 US 568 (1985).

58 *Commodity Futures Trading Commission v Schor*, 478 US 833 (1986). In *Schor,* the statute empowered an agency to award reparations to customers from commodity brokers for violations of the statute or regulations. The agency adopted regulations providing that brokers could submit counterclaims against their customers when the customer sought reparations. An alternative ground for the decision in *Schor* is that the customer waived the right to have the counterclaim tried in federal court. *Id.* at 849-50.

59 The Court stated "we have also been faithful to our Article III precedents, which counsel that bright-line rules cannot effectively be employed to yield broad principles applicable in all Article III inquiries. . . . Rather, due regard must be given in each case to the unique aspects of the congressional plan at issue and its practical consequences in light of the larger concerns that underlie Article III." *Id.* at 857. For discussion of the incoherence of the US law relating to delegation of adjudicatory powers, see Richard E. Levy & Sidney A. Shapiro, 'Government Benefits and the Rule of Law: Toward a Standards-Based Theory of Judicial Review', 58 *Administrative Law Review* 499, 507-24 (2006); Richard Fallon, 'Of Legislative Courts, Administrative Agencies, and Article III', 101 *Harvard Law Review* 916, 918-33 (1988).

60 *New South Wales v Commonwealth*, 20 CLR 54 (1915).

61 Australian Constitution ss 101, 102.

62 Cane remarks that the Australian version of separation of powers effectively prevented the creation of combined function agencies. As a result, adjudication by agencies engaged in regulatory functions is unknown in Australia. Cane, *supra* note 6, at 58.

63 *Supra* note 52.

64 *See* Australian Constitution s 51(xxxv) (empowering Parliament to make laws with respect to "Conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State").

65 *See Waterside Workers' Federation of Australia v JW Alexander Ltd*. 25 CLR 434, 464-65 (1918).

66 Similarly, see *R v Davison*, 90 CLR 353 (1954), holding that the decision that a person is bankrupt is a judicial function that cannot be delegated to the registrar of the bankruptcy court.

67 *See Boilermakers*, *supra* note 52.

68 *Brandy v Human Rights and Equal Opportunity Commission*, 183 CLR 245 (1995) ('*Brandy*').

69 183 CLR at 267-71 (rejecting the argument that the registration provision should be interpreted so that the decision subject to enforcement was made by the Federal Court rather than HREOC).

70 As the Court remarked in the *Tasmanian Breweries* decision: "The uncertainties that are met with arise, generally if not always, from the fact that there is a 'borderland in which judicial and administrative functions overlap . . . so that for reasons depending upon general reasoning, analogy, or history, some powers which may appropriately be treated as administrative when conferred on an administrative functionary may just as appropriately be seen in a judicial aspect and be validly conferred upon a federal court." *R v Trade Practices Tribunal; Ex Parte Tasmanian Breweries Proprietary Ltd.*, 123 CLR 361, 373 (1970) (op. of Kitto, J).

71 As the High Court recognized in 1926, "[I]f a legislative provision of the present nature [for a taxation tribunal] be forbidden, then a very vast and at present growing page of necessary constitutional means by which Parliament may in its discretion meet...the requirements of a progressive people, must, in my opinion, be considered as substantially obliterated. . . ." Federal Commissioner of Taxation v Munro, 38 CLR 153, 178 (1926) (opinion of Isaacs, J. upholding the validity of the Taxation Board of Review), affirmed by Privy Council *sub. nom*. *Shell Co. of Australia Ltd. v Federal Commissioner of Taxation* [1931] AC 275.

72 *R v Quinn; Ex Parte Consolidated Foods Corp*. 138 CLR 1, 12 (1977).

73 *Federal Commissioner of Taxation v Munro*, *supra* note 71. Only a year earlier the High Court had invalidated a very similar tax tribunal. Parliament immediately acted to create a new tribunal. The primary difference between them was that no "appeal on law points" to the High Court was provided for. Thus, Parliament managed to transfer tax adjudication from the judicial to the administrative branch by reducing the ability of taxpayers to obtain judicial review of the tribunal's decision.

74 *Attorney-General v Breckler*, 197 CLR 83, 110-12 (1999). The decision turned on several factors. The pension plan provided that the trustees would be bound by a decision of the Superannuation Complaints Tribunal, so it was not necessary to rely on judicial enforcement. Moreover, it was possible to collaterally attack the tribunal's decisions in court.

75 *Luton v Lessels*, 210 CLR 333, 360 (2002) (the administrative determination of liability creates a "factum" by reference to which the statute creates rights for the future which then are enforced by resort to courts).

76 *Tasmanian Breweries*, *supra* note 70, at 372-78 (Kitto, J.—the "public interest" standard is too subjective to be characterized as judicial); 401-03 (Windeyer, J.—the public interest standard is remote from standards courts apply, relying on American authorities upholding judicial delegations to agencies) 408-09; (Owen, J.—Tribunal lacks enforcement powers).

77 *Attorney-General v Alinta Ltd*., 242 ALR 1 (2007). Although the High Court was unanimous in this case, there are six separate opinions that rely on an uneasy combination of different reasons for finding the Panel's power to be non-judicial. These include the fact that the Panel takes account of policy considerations that are different from the kind of policy determinations made by common law courts; that the Panel's order creates "new rights and obligations;" that historical analysis shows that it would be inappropriate for a court to undertake review of takeovers; that the displacement of contract rights from a takeover agreement is different from what happens in a contract case in court; that the Panel's order provides the "factum" which courts would then be required to enforce; and numerous other factors that strike an outside reader as wholly lacking in analytical substance.

78 Nevertheless, the Federal Court is permitted to make findings of fact on appeal in certain limited circumstances. *AAT Act* para. 44(7). Sometimes Australian courts exercising their judicial review function express reservations about a tribunal's exercise of discretion, occasionally giving quite prescriptive orders for the decision on remand.

79 *See* Cane, *supra* note 6, at 60-67, 145-49. He argues that the Kerr Commission missed the mark, because the vast majority of administrative decisions do not involve determinations of policy or applications of discretion. Instead, they involve application of specific detailed and formal principles to the facts. In that respect, they are just the same as the kinds of decisions courts make and review all the time. So judicial review of the vast majority of administrative decisions would not have offended separation of powers. When the AAT does confront important issues of policy, it generally defers to the executive, which further undercuts the reasoning of the Kerr Committee. *See* discussion in the text, *infra*, at notes 119-25. Professor Creyke disagrees with Cane's analysis on this point. She believes that tribunals almost invariably re-examine the exercise of discretion by the agency whose decision is under review. Email to the authors from Robin Creyke, June 9, 2011.

80 *AAT Act* s 2A.

81 Creyke, *supra* note 6, at 94.

82 *AAT Act* ss 33(1)(b)&(c).

83 *See* 424 US 319, 335 (1976).

84 See the High Court's description of the AAT's procedures in *Bushell v Repatriation Commission* (1992) 175 CLR 408, 424-5:

> Proceedings before the A.A.T. may sometimes appear to be adversarial when the Commission chooses to appear to defend its decision or to test a claimant's case but in substance the review is

inquisitorial. Each of the Commission, the Board and the A.A.T. is an administrative decision-maker, under a duty to arrive at the correct or preferable decision in the case before it according to the material before it. If the material is inadequate, the Commission, the Board or the A.A.T. may request or itself compel the production of further material. The notion of onus of proof, which plays so important a part in fact-finding in adversarial proceedings before judicial tribunals, has no part to play in these administrative proceedings.

85 Examples of inquisitorial practices in the specialized tribunals include the RRT's research unit, which compiles "country information" reports, briefings prepared by the MRT's "case officers," and the appointment to the SSAT of medical specialists and former departmental officials. Creyke & McMillan, *supra* note 6, at 156. For a concise discussion of the differences between adversarial and inquisitorial processes, see Margaret Allars, 'Neutrality, the Judicial Paradigm and Tribunal Procedure', 13 *Sydney Law Review* 377, 381-85 (1991).

86 See the *AAT Act*, ss 37 & 38 (describing the Tribunal's powers to require the submission of documents and other materials).

87 Cane, *supra* note 6, at 241.

88 Creyke and McMillan, *supra* note 6, at 163, citing *Azzi v Minister of Immigration and Multicultural Affairs* (2002) 125 FCR 48, and *Budworth v Repatriation Commission* (2001) 33 AAR 48.

89 Creyke & McMillan, *supra* note 6 at 163, citing *Minister for Immigration and Ethnic Affairs v Singh* (1997) 44 ALD 487. *See also* Creyke, *supra* note 6, at 93 ("Courts, too, have been slow to impose an obligation on a tribunal to undertake independent inquiries, even given tribunals' ostensible inquisitorial role.").

90 *Id.*, citing Managing Justice, Report No 89, 2000, s 9.53-9.55.

91 Cane, *supra* note 6, at 240, n.114, citing JA Smillie, 'The Problem of 'Official Notice': Reliance by Administrative Tribunals on the Personal Knowledge of Their Members,' [1975] *Public Law* 64.

92 *See* Pearson, *supra* note 6, at 311 ("Procedural fairness requires the disclosure of information coming from [a tribunal member's expertise] where the tribunal proposes to reach a conclusion based on the knowledge of a member of a particular fact, or relying on a particular expertise."). She cites *Tisdall v Health Insurance Commission* [2002] FCA 97, for this proposition, but adds that "It is troubling to note that this does not always occur." *Id.* at n.47.

93 *See* 5 USC s 556(e).

94 Cane at 243-244 (citing a survey of AAT members that indicated satisfaction with the procedure, *An Evaluation of the Use of Concurrent Evidence in the Administrative Appeals Tribunal* (Nov. 2005), available at http://www.aat.gov.au/SpeechesPapersAndResearch/Research/AATConcurrentEvidenceReportNovember2005.pdf).

95 *AAT Act* s 33(1)(c).

96 The APA's provision states: "Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or repetitious evidence." 5 USC s 556(d).

97 *See* Creyke & McMillan, *supra* note 6, at 144; *Shi v Migration Agents Registration Authority*, *supra* note 11.

98 *Id.*

99 *Id.* at 145 (suggesting that "an agency is likely to be disgruntled where a decision is set aside, or a hearing is held unnecessarily, as a result of fresh evidence that might as easily have been presented to the decision-maker").

100 *Id.* at 146. *See also Shi v Migration Agents Registration Authority*, *supra* note 11 (holding that the AAT is permitted to consider new evidence).

101 *AAT Act* s 37 (1AAA).

102 *Id.* at s 33(1AA). *See also* Cane, *supra* note 6, at 244. In the SSAT and MRT, the government does not appear as a party (similar to many US benefits adjudications). Creyke, *supra* note 6, at 92.

103 *Australian Postal Commission v Hayes*, (1989) 23 FCR 320; 87 ALR 283; 18 ALD 135, excerpted in Creyke & McMillan, *supra* note 6, at 164-65. The court determined that the *AAT Act* s 37 requirement that all relevant material be disclosed before the hearing did not require the disclosure of subsequently discovered evidence that was not before the decisionmaker.

104 *Re Taxation Appeals* NT94-281-NT94-291 (1995) 21 AAR 275, excerpted in Creyke & McMillan at 166.

105 *Id.* at 171.

106 *See* Pearson, *supra* note 6, at 309.

107 *McDonald v Director-General of Social Security* (1984) 1 FCR 354; 6 ALD 6 (Full Court) (excerpted in Creyke & McMillan at 172).

108 *See* Pearson, *supra* note 6, at 309-10.

109 *Id.* at 311.

110 Creyke & McMillan, *supra* note 6, at 171.

111 *Id.* at 157.

112 *AAT Act* s 34J.

113 *Id.* s 34A. *See also* Cane, *supra* note 6, at 246-49.

114 AAT Annual Report 2008-09, App. 3, *supra* note 22.

115 Cane, *supra* note 6, at 246-47.

116 *See* http://www.austlii.edu.au/au/cases/cth/AATA.

117 *See* Creyke, *supra* note 6, at 98.

118 *See Re Ganchov and Comcare* (1990) 19 ALD 541 (Decision of Deputy President Todd), excerpted in Creyke and McMillan, *supra* note 6, at 176.

119 *See* text at note 33.

120 *Drake and Minister for Immigration & Ethnic Affairs* (No. 2) (1979) 2 ALD 634. *Drake No. 2* was written by High Court Justice Brennan sitting as AAT president.

121 *See* Andrew Edgar, 'Tribunals and administrative policies: Does the high or low policy distinction help?' 16 *Australian Journal of Administrative Law* 143 (2009).

122 *See* Cane, *supra* note 6, at 169 (suggesting that reweighing factors in reviewing a discretionary decision is something the AAT does cautiously as it could be seen as making policy and creating conflict with government departments).

123 *See* Edgar, *supra* note 121, at 149, 150-51. Interestingly, on this point he invoked K.C. Davis's criticism of merits review, *id.* at 150, citing K C Davis, *Discretionary Justice: A Preliminary Inquiry* 142 (1971).

124 *Id.* 146.

125 Cane, *supra* note 6, at 159.

126 *Id.* at 160.

127 Lubbers has written in favor of a specialized Social Security court to remove the vast number of Social Security appeals from federal district courts. Lubbers & Verkuil, *supra* note 1. The newly created English Upper Tribunal, which is treated as a court of record and provides for an appeal of the decisions of first-tier tribunals, is a move in the direction of a specialized court that the US would do well to study. *See* text at notes 49-51, *supra*.

128 *See* Ass'n of Admin. Law Judges, Inc. v Heckler, 594 F. Supp. 1132 (D.D.C.1984), *amended* 1985 WL 71829 (July 2, 1985) (finding the SSA program of reviewing decisions of administrative law judges with high rates of allowing disability benefit claims to be of dubious legality).

129 *See generally* Richard E. Levy, 'Social Security Disability Determinations: Recommendations for Reform', 1990 *Brigham Young University Law Review* 461, 497-502.

130 *See, e.g.* Paul R Verkuil et al The Federal Administrative Judiciary' 1992 *Reports and Recommendations of the Administrative Conference of the US* 773; Paul R. Verkuil, 'Reflections Upon the Federal Administrative Judiciary'. 39 *University of California at Los Angeles Law Review* 1341 (1992); Jeffrey S. Lubbers, 'The Federal Administrative Judiciary: Establishing an Appropriate System of Performance Evaluation for ALJs', 7 *Administrative Law Journal of the American University* 589 (1994).

131 Many have urged procedural reforms of Social Security adjudication and judicial review. Levy, for example, proposes legislation that would remove Social Security ALJs from the SSA and make them an independent corps; he also proposes replacing federal district court review of ALJ decisions with an Article I court of disability appeals that is similar to the Court of Veterans' Appeals. *See* Levy, *supra* note 129, at 528-37. Similarly, Lubbers & Verkuil propose an Article I Social Security Court, *supra* note 1, at 778-82. This article takes no position on whether the existing system of judicial review of benefits decisions should be altered, but the creation of a Social Security court should be seriously considered.

132 About half of the states and a number of large cities have adopted the central panel model. See Chris Guthrie, Jeffrey J. Rachlinski, & Andrew Wistrich, 'The "Hidden Judiciary:" An Empirical Examination of Executive Branch Justice', 58 *Duke Law Journal* 1477, 1484 n.29 (2009). Under that approach, the judge hearing a case is independent of the agency that brings it. The judges are hired, assigned, managed, and evaluated by an independent central panel agency. Our impression is that central panels have worked well and are considered by the public and by lawyers to be more legitimate than administrative judges embedded in the agency that is a party to the dispute. The central panel has often been proposed and just as often rejected at the federal level, largely because of doubts that central panel judges could effectively handle technical and difficult regulatory problems from numerous agencies. *See e.g.*, Jeffrey Lubbers, 'A Unified Corps of ALJs: A Proposal to Test the Idea at the Federal Level', 65 *Judicature* 266 (1981). However, we are proposing a centralization of adjudication only for Social Security, so that the judges would need to master the law and practice only of a single benefit program. Were the SST to be expanded to other federal benefit agencies, such as those run by the VA and DOL, there would be an additional learning curve, but all of these cases come down to medical and vocational issues, so any competent judge should be able to decide cases accurately under any of the benefit schemes with only modest additional training.

133 In considering this proposal, Congress should decide whether to provide for an administrative appeal of SST decisions, such as the AAT provides for SSAT decisions, the Upper Chamber provides in the UK, or the Appeals Council presently provides for a relatively small fraction of ALJ decisions in Social Security cases. Our preliminary assessment of this issue is that a single administrative decision by an independent ALJ is sufficient and a second level of administrative hearings absorbs resources and causes delay without sufficient countervailing advantage. *See* Charles H. Koch & David A Koplow, 'The Fourth Bite at the Apple: A Study of the Operation and Utility of the Social Security Administration's Appeals Council', 17 *Florida State University Law Review* 199, 296-98 (1990).

134 For obvious practical reasons, the existing ALJs working for SSA would be 'grandfathered' into the new system. However, the existing ALJs would be subject to the new scheme of performance evaluation.

135 See Office of Personnel Management chart, *supra* note 3.

136 Jerry Mashaw, *Bureaucratic Justice* 104-06, 148-49, 185-90 (1983).

QCAT HYBRID CONFERENCING PROCESSES: ADR AND CASE MANAGEMENT

Justice Alan Wilson*

The Queensland Civil and Administrative Tribunal ('QCAT') is a new star in the constellation of Australian State 'super tribunals', replicating some (but not all) of the jurisdictions, structure and procedures of older similar tribunals like the Victorian Civil and Administrative Tribunal ('VCAT') and the State Administrative Tribunal ('SAT') in Western Australia.

Its governing legislation[1] places a heavy emphasis on the provision of speedy and inexpensive justice through the use, in particular, of alternative dispute resolution ('ADR') techniques.

Using ADR extensively in any new, large Queensland tribunal has been a prominent theme since QCAT was first envisaged by the Queensland Government. The Panel of Experts[2], whose reports recommended the advent of the Tribunal to the government, expressed strong views that ADR must be a vital part of its operations.

Their enthusiasm was subsequently enshrined in both the legislation and in the Tribunal's operations and structure. From the outset; for example, the new registry structure of QCAT had, and has maintained, a group specifically charged with the effective use of ADR throughout the Tribunal's many jurisdictions (over 200).

The legislative emphasis on ADR is vivid and inescapable. The *Queensland Civil and Administrative Tribunal Act 2009* (Qld) ('*QCAT Act*') sets up expectations of the Tribunal, and then makes it clear that ADR will be central to the achievement of those expectations.

The path to ADR in the *QCAT Act* is as follows: a primary object of the Act is to '*have the tribunal deal with matters in a way that is accessible, fair, just, economical, informal and quick*';[3] and the functions of the Tribunal include the obligation to '*ensure proceedings are conducted [in a way that is]… as quick as is consistent with achieving justice*'.[4]

Then, s 4(b) specifically requires the Tribunal to '… *encourage the early and economical resolution of disputes before the tribunal, including, if appropriate, through alternative dispute resolution processes*'.

The concept of a robust use of ADR processes is embedded elsewhere in the legislation; for example, in s 69, which sets out the purposes of a Compulsory Conference, and in s 75, which allows the referral of a matter to mediation. Both sections contemplate referral in the face of a party's opposition. The only limit to referral to ADR occurs in s 4(b): '*if appropriate*'.

QCAT has taken the view from the outset that these provisions comprise a statutory imprimatur requiring that the Tribunal strive to avoid adversarial hearings, if that is appropriate and possible, and use ADR in inventive and thoughtful ways. It has taken that

* *Justice Alan Wilson is Judge, Supreme Court of Queensland and President, Queensland Civil and Administrative Tribunal.*

charge to heart, so that what it does now includes much more than traditional mediation. It has developed a hybrid model, combining elements of mediation and case management, which we think is working well.

Is ADR appropriate for administrative review matters?

Using these techniques in administrative review matters has not been without controversy. That is unsurprising: eminent jurists and commentators have questioned whether ADR will or should have a role to play in administrative law.

Lord Irvine said in 1999 that, while ADR has an expanding role within the civil justice system '*… there are serious and searching questions*' to be answered about its use, and that it is '*naïve*' to assert that all disputes are suitable for ADR and mediation. By way of example, he cited cases concerning the establishment of legal precedent, administrative law problems, and cases which '*… set the rights of the individual against those of the State*'. The use of ADR in these cases, he said, must be approached with great care.[5]

Commentators have also expressed concern about the dangers of the '*vanishing trial*' and the privatisation of justice.[6] As Bondy *et al* ask, is the principle of public accountability served by mediation? How might its increased use impact upon the supervisory jurisdiction of the courts over the activities of decision-makers and public bodies? It has also been suggested that, in the field of public law, the radiating effect of court judgments on decision-making by public bodies is an important check on the authority of State.[7]

In the United Kingdom the special status and function of public law was recognised in a government pledge, in 2001, to use ADR to resolve disputes involving government departments wherever possible; *but*, the pledge specifically excluded public law and human rights disputes.[8]

Even in Britain, however, there is a divide at very high levels between those who believe ADR does have a role to play in public law, and others who contend that its role must be quite limited.

Lord Woolf said in his judgment in *Cowl*[9] that, in public law disputes, both sides must now be

> … acutely conscious of the contribution Alternative Dispute Resolution could make to resolving disputes in a manner that both meets the needs of the parties and the public, and saves time, expense and stress … Today, sufficient should be known about ADR to make the failure to adopt it, in particular when public money is involved, indefensible.

At QCAT we have concluded that the legislative exhortations in our Act are so plain, and so strong, that to exclude or limit the use of ADR in any of our jurisdictions would fly in the face of parliament's obvious intention.

We have then, from the outset, striven to use ADR in appropriate ways in our administrative law cases.

The QCAT Administrative Review jurisdiction

The Tribunal has a vast array of jurisdictions under the heading of General Administrative Review including, for example:

(a) Decisions made by a Building Services Authority regarding the rectification of work, insurance claims, exclusions and bans for domestic and commercial building work;

(b) Review of consumer credit matters;

(c) Disaster compensation;

(d) Licensing of drivers and vehicles;

(e) Decisions about drugs, and drug and poison licences;

(f) Decisions about prohibiting persons from entering educational institutions;

(g) Management of explosives;

(h) Compensation for exotic diseases;

(i) Regulation of: films; food businesses; funeral benefit schemes; casinos and gaming machines; motor vehicle insurance; wildlife management; taxis; public transport; retirement villages; and road uses;

(j) Review of decisions made by the Commissioner for Fair Trading about motor dealers;

(k) A wide range of decisions about horse racing.

How QCAT uses ADR

As a matter of policy, in line with QCAT's statutory foundations, almost no matter goes to a final hearing in the Tribunal without, at least, a directions hearing at which ADR is discussed with the parties and, in the majority of cases, subsequently undertaken.

The favoured ADR technique is the *Compulsory Conference*, under s 69. The conference is conducted by a QCAT Member with the same adjudicative powers as the Member/s who will preside and hear the matter at its final hearing. The effect is equivalent to judicial mediation – that is, where a judge acts as a mediator.

The statutory purposes of a Compulsory Conference are identified in the legislation as:

(a) The identification and clarification of the issues in dispute;

(b) Promoting settlement;

(c) Identifying the questions of fact and law to be decided;

(d) If the proceeding is not settled, to make orders and give directions about the future conduct of the proceeding;

(e) To make any other orders or directions the presiding Member considers appropriate to resolve, or encourage the resolution of, the dispute.

Our Members have embraced these conferences and used them thoughtfully, and inventively. What they commonly report is that, in the arena of a Compulsory Conference, parties have an excellent opportunity to explain their cases and positions; to reach a better understanding of their opponent's position; to explore, in the light of that understanding, avenues for resolution; and, if the matter cannot be resolved, to be informed about what is needed to take the matter to a hearing as speedily, inexpensively, and efficiently as possible.

What the figures show

Statistics from our first nine months of operation show 205 Compulsory Conferences in General Administrative Review matters, of which 58 were successful, 53 remain the subject of on-going management, and 94 were unsuccessful.

The second figure, comprising about 26% of all matters, reflects cases where the Presiding Member has usually been of the view that the matter can ultimately settle and, for that reason, has directed a second Compulsory Conference for the purpose of continuing discussions, further assisting the parties toward resolution, and giving appropriate directions.

We struck some difficulty incorporating this variant into our statistics; in truth, they show that we are settling over 50% of matters at a Compulsory Conference. We also see that, even in matters which do not resolve, hearings are shorter and more efficient.

There is nothing surprising in QCAT's figures.[10] In the UK, research in 2009 has shown that most review claims are settled (over 60%) and that most settlements are perceived as resulting in positive outcomes for the claimants.[11]

The reception of Compulsory Conferences

One of our Members has solicited views from Brisbane legal practitioners who work regularly in the Administrative Review jurisdiction. She has collated their responses; here are some of the more interesting:

> The process (i.e. Compulsory Conferences) **forces decision-makers to think early about the merits of their decision**. In the setting of a Compulsory Conference it can be beneficial for a respondent to have the decision-maker think specifically about the respondent's case. Even if this does *not lead to a resolution, the parties will often take large strides towards a reduction of issues...*
>
> I think Compulsory Conferences, like all face to face exchanges, tend to winnow away posturing and nonsense or at least minimise them and do, in general, **promote a greater understanding of the real issues.**
>
> Compulsory Conferences are proving to be a very effective vehicle to achieve early resolution. They have been a mechanism to have the parties **sit down and talk at an early stage**. In every Compulsory Conference in which I have been involved, the Member has read the file and been aware of the party's position and that has been of considerable assistance.
>
> **Initially I was opposed to these conferences because, by its nature, proceedings involving Administrative Review are inquisitorial, by way of hearing de novo, and require the Member to make the 'correct and preferable' decision.** It is not for the parties to agree upon a result but rather for the Member to decide the matter afresh**. Upon further reflection and after attending a number of conferences I am impressed that they offer an arena for open and frank discussion which is worthwhile and which need not detract from the Member's primary role as a decision-maker. At best, if all necessary matters can be agreed upon between the parties and the Member, the matter can effectively be decided by consent. Even if that does not occur, the parties can agree on a joint Statement of Facts and submissions on any outcome.**

Granted this is a long way from hard-edged research material but, in each instance, a lawyer experienced in an administrative law jurisdiction has been prepared to write these views down and permit their publication.

Does ADR add value to Administrative Review?

Many cases in this jurisdiction involve technical legal arguments with little or no active participation by the claimant, whose involvement is usually confined to giving instructions,

signing affidavits and the like. Remedies are sometimes remote from, and academic for, the claimant and will not necessarily resolve substantive personal issues.

ADR can, in those circumstances, have some attractions and benefits for individual participants because it provides an arena in which they may be heard, and take an active part in the unfolding of their case.

The Compulsory Conference arena may also be seen as less threatening than a formal hearing room. As Bondy et al observed:

> *Mediation could therefore **afford individuals an opportunity to take part in negotiations and present their own narrative** … the sense of empowerment arising from involvement in shaping and agreeing the outcome may be a positive experience, in contrast with the alienation that parties may experience when divorced from the process. This sense of empowerment can in itself be regarded as a form of positive outcome.*[12]

Research in the UK and within QCAT suggests that the matter of process (procedural justice) is often perceived as being as important as outcomes (substantive justice) and that satisfaction with both process and outcome can be inter-related.

Thus, a disappointing result might be more acceptable to a party if it is reached in a way that the party perceives is fair or in which the party believes he or she has been heard, and understood.[13] As the passages set out earlier suggest, that process of communication is likely to be enhanced in a Compulsory Conference.

Ancillary benefits of Compulsory Conferences

QCAT Members have found that Compulsory Conferences may serve a range of useful purposes even if they fall short of achieving a negotiated compromise.

In particular they provide an opportunity for frank discussion involving the parties and the Member and may include forms of 'reality testing' of each party's contentions and arguments. There is no prohibition or inhibition upon the presiding Member expressing an informed view about the likely outcome of the proceedings. That will usually occur privately in caucus with individual parties and is not prejudicial because the presiding Member cannot (unless all the parties and the Member agree) continue in the matter or sit on the Tribunal which ultimately hears it.

Parties may come to a fuller appreciation of weaknesses and decide not to proceed. Information relevant to each party's perception of its case may be exchanged, expanded and clarified.

Conclusion

Abraham Lincoln, then a Congressman, said this to lawyers in 1850:

> Discourage litigation. Persuade your neighbours to compromise wherever you can. Point out to them how the nominal winner is often the real loser: in fees, expenses and waste of time. As a peacemaker the lawyer has a superior opportunity of being a good man.

QCAT sees no reason to ignore this sage observation in the arena of Administrative Review, notwithstanding the particular constraints said to operate in that jurisdiction. Its experience with its statutory tools including, in particular, Compulsory Conferences, has reinforced its perception that they offer a range of uses in most areas of administrative law.

Endnotes

1 *Queensland Civil and Administrative Tribunal Act 2009*.

2 Queensland, *Parliamentary Debates*, 17 June 2009.

3 *QCAT Act*, s 3(b).

4 *QCAT Act*, s 4(c).

5 *Inaugural Lecture to the Faculty of Mediation and ADR* (27 January 1999), <www.dca.gov.uk/speaches/1999/27-1-99.htm>.

6 Bondy, Mulcahy, Doyle and Reid, 'Mediation and Judicial Review: an Empirical Research Study' [2009] *The Public Law Project* (The Nuffield Foundation) 1, 3.

7 Bondy, Doyle and Reid, 'Mediation and Judicial Review – Mind the Research Gap', [2005] *Judicial Review* 220.

8 UK Government Consultation Paper, *Access to Justice with Conditional Fees* (March 1998).

9 *R (Cowl) v Plymouth City Council* [2001] EWCA Civ 1935.

10 It has been acknowledged that QCAT's present statistics are inadequate. Further analysis and refinement will, it is expected, indicate an average settlement rate of 50% - 60% of Administrative Review cases.

11 Bondy and Sunkin, 'The Dynamics of Judicial Review Litigation: the Resolution of Public Law Challenges before Final Hearing', [2009] *Public Law Project* 1; and see, too, Bondy and Sunkin 'Settlements in judicial review proceedings' [2009] *Public Law* 237.

12 Bondy et al, above n 6, 37-38.

13 Genn at al, 'Tribunals for Diverse Users' (2006) *DCA Research Series* 1/06, January, 194; and, see Ashman and Joachim, 'Consumer Satisfaction: a Case Study from an Australian Guardianship Jurisdiction' [2010] 18(1) *Australian Journal of Administrative Law*.

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We are seeking copy of approximately 1,000 – 1,500 words in length; this is to be delivered to the Editor quarterly on 1st of March, June, September and December. Coverage can include court and tribunal decisions, changes to legislation, new journal articles and books, and government media releases. A small remuneration will be paid for this copy.

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