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RECENT DEVELOPMENTS IN ADMINISTRATIVE LAW

Katherine Cook

Make a date for the AIAL National Administrative Law Conference

The 2012 National Administrative Law Conference 'Integrity in Administrative Decision Making' will be held at the National Wine Centre, Adelaide on Thursday 19 and Friday 20 July 2012.

In 2004 Chief Justice Spigelman delivered the AIAL National Lecture Series about the fourth branch of government, the integrity branch. This Conference will provide an opportunity to consider the concept of the integrity branch, the institutions that constitute it and its health in 2012. In addition to addressing these and related topics the Conference will also review the state of administrative law in the Commonwealth, States and Territories.

New Tax File Number Guidelines

On 12 December 2011, the Office of the Australian Information Commissioner (AIC) issued new *Tax File Number Guidelines 2011* (TFN Guidelines).

The TFN Guidelines are issued under the *Privacy Act 1988* (Privacy Act). The TFN Guidelines replace the previous Tax File Number Guidelines 1992. The TFN Guidelines, which are legally binding, regulate the collection, storage, use, disclosure, security and disposal of individuals' tax file number (TFN) information. The TFN Guidelines only apply to the TFN information of individuals and do not apply to TFN information about other legal persons including corporations, partnerships, superannuation funds and trusts.

A breach of the TFN Guidelines is an interference with privacy under the *Privacy Act*. Individuals who consider that their TFN information has been mishandled may make a complaint to the AIC.

www.oaic.gov.au/law/tax-file-numbers.html

A Commonwealth Statutory Cause of Action for Serious Invasion of Privacy

The Commonwealth Government released an issues paper, *A Commonwealth Statutory Cause of Action for Serious Invasion of Privacy*, on 23 September 2011, to inform its response to the ALRC's recommendations to introduce a statutory cause of action for serious invasions of privacy. The NSW Law Reform Commission[1] and Victoria Law Reform Commission[2] have also recommended similar causes of actions be adopted.

This paper considered whether Australia should introduce a statutory cause of action for privacy and, if so, what elements a statutory cause of action might include. The paper considered the analysis of the Australian, Victorian and New South Wales Law Reform Commissions, and the policy context and current legal positions in Australia and comparable jurisdictions.

The deadline for comments was 18 November 2011. The Government is currently considering the more than 70 submissions received. For more information, visit www.ag.gov.au/Consultationsreformsandreviews/Pages/ACommonwealthStatutoryCauseofActionforSeriousInvasionofPrivacy.aspx.

DIAC to rethink detainee transfer processes

A Commonwealth Ombudsman investigation into the transfer of 22 detainees to the Metropolitan Remand and Reception Centre at Silverwater during the April 2011 riots at Villawood Immigration Detention Centre has prompted the Department of Immigration and Citizenship (DIAC) to review its processes.

Acting Deputy Ombudsman George Masri said the investigation had found deficiencies in the way in which detainees were notified about their transfer to Silverwater, the records kept by DIAC and the follow up with detainees after their transfer.

'DIAC did not follow its own procedures in relation to the transfers either during or after the incidents at Villawood on 20 and 21 April last year,' Mr Masri said.

'Notwithstanding the operational demands at the time, once the physical threat to staff and detainees had passed, DIAC had an obligation to ensure that all procedural and administrative requirements were met. This did not happen.'

Mr Masri said that DIAC had not appropriately informed the detainees about why they had been transferred to Silverwater and had delayed notifying the detainees' migration agents. There were also considerable gaps in DIAC's records regarding these transfers.

'DIAC's own procedures require it to keep comprehensive records about the welfare of a person in immigration detention who has been transferred to a correctional facility but, when asked, the department was not able to produce any relevant records,' he said.

'Nor did DIAC fully comply with its mandated requirement to visit a detainee in a correctional institution within 24 hours of arrival at the institution and to contact them weekly thereafter, either in person or by telephone. The first visit did not take place until six days after the detainees were transferred and only one or two more visits in person occurred 11 or 12 days later. There is no evidence of weekly contact being made during the period the detainees were held at Silverwater.'

DIAC has agreed to the Ombudsman's recommendations for improving its processes and has instigated a review of transfer arrangements between immigration and correctional detention, as well as within the wider immigration detention network. DIAC expects to update relevant policy and procedures for implementation later this year.

The Ombudsman investigated the transfer of the detainees from Villawood to Silverwater following a complaint by the detainees' legal representative, a member of the NSW Council for Civil Liberties.

The report, Department of Immigration and Citizenship: Detention arrangements – The transfer of 22 detainees from Villawood Immigration Detention Centre to the Metropolitan Remand and Reception Centre Silverwater, is available from www.ombudsman.gov.au.

www.ombudsman.gov.au/media-releases/show/204 - 23 April 2012

Overhaul of the Commonwealth Acts Interpretation Act 1901

On 15 June 2011, Federal Parliament passed the Acts Interpretation Amendment Bill 2011, enacting a number of significant changes to the *Acts Interpretation Act 1901* (the Act).

> It is hoped that these amendments, which came into force on 27 December 2011, will result in significant improvements to the Act as well as improving the clarity of Commonwealth legislation more generally.

The amendments assist the implementation of the clearer laws elements of the Government's *Strategic Framework for Access to Justice in the Federal Civil Justice System*. While the Act has been subject to numerous amendments since 1901, this is the first time the Act has been comprehensively amended to address concerns regarding its structure, application to modern technology and language.

The amendments seek to improve the structure of the Act by co-locating the definitions which are currently scattered throughout the Act, and co-locating other provisions that are currently not in a logical order.

There are also a number of substantive amendments. For example:

- ensuring that powers in relation to instruments apply to all types of instruments;
- allowing section 19B and 19BA Orders to apply retrospectively (these Orders update references in legislation to a particular Minister, Department or Secretary of a Department so that they can be read consistently with responsibilities as allocated under the Administrative Arrangements Order);
- providing that an action by a Minister other than the Minister who is authorised to perform that action is not invalid merely on that basis;
- providing that anything done by or in relation to a person purporting to act under an appointment (including an acting appointment) is not invalid merely because the occasion for the appointment had not arisen, there was a defect or irregularity in connection with the appointment, the appointment had ceased to have effect or, in the case of acting appointments, the occasion to act had not arisen or had ceased; and
- specifying that everything in an Act as enacted by the Parliament should be considered part of an Act.

A number of concepts have also been modernised. For example:

- allowing meeting participants to be in different locations and to participate using technology such as video-conferencing; and
- adjusting the definition of 'document' to include things like maps, plans, drawings and photographs.

The first audit of a Commonwealth partner under the Auditor-General's new powers

Following a request from the Joint Committee of Public Accounts and Audit (JCPAA) the Auditor-General has decided to undertake a performance audit, under section 18B of the *Auditor-General Act 1997* (the Act), of the administration of:

- the 2011 Heads of Agreement for the Continued Management, Operation and Funding of the Mersey Community Hospital as represented by the Commonwealth Department of Health and Ageing (DoHA) and the Tasmanian Department of Health and Human Services (DHHS); and

- the earlier 2008 Heads of Agreement for the management, operation and funding of the Mersey Community Hospital as represented by DoHA and DHHS.

This will be the first performance audit of a Commonwealth partner pursuant to section 18B of the Act. Section 18B and a number of other changes were introduced into the Parliament as a private member's Bill. The Act implemented the majority of recommendations made by the JCPAA in its report 419, *Inquiry into the Auditor-General Act 1997*. The Amendments commenced on 8 December 2011.

Under section 18B of the Act, a performance audit may be conducted to assess the operations of a Commonwealth partner where the Commonwealth has provided money for a Commonwealth purpose. Where a Commonwealth partner is, is part of, or is controlled by the government of a state or territory, a performance audit may only be conducted at the request of the responsible minister or the JCPAA. The JCPAA's decision follows a request from the Auditor-General prompted by representations received from a member of the Federal Parliament.

Public consultation for national security legislation reform

The Commonwealth Government has announced new plans to review national security legislation to ensure Australia's national security capability can evolve to meet emerging threats, while also delivering the right checks and balances for a civil society.

Attorney-General Nicola Roxon has asked the Parliamentary Joint Committee on Intelligence and Security to consider potential reforms through public hearings. The Attorney emphasised that this is the beginning of the process and the Government was seeking diverse views before determining which legislative reforms it would pursue.

The Government is proposing reforms to the *Telecommunications (Interception and Access) Act 1979*, the *Telecommunications Act 1997*, the *Australian Security Intelligence Organisation Act 1979* and the *Intelligence Services Act 2001*.

Lawful access to telecommunications will be reviewed to ensure that vital investigative tools are not lost as telecommunications providers change their business practices and begin to delete data more regularly.

Strengthening safeguards and privacy protections within national security legislation will also be considered, including clarifying the roles of the Commonwealth and state ombudsmen in overseeing telecommunications interception by law enforcement agencies.

Changes that will be examined by the Committee include an authorised intelligence operations scheme for ASIO officers. Such a scheme would see ASIO officers afforded the same protection from criminal and civil liability for authorised operations that Australian Federal Police currently receive.

The Committee will also consult on measures to address security risks posed to the telecommunications sector, and whether the Government needs to institute obligations on the Australian telecommunications industry to protect their networks from unauthorised interference.

If the request is agreed to, the Government would ask the Committee to report back by 31 July 2012. The Government will then consider the report before developing draft legislation for consultation.

www.attorneygeneral.gov.au/Media-releases/Pages/2012/Second%20Quarter/4-May-2012---Public-consultation-for-national-security-legislation-reform.aspx

4 May 2012

National Children's Commissioner to be established

The Federal Government has announced the creation of a National Children's Commissioner within the Australian Human Rights Commission.

Attorney-General Nicola Roxon said that the new Commissioner will focus on promoting the rights, wellbeing and development of children and young people in Australia. 'For the first time, Australia will have a dedicated advocate focussed on the human rights of children and young people at the national level,' Ms Roxon said.

The Minister for Families, Community Services and Indigenous Affairs Jenny Macklin said establishing a Federal Children's Commissioner was a key action under the Government's *National Framework for Protecting Australia's Children 2009-2020*.

'We want every child to grow up safe, happy and well. The new Commissioner will represent the views of children and young people, particularly those most vulnerable, at the national level,' Ms Macklin said.

Minister for Community Services Julie Collins said children and young people need a national advocate to ensure their rights are reflected in national policies and programs. 'The national Commissioner will not duplicate but complement the work of states and territories, particularly the work of other commissioners and guardians.'

The Children's Commissioner will take a broad advocacy role to promote public awareness of issues affecting children, conduct research and education programs, consult directly with children and representative organisations; it will also monitor Commonwealth legislation, policies and programs that relate to children's rights, wellbeing and development.

The Government has called for expressions of interest for the position.

www.attorneygeneral.gov.au/Media-releases/Pages/2012/Second%20Quarter/29-April-2012---Gillard-Government-to-establish-National-childrens-commissioner.aspx

29 April 2012

Victorian Independent Broad-based Anti-corruption Commission legislation too narrow and flawed, LIV says

Legislation creating the Independent Broad-based Anti-corruption Commission (IBAC) is flawed, too narrow and should be reconsidered, according to the Law Institute of Victoria (LIV).

LIV President Michael Holcroft said recently that the limited mandate of IBAC will make it inefficient and will undermine public confidence in the handling of corrupt public officials.

'We support a robust anti-corruption body able to investigate all corruption in the public sector. Despite having introduced five separate pieces of legislation, we don't think the Government has achieved this goal,' Mr Holcroft said.

'The legislation is flawed – it is difficult to read and will be difficult to use,' Mr Holcroft said.

Mr Holcroft said the proposed IBAC was not much more than the Office of Police Integrity (OPI) by another name. IBAC subsumes the OPI jurisdiction and widens it to include unsworn officers with a narrow mandate relating to 'serious' corrupt officials.

In a submission to the Government, the LIV said that the definition of corrupt conduct was limited to only some indictable offences. The offences of misconduct in public office or conspiracy are not included. Serious corrupt conduct is not defined, and is left to be determined by the IBAC Commissioner with no guidance to help the Commissioner, other integrity bodies or the public understand what 'serious' corrupt conduct is.

Mr Holcroft said the LIV was also concerned that the new IBAC is underfunded. Past OPI expenditure suggests that at least $100 million would be needed over four years to administer OPI functions, leaving only $70 million over four years to cover the establishment costs of IBAC and the costs of investigating serious corruption.

'We believe that the starting point for IBAC – its mandate to investigate corruption – should be broad. We need a better definition of 'serious corrupt conduct' so that it is clear what IBAC will investigate and what it will refer to other integrity bodies including the Ombudsman,' he said.

The relationship between the IBAC Act and the Victorian Whistleblower Protection Act is also unclear. Mr Holcroft said the LIV was also concerned that IBAC could question people without telling the witness the nature of the allegations. The capacity of the overseeing Victorian Inspectorate to fix any wrongs in IBAC investigations as they occur also requires greater clarity.

The LIV also says IBAC should have broader flexibility to hold public hearings, by removing the need for 'exceptional circumstances'.

The LIV's submission can be found on the Institute's website at: http://www.liv.asn.au/PDF/About/Media/120509_LIV_IBAC-Submission.aspx.

www.liv.asn.au/About-LIV/Media-Centre/Media-Releases/IBAC-legislation-too-narrow-and-flawed,-LIV-says.aspx?rep=1&glist=0&sdiag=0

10 May 2012

Recent decisions

Exactly when is a decision-maker functus?

SZQOY v Minister for Immigration [2012] FMCA 289 (19 April 2013)

The applicant, a national of Nepal, sought judicial review of a Refugee Review Tribunal (the Tribunal) decision affirming a decision of the Minister's delegate not to grant her a Protection Visa. The applicant claimed among other things that she had a well founded fear of persecution on the basis of an interfaith relationship.

The Tribunal member completed his decision on 2:32pm on 27 July 2011 and at 2:34pm used the electronic Tribunal case management system to inform the Tribunal's registry that the decision was ready to be published to the applicant and the Minister. At 4:57pm on the same day, the applicant's adviser faxed a submission containing additional potentially relevant evidence to the Tribunal. The Tribunal member after being presented with the submission asked that the material be forwarded to the Registry Manager for response as he had decided that there was no jurisdictional error and the case could not be reopened. At 6:34pm the applicant's advisor was notified of the Tribunal decision by fax.

The Minister contended that the point at which the Tribunal became *functus officio* was to be determined by reference to s 430(2) of the Migration Act 1958. Section 430(2) relevantly provides that a decision of the Tribunal (other than an oral decision) is taken to have been made on the date of the written statement.

The Minister referred a recent decision of Smith FM in *SZQCN v MIAC* [2011] FMCA 606 (23 September 2011), which held, pursuant to s 430(2), that the Tribunal decision is deemed to take effect upon the first moment in time on the date appearing on the written statement of reasons for the decision, regardless of the actual time when the decision was finalised in the mind of the Tribunal member, or when the statement of reasons was completed within the Tribunal, or published to the applicant. The Minster submitted that this construction ascribed to the Parliament the unlikely intention of deeming a decision-maker to be *functus* even before his or her statement of reason had been published. Instead, the Minister submitted that the better construction was that a Tribunal decision is final at the point when the presiding member has conveyed it to the Tribunal registry for publication.

The Court found that s 430(2) is concerned with when the limitation period for judicial review of the Tribunal's decision starts to run and not with when the Tribunal has completed its task. The Court found that in the absence of any specific provision governing the time when the Tribunal became *functus*, no decision was beyond recall prior to the publication of the decision. In this case, there was no direct evidence that the presiding member could not have recalled the decision at any point prior to its dispatch and the despatch was not an automated and irreversible process but effected through the actions of a Tribunal officer. Therefore given this final step was not taken until after the applicant's adviser had sent the further submissions, the Tribunal was not *functus* at the time the submissions were received.

Consequently the Court found that the Tribunal member erred when he concluded that the matter was finalised when he saw the additional submissions. The Court held that the information in the submission was not so insignificant that the failure to take it into account could not have materially affected the decision. Consequently the Tribunal should have considered it and its failure to do so was a jurisdictional error.

The consequences of a failure to properly appoint statutory officers

Kutlu v Director of Professional Services Review [2011] FCAFC 94 (28 July 2011) (*Kultu*)

This decision concerned whether a failure to follow a legislated consultation step prior to making a statutory appointment invalidated the appointment and the decisions of the purported appointee.

The *Health Insurance Act 1973* (HI Act) requires the Minister for Health and Ageing to consult with the Australian Medical Association (AMA) before appointing a medical practitioner to be a member of the PSR panel (s 84(3)) or a Deputy Director (s 85(3)).

In 2005 and 2009, without first consulting the AMA, the then Ministers appointed a number of medical practitioners as Deputy Directors and/or Panel members of the PSR panel. Each of the appointees was a member and/or Deputy Director of a PSR Committee (the Committee) that made adverse findings against five medical practitioners in conducting reviews of those practitioners' rendering of professional services for which the Commonwealth paid Medicare benefits. In late 2010, the Commonwealth made public the information that the Ministers had not complied with the statutory requirement of prior consultation before making, among others, those appointments.

The five applicant medical practitioners contended that the Minister's failure to follow the HI Act meant that the Committees were not validly constituted and the findings by those Committees against them had no effect.

The Commonwealth contended, among other things, that it could not have been the intention of the Parliament that such a failure, first, rendered the appointments invalid, and, second, caused the constitution and all the processes of Committees of which such appointees were members to be invalid. The Commonwealth also argued that, even if the appointment of a Panel member or Deputy Director itself were invalid, this did not deprive the Committee, on which that appointee acted, of validity. It argued in the alternative that the common law principle of preserving the validity of what had been done by de facto officers ought to be applied to preserve what such Committees had done.

The Court held that the requirement in the HI Act to consult the AMA is mandatory:

> ... the requirements of ss 84(3) and 85(3) are essential preliminaries to the Minister's exercise of the power of appointment. They have a rule-like quality that is easily identified and applied. The sections do not direct the Minister to carry out his or her powers of appointment in accordance with matters of policy. Instead, they confer a discretion to appoint after the preconditions of consultation with, and advice by, the AMA have been fulfilled and the Minister has had regard to that advice. ...

It followed that all the impugned appointments were invalid and as such the adverse findings and the final reports of the PSR Committees constituted by one or more of the appointees was invalid.

While the Court found that the public inconvenience resulting from a finding of invalidity of the various impugned appointments is likely to be significant:

> ....the scale of both Ministers' failures to obey simple legislative commands to consult the AMA before making the appointments is not likely to have been a matter that the Parliament anticipated. If the appointments were treated as valid, the unlawfulness of the Ministers' conduct in making them would attract no remedy. And, if that were so, the appointees would hold the offices to which the Minister had unlawfully appointed them and they could not be prevented by injunction or other orders of a court from exercising the powers of those offices.

The Court also rejected the Commonwealth's argument that the de facto officers doctrine applied. The Court held that the de facto officers doctrine is a principle of common law that can be overridden by statute (*R v Janceski* [2005] NSWCCA 281). In this case, the Parliament did not authorise persons to exercise those offices unless they had been appointed in accordance with s 84(3) and s 85(3) of the Act.

On 10 February 2012, the High Court granted special leave to appeal to the Commonwealth. However on 18 May 2012, the Commonwealth filed a Notice of Discontinuance. This followed the introduction of the Health Insurance Amendment (Professional Services Review) Bill 2012 in the Commonwealth Parliament on 9 May 2012. The Bill addresses issues raised by Kutlu by ensuring that actions taken under Part VAA, VB or VII of the HI Act and any flow on acts that have been brought into question as a result of the Kutlu decision,

are treated as valid and effective and are to be taken always to have been valid and effective.

Dob-in letters and illogicality and irrationality

SZOOR v Minister for Immigration and Citizenship [2012] FCAFC 58 (27 April 2012)

This was an appeal from a judgment of the Federal Magistrates Court that upheld a decision of the Refugee Review Tribunal (the Tribunal) affirming a decision not to grant the appellant a protection visa.

The appellant was a Pakistan citizenship, he claimed, among other things, that he had a well founded fear of persecution on the grounds of imputed political opinion. The appellant claimed that in July 2005 while working as a cameraman for GEO TV in Pakistan, he was involved with the filing of a news report about a Jamia Manzoor-ul-Islamia (JMI) madrassa. The appellant alleged that as a result of his involvement with the news report he was attacked by JMI and threats were made against his life. He provided corroborative documentary material to the Tribunal to support his claims, including, among other things, a letter purportedly from the Punjab Union of Journalists (PUJ), a medical report and a news report.

During its consideration of the matter, the Tribunal received an anonymous 'dob-in-letter'. The letter alleged, among other things, that the appellant's claims were fabricated. The Tribunal put the substance of the letter to the appellant. In its reasons the Tribunal found that although the allegation was made by a person who wished the appellant ill, the fact that the person making the allegation was able to detail the nature of the fabrication, which was supported by an analysis of the evidence provided by appellant, pointed to it being true.

The issue in the appeal was whether the Tribunal, by making a finding against the appellant, in part by relying on the letter, committed a jurisdictional error. The appellant contended that there was no probative evidence to support the allegations in the letter and, therefore, the Tribunal's reasoning was illogical and its findings as a whole vitiated (*MIAC v SZMDS* [2010] HCA 16 (26 May 2010)) (*SZMDS*).

Relying primarily on the High Court's reasoning in *SZMDS*, the Court (Rares, McKerracher and Reeves JJ) unanimously dismissed the appeal.

Justice Rares stated that the approach to irrationality or illogicality dictated by the authorities in the High Court appear to be that even if the decision-maker's articulation of how and why he or she went from the facts to the decision is not rational or logical, if someone else could have done so on the evidence, the decision is not one that will be set aside. It is only if no decision-maker could have followed that path, and despite the reasons given by the actual decision-maker, that the decision will be found to have been made by reason of a jurisdictional error.

While Rares J agreed that the appeal should be dismissed; he stated that, unfettered by High Court authorities, he would have concluded that the fact that an anonymous letter writer may have access to certain information that is accurate does not logically, rationally or reasonably allow the inference to be drawn that the other assertions made by the mysterious source are true:

> It is difficult to see how it is in the public interest that unknown persons who give no basis for their being in a position to make prejudicial assertions about another person are entitled to any credence in decision-making under the Act: cf *VEAL* 225 CLR at 98-99 [24]-[25]. Unconstrained by authority, I

> would have found that to do so is as irrational, illogical and unreasonable as having regard to a person saying that the red headed applicant for a visa should have his claim rejected because he has red hair and is a liar. However, the law appears to be otherwise.

Justice McKerracher, with whom Reeves J agreed, held that the appellant's argument paid insufficient regard to the other strong conclusions already reached by the Tribunal in relation to the appellant's conduct and his credibility before it considered the letter and, therefore, the substance of the letter was not integral to the subsequent reasoning of the Tribunal. Justice McKerracher found that the Tribunal, independent of the letter, had already concluded that the corroborative documentary material was obliviously and deliberately fabricated.

However, McKerracher J noted that, if the letter was the only material before the decision-maker in a hypothetical case, or reliance was placed on that document in order to lead to other conclusions or judicial facts, doing so would involve a process which might well be tainted with illogical or irrational reasoning. Had the letter been the only evidence relied upon, the appeal might have been disposed of quite differently.

FOI: legal professional privilege and the parliamentary privilege

British American Tobacco Australia Ltd v Secretary, Department of Health and Ageing [2011] FCAFC 107 (23 August 2011)

This case concerned a request by British American Tobacco (the appellant) to the Secretary of the Department of Health and Ageing (the respondent) under s 15 of the *Freedom of Information Act 1982* (FOI Act) for access to a copy of a memorandum of advice provided by the Attorney-General's Department (AGD) to the Tobacco Policy Section of the then Department of Health Services and Health (DHSH). The advice concerned legal and constitutional issues relating to the generic packaging of cigarettes.

The respondent refused the request on the basis that the documents were exempt from production under s 42 of the FOI Act because they were subject to legal professional privilege. The respondent's decision was affirmed by the Administrative Appeals Tribunal. The appellant appealed the Tribunal's decision to the Full Federal Court.

The appellant contended before the Full Federal Court that the legal professional privilege in the AGD legal advice was waived by the respondent. The appellant relied upon five acts of disclosure which, either alone or cumulatively, were said to have resulted in a waiver of privilege.

These acts were:

- a reference to aspects of the AGD legal advice in a Government Response paper which was tabled in the Senate;
- subsequent publication of the Government Response paper on a government website;
- a provision of a summary of the AGD legal advice to the Tobacco Working Group (TWG), (an advisory group to government) and the Ministerial Tobacco Advisory Group (MTAG), an advisory group which replaced the TWG; and
- the provision of a summary of the AGD legal advice prepared for the TWG to the appellant in the course of the proceedings before the Tribunal.

The respondent submitted that both the tabling of the Government Response paper and subsequent publication were "proceedings in parliament" pursuant to s 16(2) of the *Parliamentary Privileges Act 1987* (the *PP Act*) and therefore could not be considered by a Tribunal or Court for the purpose of determining whether legal privilege in the AGD legal advice had been waived (s 16(3) of the *PP Act*). Section 16(3) restricts the uses which may be made of evidence of federal parliamentary proceedings in litigation and proceedings before Courts and Tribunals. It provides:

> In proceedings in any court or tribunal, it is not lawful for evidence to be tendered or received, questions asked or statements, submissions or comments made, concerning proceedings in Parliament, by way of, or for the purpose of—
>
> (a) questioning or relying on the truth, motive, intention or good faith of anything forming part of those proceedings in Parliament;
>
> (b) otherwise questioning or establishing the credibility, motive, intention or good faith of any person; or
>
> (c) drawing, or inviting the drawing of, inferences or conclusions wholly or partly from anything forming part of those proceedings in Parliament.

Additionally, the respondent contended that none of the acts of disclosure relied upon by the appellant were inconsistent with the respondent continuing to insist upon the privilege.

The Full Court (Keane CJ, Downes and Besanko JJ) held that legal professional privilege in the AGD legal advice had not been waived.

The Court accepted the respondent's argument that the tabling of the Government Response in the Senate was protected by parliamentary privilege under s 16(3) of the PP Act and this prevented the Tribunal and the Court from having regard to this when determining whether privilege was waived.

The Court did not accept the respondent's contention that s 16(3) extended to the publication of the Government response on a departmental website. Rather the Court affirmed the test for implied waiver stated in *Mann v Carnell* [1999] HCA 66 and affirmed in *Osland v Secretary, Department of Justice* [2008] HCA 37 that waiver of legal professional privilege will occur if the conduct of the person seeking to rely upon the privilege is inconsistent with the maintenance of the privilege. The disclosure of the gist of a privileged communication does not necessarily result in a waiver of the privilege. The Court held that in this case, the respondent was not seeking to deploy a partial disclosure of the AGD legal advice on its website for any forensic or other advantage.

In relation to the provision of summaries to the TWG and the MTAG, the Court held that the disclosures were not inconsistent with the maintenance of the privilege and, additionally, that the TWG and the MTAG were not 'outsiders' in relation to the government. Therefore, providing the advice to these bodies was not inconsistent with the maintenance of privilege.

With regard to the disclosure of the summary to the appellant during the Tribunal proceedings, the Court agreed with the Tribunal in finding that this disclosure was consistent with the claim of privilege. This circumscribed version of the AGD legal advice was disclosed as a document relevant to the Tribunal proceedings.

FOI: documents held by the Official Secretary to the Governor-General

Kline and Official Secretary to the Governor-General [2012] AATA 247 (30 April 2012) (Deputy President Hack SC)

Ms Kline nominated a person for appointment to the Order of Australia in 2007 and 2009. On both occasions her nominees were not appointed.

On 26 January 2011, Ms Kline applied under the *Freedom of Information Act 1982* (Cth) (*FOI Act*) for access to a number of documents held by the Official Secretary to the Governor-General (the respondent). The documents related to, among other things, Ms Kline's nominations to the Order and all correspondence held by the Official Secretary in relation to this nomination.

The Official Secretary decided, and the Information Commissioner on review agreed, that the Act does not apply to those documents by reason of s 6A of the Act. Section 6A provides that the *FOI Act* does not operate with respect to documents held by the Official Secretary unless they relate to 'matters of an administrative nature'.

The Tribunal held that none of the documents or categories of documents in dispute relate to matters of an administrative nature. The Tribunal found that documents generated in connection with the conferral of the Order honours do not ordinarily relate to matters of 'an administrative nature'. They relate to substantive functions of the Governor-General. While it is possible to conceive of exceptions to this general proposition (for example, correspondence with the supplier of medals and insignia, or with a caterer providing refreshments at the awards ceremony), the documents in question do not relate to this type of matter. If the *FOI Act* was intended to apply to documents generated in connection with a wider view of the Governor-General's functions, it would have done so using clear words.

The Tribunal also drew an analogy with the decision of Gray J in *Bienstien v Family Court of Australia* [2008] FCA 1138. In *Bienstien* the Federal Court relied on the limitation in s 5 of the *FOI Act* which provides, like s 6A, that the *FOI Act* does not operate with respect of documents held by a court unless they relate to 'matters of administrative nature'. While in this case the independence of the judiciary was not at stake, the Tribunal considered whether the documents in question related to matters that are concerned with the exercise of the Governor-General's function in circumstances where the proper exercise of that function would be compromised by disclosure. The Tribunal found that making choices about who would receive an honour is akin to a judicial function that involves a delicate judgment and frank advice from the Council of the Order is essential to the process. This being so, there are good reasons why this process should occur behind closed doors.

Endnotes

1 See NSWLRC Report at 8-10. See further NSWLRC Report at 7-22 and VLRC Report at 145-146.
2 See VLRC Report at 147.

A NEW FEDERAL SCHEME FOR THE PROTECTION OF HUMAN RIGHTS

James Stellios* and Michael Palfrey**

The development of overarching legislative schemes for protecting human rights in Australia has enjoyed considerable momentum over the last 10 years or so. Drawing on the United Kingdom *Human Rights Act 1998*, Australian jurisdictions have considered the adoption of the so-called 'dialogue' model of rights protection, with a role given to each arm of government to protect rights. The Australian Capital Territory introduced such a system in 2004[1] and Victoria followed in 2006.[2] In 2008, the Commonwealth government commissioned an independent inquiry to consider options for legislative reform at the federal level.

Although that Committee recommended the adoption of a UK-style 'dialogue' model of human rights protection,[3] the Commonwealth has, instead, decided to implement a more limited form of 'dialogue' model that imposes scrutiny requirements on the development of policy by the executive and during the legislative process. That new human rights scheme has now been implemented by the enactment of the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth).

This article outlines how the new scheme is intended to operate and the significant implications it will have for Commonwealth government policy development and administrative decision-making.

The recommendations of the Human Rights Consultation Committee

In December 2008 the Human Rights Consultation Committee was asked by the Commonwealth government to inquire into three questions: first, which human rights and responsibilities should be protected and promoted in Australia? Second, are human rights sufficiently protected and promoted? And third, how could Australia better protect and promote human rights and responsibilities?

Having undertaken a national consultation process, the Committee delivered its report containing a range of recommendations in September 2009. One of the key recommendations was for the Commonwealth to enact a Human Rights Act based on the 'dialogue' model of rights protection[4] with similar features to those in the ACT *Human Rights Act 2004* and the Victorian *Charter of Human Rights and Responsibilities Act 2006.* The features contemplated were:

- legislative and executive scrutiny mechanisms whereby the making of new laws and legislative instruments would have to be accompanied by statements of compatibility with human rights and then be reviewed by a parliamentary joint committee on human rights prior to enactment;[5]

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- an interpretative rule requiring legislation to be interpreted consistently with human rights;[6]
- if considered practical, a power for the High Court to issue a declaration of incompatibility with human rights if the Court was unable to interpret a provision consistently with human rights;[7] and
- an obligation on Commonwealth public authorities to act in a manner compatible with human rights and to give human rights proper consideration when making decisions.[8]

Even if a Human Rights Act were not adopted, it was envisaged that the legislative and executive scrutiny process would still be implemented,[9] along with an amendment to the *Acts Interpretation Act 1901* (Cth) to require legislation to be interpreted consistently with rights[10] and an amendment to the *Administrative Decisions (Judicial Review) Act 1977* (Cth) to make human rights relevant considerations to be taken into account in government decision-making.[11]

As for what human rights should be protected, the Committee identified a list of derogable and non-derogable rights that should be included in a federal Human Rights Act.[12] Further, the Committee generally recommended that the 'Federal Government operate on the assumption that, unless it has entered a formal reservation in relation to a particular right, any right listed in the following seven international human rights treaties should be protected and promoted':[13]

- the *International Covenant on Civil and Political Rights*;
- the *International Covenant on Economic, Social and Cultural Rights*;
- the *Convention on the Elimination of All Forms of Racial Discrimination*;
- the *Convention on the Elimination of All Forms of Discrimination Against Women*;
- the *Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment*;
- the *Convention on the Rights of the Child*; and
- the *Convention on the Rights of Persons with Disabilities*.

The Committee recommended that a limitation clause for derogable civil and political rights, similar to that contained in the ACT and Victorian legislation,[14] be included in the proposed Human Rights Act.

The government's response

When releasing *Australia's Human Rights Framework* in 2010, the then Attorney-General indicated that the government would not seek to enact a Human Rights Act. The Attorney-General explained that many Australians were concerned about its possible consequences and that the government believed 'that the enhancement of human rights should be done in a way that as far as possible unites, rather than divides, our community'.[15] The recommended amendments to the *Acts Interpretation Act* and the *Administrative Decisions (Judicial Review) Act* were not taken up.

Given the High Court's 2011 decision in *Momcilovic v The Queen*,[16] which considered the interpretive rule and declaration of inconsistency power in the Victorian *Charter*, there were key aspects of the proposed Human Rights Act which would have run into constitutional

difficulty. The power to make a declaration of incompatibility could not have been given to the High Court as proposed (or any other court for that matter) and the extent to which a federal interpretive rule would have survived constitutional scrutiny remains unclear following that case[17].

Although rejecting a Human Rights Act, the government decided to adopt the recommendations to establish the legislative and executive scrutiny mechanisms; these mechanisms have now been implemented with the enactment of the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth).[18]

Human Rights (Parliamentary Scrutiny) Act 2011

Two principal human rights scrutiny mechanisms are created by the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Statements of compatibility

Section 8 of that Act provides that a member of Parliament who proposes to introduce a Bill into Parliament 'must cause a statement of compatibility to be prepared', which is then presented to Parliament. The same obligation is placed on the rule-maker in relation to the making of a legislative instrument to which s 42 of the *Legislative Instruments Act 2003* (Cth) applies and the compatibility statement must be included in the explanatory statement relating to the legislative instrument (see s 9). These statements of compatibility 'must include an assessment of whether [the provisions are] compatible with human rights' (ss 8(3) and 9(2)).

One immediate and practical question that will arise is what level of detail will be required in a statement of compatibility? Under the similar process in the ACT *Human Rights Act*, the ACT government has, at times, been criticised for simply stating whether or not a Bill is consistent with human rights without setting out the reasons for that conclusion.[19] The Victorian requirement is for a statement to set out 'how' a Bill is compatible with human rights and, consequently, more detailed statements of compatibility have been prepared in that jurisdiction.[20]

It certainly seems to have been contemplated that, for the federal scheme, an 'assessment' of compatibility will need to go beyond a mere conclusion of compatibility. The Explanatory Memorandum indicates that statements 'are intended to be succinct assessments aimed at informing Parliamentary debate and containing a level of analysis that is proportionate to the impact of the proposed legislation on human rights'.[21]

Despite the obligatory form of language used in the drafting of the statement of compatibility provisions, a failure to comply with the statutory requirements does not affect the validity, operation or enforcement of the provisions in question or any other law of the Commonwealth (ss 8(5) and 9(4)). Furthermore, they are not binding on any court or tribunal (ss 8(4) and 9(3)).

Parliamentary committee

The Act also provides for the establishment by Parliament of the Parliamentary Joint Committee on Human Rights (s 4), regulates its membership, powers and proceedings (ss 5 and 6) and sets out its functions (s 7). The functions of the committee are limited to: (a) examining Bills and legislative instruments that come before either House, for compatibility with human rights and to report to Parliament; (b) examining existing Acts for compatibility

with human rights and to report to Parliament; and (c) to inquire into matters referred by the Attorney-General and to report to Parliament.

What human rights are protected?

Importantly, the pivotal expression 'human rights' is defined to mean 'the rights and freedoms recognised or declared by' the seven core UN human rights treaties nominated by the Human Rights Consultation Committee, as they apply to Australia (s 3(1) and (2)). This is a significant development on the range of rights protected in the ACT *Human Rights Act* and the Victorian *Charter,* which are limited to rights drawn from the International Covenant on Civil and Political Rights.

The impact of the new legislative scheme

Federal policy development and law-makers

This new human rights scheme will have important implications for federal policy developers and law-makers. Those proposing new federal legislation and legislative instruments will have to make an assessment of whether the provisions are compatible with a range of human rights set out in the seven core UN treaties. The Parliamentary committee will also be required to make the same assessment. Familiarity with those treaties will be required by all concerned, along with an appreciation of how to approach an assessment of the provisions.

As indicated by the then Attorney-General in his second reading speech, the provisions are intended to have a transformative impact on policy development and law making:

> As a government, we are focused on influencing the culture and practice of decision makers, policy developers and law-makers at the starting point in the development of policy and laws and creating an appreciation as to how laws impact on the individuals to which the laws apply. The bill includes measures which will mean that the executive in proposing the legislation and the parliament in considering legislation will have greater regard to the impact of laws on the rights of citizens.[22]

Although the government declined to enact the 'dialogue' model of human rights protection recommended by the Human Rights Consultation Committee and reflected in the ACT and Victorian schemes, it nonetheless considers the enacted scrutiny scheme will create its own form of 'dialogue' between the executive, the parliament and the citizens of Australia. The statement of compatibility allows the executive to inform members of Parliament of the human rights impact of proposed laws and the parliamentary committee can establish a dialogue between the Parliament and the people on the human rights impact of the law.[23]

Interpretation by the judiciary, tribunals and legal advisers

The impact of this new human rights scheme does not end at the policy development and law making stages. It will also affect the judicial task of statutory interpretation. The form of 'dialogue' model adopted in the ACT *Human Rights Act* and the Victorian *Charter* clearly involves the judiciary in a 'dialogue' on rights protection, through the application of the rights-consistent interpretive rule and by the Supreme Court in each jurisdiction making a declaration of incompatibility where rights-consistent interpretations cannot be adopted. The interpretive rule in those jurisdictions is to be applied by anyone interpreting the provisions, so all courts, tribunals and legal advisers (amongst others) are drawn into the rights-consistent interpretive process.

However, the new federal human rights scheme does not contain an interpretive rule or the judicial power to make a declaration. Nor has the Commonwealth amended the *Acts*

Interpretation Act 1901 to include an interpretive rule as recommended in the Report by the Human Rights Consultation Committee. The 'dialogue' referred to by the then Attorney-General is notionally between the executive, the parliament and the people.

Nevertheless, the new scheme will have an impact on how courts interpret Commonwealth legislation and legislative instruments made following the introduction of the scheme. If legislative provisions have been assessed by the executive and the legislative committee as consistent with human rights, and enacted on that basis, then interpretations of those provisions consistent with human rights may well be required by the courts.

This position was foreseen by the then Attorney-General when introducing the legislation into Parliament:

> After enactment, statements of compatibility may also be of assistance to the courts. Currently, in determining the meaning of provisions in the event of ambiguity, a court may refer to other material considered by parliament in the passage of legislation. This includes accompanying explanatory memoranda, second reading speeches and parliamentary committee reports. A statement of compatibility and a report of the Joint Committee on Human Rights, while not binding on a court or tribunal, could be used by the court or tribunal to assist in ascertaining the meaning of provisions in a statute where the meaning is unclear or ambiguous.[24]

Thus, although the new scheme does not contain an interpretive rule similar to those contained in the ACT *Human Rights Act* and the Victorian *Charter*, the interpretive process by courts (and, by extension, tribunals and legal advisers) will nevertheless be affected.

Impact on executive decision-makers under such laws

Although the Commonwealth has not imposed a duty on Commonwealth government officers and agencies to act consistently with human rights or to take rights into account when making decisions, the new federal scheme will necessarily affect the actions undertaken and decisions made by Commonwealth decision-makers under Commonwealth provisions made following the introduction of the new scheme. Where those provisions have been assessed as human rights compatible by policy developers or law-makers, it will be fair to assume that exercise of power by executive officers under those provisions will have to be consistent with human rights. Thus, although the Commonwealth rejected the Human Rights Consultation Committee's recommendation to amend the *Administrative Decisions (Judicial Review) Act* to make human rights relevant considerations to be taken into account in government decision-making, the seven core UN treaties may well be relevant to the scope of decision-making power.

Impact on interpretation not to be overstated

The impact of the new scheme on interpretation should not be overstated. First, it will only affect Acts and legislative instruments made after the introduction of the scrutiny scheme. Second, consideration of rights consistent interpretations will only be undertaken in cases of ambiguity. The High Court has made it clear that the text of provisions will be given full effect if it is clear on its face, irrespective of what is in the historical record.[25] This would be the case even if that clear meaning is, in the court's view, inconsistent with human rights, and contrary to the assessment of compatibility made in the statement of compatibility or report of the parliamentary committee. After all, as the then Attorney-General recognised, the courts will not be bound by these executive and legislative assessments of compatibility. Third, there is already a common law principle of statutory interpretation that provisions are to be interpreted consistently with international obligations, although there is some uncertainty as to the scope of that principle.[26] Finally, there is also a common law principle of interpretation – increasingly now referred to as the principle of legality – that assumes that

fundamental common law rights will not be abrogated by Parliament unless clear language is used and, as was emphasised in *Momcilovic*,[27] there is some degree of overlap between those fundamental common law rights and the human rights found in the seven core UN treaties, particular civil and political rights.

Nevertheless, the provisions will have an important impact on the process of interpretation. In cases of ambiguity, a court will look to the historical record for context, and that context will include executive and legislative assessments of compatibility with the human rights set out in the seven core UN treaties. That will necessarily impact on interpretations adopted by tribunals and on advice given by legal advisers on the meaning and operation of provisions, and the scope of executive decision-making pursuant to those provisions.

Conclusion

The new federal human rights scheme in the *Human Rights (Parliamentary Scrutiny) Act* will give rise to a range of challenges. There are basic questions about the executive and legislative assessment processes that will have to be resolved. For example, what does 'compatible with human rights' mean? Many human rights are not absolute, they can be qualified if there is appropriate justification. Will there be incompatibility when a right has been burdened, or only when the burden cannot be justified? If the latter, what tests will be adopted to determine whether a breach has been justified? Will we apply the tests developed by international tribunals and UN bodies, or will home-grown compatibility tests have to be developed?

Education programs have been, and will have to continue to be, rolled out for policy developers, law-makers and decision-makers. These programs will have to address not only the content of the seven core human rights treaties, but also how the requirements of the new scheme will translate into actual decision-making processes. The experience in the ACT and Victoria suggests that education programs will have to be appropriately designed for all levels of government decision-makers.[28]

Since the scrutiny processes are only sketched out in the *Human Rights (Parliamentary Scrutiny) Act,* administrative and legislative processes and practices will have to be adopted to fill in the gaps. It may well be that the ACT and Victorian experiences will provide lessons for how things should be done.

Ultimately, it is clear that the new federal human rights scheme created by the *Human Rights (Parliamentary Scrutiny) Act* will have significant consequences for government policy development and administrative decision-making. As the then Attorney-General said in his second reading speech, the intention of the new scheme is to influence the culture and practice of government decision-making, which will entail important changes in the way that government business is conducted.

Endnotes

1 *Human Rights Act 2004* (ACT).
2 *Charter of Human Rights and Responsibilities 2006* (Vic).
3 *National Human Rights Consultation Report* (2009), recommendation 18.
4 Ibid, recommendation 19.
5 Ibid, recommendations 26, 27.
6 Ibid, recommendation 28.
7 Ibid, recommendation 29.
8 Ibid, recommendations 20, 30.
9 Ibid, recommendation 6.
10 Ibid, recommendation 12.
11 Ibid, recommendation 11.

12 Ibid, recommendations 22, 24 and 25.
13 Ibid, recommendation 11. However, the Committee further recommended 'that, if economic and social rights are listed in a federal Human Rights Act, those rights not be justiciable and that complaints be heard by the Australian Human Rights Commission' (recommendation 22).
14 Ibid, recommendation 23.
15 *Australia's Human Rights Framework* (2010), Foreword.
16 [2011] HCA 34; (2011) 280 ALR 221; 85 ALJR 957.
17 For an analysis of the various constitutional issues dealt with by the High Court in *Momcilovic*, see Will Bateman and James Stellios, 'Chapter III of the Constitution, Federal Jurisdiction and Dialogue Charters of Human Rights' (2012) *Melbourne University Law Review* (forthcoming).
18 The Commonwealth has also enacted the *Human Rights (Parliamentary Scrutiny) (Consequential Provisions) Act 2011* (Cth), which amends the *Administrative Appeals Tribunal Act 1975* (Cth) to include the President of the Australian Human Rights Commission as a member of the Administrative Review Council and contains consequential amendments to the *Legislative Instruments Act 2003* (Cth).
19 See, eg, The ACT Human Rights Act Research Project, Australian National University, *The Human Rights Act 2004 ACT: The First Five Years of Operation – A Report to the ACT Department of Justice and Community Safety* (2009) 35-37.
20 See Parliament of Victoria, Scrutiny of Acts and Regulations Committee, *Review of the Charter of Human Rights and Responsibilities Act 2006* (2011) 88.
21 Explanatory Memorandum, Human Rights (Parliamentary Scrutiny) Bill 2010, 4.
22 Second Reading Speech, Human Rights (Parliamentary Scrutiny) Bill 2010, 2 June 2010, 4900 (Robert McClelland MP).
23 Ibid.
24 Ibid. See also Explanatory Memorandum, Human Rights (Parliamentary Scrutiny) Bill 2010, 5.
25 See, eg, *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27, [47]; *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252, [31].
26 See the discussion in D C Pearce and RS Geddes, *Statutory Interpretation in Australia* (7th ed, 2011) 79-82.
27 [2011] HCA 34; (2011) 280 ALR 221; 85 ALJR 957, [43]-[44] (French CJ); [444] (Heydon J).
28 See Parliament of Victoria, Scrutiny of Acts and Regulations Committee, *Review of the Charter of Human Rights and Responsibilities Act 2006* (2011) 79, 132; The ACT Human Rights Act Research Project, Australian National University, *The Human Rights Act 2004 ACT: The First Five Years of Operation – A Report to the ACT Department of Justice and Community Safety* (2009) 61, 62.

INDEPENDENT POLICY ADVICE AND THE PRODUCTIVITY COMMISSION

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During the past decade, the number of reviews commissioned by governments on key policy issues appears to have increased exponentially. However, some of these reviews and inquiries have done better than others in achieving improved outcomes. To borrow a catch phrase, 'reviews ain't reviews'. How well they have performed has depended not just on whether they have targeted the right issues but, crucially, on their governance, their skill base and how they have gone about their tasks.

One aspect of governance that has stood out as a success factor across a variety of policy reviews is 'independence'. While many reviews have been characterised as independent, in practice their independence has not always been accepted by stakeholders, which in itself has affected their influence.

I will consider the question of independence specifically in relation to the Productivity Commission. The Commission's independence is integral to its role in advising governments and informing public opinion; I have thus had frequent cause to reflect on its implications.

There are two threshold questions. First, why is independence of value in a public policy sense? And, second, what does it require?

Why independent policy advice?

The simplest answer to the first question is that governments need advice that is based on a broad understanding of the public interest. Without this the policy-making arena could become dominated by self-interested or ideologically based claims and end up generating exclusively bad outcomes. Claims of that kind are of course pervasive in any democracy—that is what democracy is all about. If all goes well, they should be sorted out by the political decision-making process, with advice from different parts of the bureaucracy and vigorous parliamentary debate ultimately securing courses of action in the national interest—with the ballot box providing ultimate adjudication.

While the system works tolerably well overall—not perfectly but, as they say, 'better than any alternative we can think of'—it is an empirical fact that much bad policy does nevertheless get through.

Particularly in complex policy areas or where good evidence is not readily available, self-interested arguments can escape the scrutiny and checks they deserve. Parliamentary debates are often not as well informed as they might be about the choices and trade-offs and the structure and interests of government departments can militate against an understanding of the wider impacts on the economy and community.

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Independent advice, if it is also well researched public advice, can complement departmental sources by helping governments identify the best way forward in complex or contentious policy areas. It can also facilitate implementation, by building public confidence that the policy is well founded and therefore likely to be generally beneficial. It can increase the trust of the wider community in circumstances where many will not have, or be able to acquire, a detailed understanding of the particular policies under consideration.

What advice is 'independent'?

Independence essentially hinges on the incentives and constraints that can affect the advisor's ability to be objective and to exercise judgment based on facts and analysis, without being unduly influenced by special interests or 'third parties'. This suggests that independence is not an absolute concept. There are degrees of independence. In a formal sense, it depends on the governance arrangements around the advisor. However, in a practical sense it also depends on the resourcing of advisory bodies and on the characteristics of the individuals concerned—their attitudes and beliefs, as well as their experience and interests.

All these things affect not only how independent a particular source of advice is *able* to be, but also how independent it is *perceived* to be. The latter can be just as important if the advice is to serve the role of enhancing public understanding and trust in the policy-making process.

In terms of governance arrangements, the minimum requirement for 'formal' independence is that the advisory body operates at arms length from the decision maker. The more substantive requirement is that the advisor cannot be unduly influenced by any party, including the decision maker. This is much harder to satisfy. It invokes more subtle considerations of the nature of the relationship between an advisory body and policy maker, and how the entity is funded and staffed.

In my view, the second requirement is rarely satisfied to a sufficient degree. This deficiency in many cases has detracted from the contribution of the reviews concerned to achieving better policy outcomes. In contrast, the Productivity Commission passes both tests for independence; this has been fundamental to its ability to make a sustained contribution over the years.

Origins of the Commission's independence

The Commission's independence is formalised in its statute, the *Productivity Commission Act 1998* (Cth), but key features of this legislation have their origin in the *Tariff Board Act 1922* (Cth). The Tariff Board had a quasi-judicial role in relation to its advice to government. Tariffs involve both winners and losers and impartiality in making judgments based on transparent 'evidence' was rightly seen as essential.

The same rationale for independence was adopted by Sir John Crawford in his report to Gough Whitlam in 1973 on the replacement of the Tariff Board by an Industries Assistance Commission (IAC) (Crawford, 1973). The IAC was assigned a similar role, though with a wider responsibility, in the conflicted area of industry assistance. Its purpose, like that of the Tariff Board, was to provide evidence-based impartial advice. However, a crucial difference, introduced in its statute, was that it was required to take an 'economy-wide perspective', ie it must promote the interests of the community as a whole over those of any particular industry or group.

Over the years, the Commission has evolved considerably and its work now covers much more extensive policy territory than tariffs and other industry assistance. However, the formal statutory independence that had its origins in the Tariff Board has held it in good stead. Indeed it has facilitated the extensions of its public policy role.

Having its own statute is clearly fundamental to the Commission's independence. The most basic reason is that it makes it hard to abolish the organisation! Legislation would be required to repeal the Act, for which there would have to be reasons that gained the support of both Houses of Parliament—reasons that the public would broadly accept.

Two aspects of the statute are relevant to the Commission's independence. One relates to appointments, the second to the operations of the Commission—particularly its relationship with the Government and Minister.

Independent Commissioners

In relation to appointments, the independence of the Productivity Commission is embodied in the Commissioners. Together with the Chairman, they are responsible for its advice to government. This advice is accomplished with the support of some 200 permanent public servants, about 150 of whom are professional researchers.

Under the *Productivity Commission Act*, Commissioners can be appointed for up to five years. This period has the advantage of spanning more than one electoral cycle. Perhaps more importantly, it gives the Commissioners job security. The only grounds for removal of a Commissioner are demonstrated misbehaviour—the dimensions of which are specified—and physical or mental incapacity. This means that Commissioners cannot be sacked merely for giving unwelcome advice on public policy matters. This is significant, because there is little statutory limitation on the ability of the Commission to offer advice. Indeed, in conducting an inquiry, the Commission has a licence under its statute to 'make recommendations in the report on any matters relevant to the matter referred'.

Placing that in perspective, however, the Commission has no executive power. It is not a decision maker. Its functions are advisory and informational. It is thus really only as influential as the quality of the advice and information it provides—which depend on the processes, the research and the judgments on which these are based.

Although the Commission can undertake research in support of its other activities, it cannot initiate its own public inquiries. The inquiries that it is asked to undertake are framed by the government and can be bounded as the government sees fit. (For example, the terms of reference for the 1997 review of private health insurance explicitly ruled out any recommendations for the wider health system. Our recent study on carbon policies around the world was restricted to a comparative assessment of measures in place, rather than proposing what Australia's policy should be.) Nevertheless, the Commission has scope, through its supporting research, to attract public attention to policy issues it sees as important. For example, the recent inquiry into aged care was preceded by a self-initiated research study identifying deficiencies in existing arrangements.

Full time v part time

How potential conflicts of interest are handled is obviously central to the independence of the Commissioners and their perceived credibility. Originally, in the IAC, Commissioners had to be full time appointees. This rationale was the same as for the judiciary, that it would eliminate scope for conflict that could come from other activities—particularly remunerated activities.

However, in the Commission's case, over time that requirement became impractical. It was hard to recruit the people the organisation needed—people with a lot of experience, skills in a range of areas, often towards the end of their careers, who did not necessarily want to work full time. Currently, of the ten Commissioners, apart from the Chairman and Deputy Chairman—both of which are full time positions, half are part time.

While this has been beneficial in enabling the Commission to draw on people with diverse skills and experience, it has obviously increased the potential for individual conflicts of interest. In addition to provisions in the Act requiring part time Commissioners to obtain approval for involvement in other activities, where there is a perceived conflict, that person is 'quarantined' from any related Commission matter.

Appointing the right people

Often the first question I am asked when talking about the Commission to a foreign audience is 'how are appointments made'? I suppose what they have in mind is: what is to stop the government loading the Commission with people chosen mainly for their political affiliation or support?

This has been an issue for ad hoc policy reviews but, in my experience, it has thus far not been an issue for the Commission.

Firstly, there are some formal protections within the Act. Appointment is by the Governor-General. While obviously acting on the advice of the government of the day, the Governor-General must accept that 'the qualifications and experience of the Commissioner are relevant to the Commission's functions'. Under the original *Industries Assistance Act 1973* (Cth), the overriding consideration was to have Commissioners who would represent the public interest, rather than representing some section of the community. There was, accordingly, mention of Commissioners having general competencies rather than specific skills or fields of experience. The *Productivity Commission Act* specifies that there should be at least one Commissioner with skills and experience in three specific areas—the environment, business and social service delivery.

This still allows for plenty of discretion and it would be fair to say that any government might naturally prefer to appoint a person regarded as 'one of ours'. Such appointments no doubt have been made over the years but these have rarely outweighed considerations of competence and credibility.

One reason for this is the public scrutiny that such appointments attract and the potential for criticism of the government if an appointment was seen to be inappropriate. Secondly, an appointee who was appointed mainly on political grounds and lacked the necessary skills would struggle in the job. Commissioners need to preside on inquiry topics that can be quite contentious, that demand a detailed understanding of complex subject matter and that, ultimately, require good judgment. The Commission is quite exposed to public scrutiny and must be able to defend its reasoning, particularly where its recommendations, if adopted, would have a significant impact on the community, or involve some losers.

The integrity of appointments has been enhanced by the changes introduced in 2008 for all Commonwealth statutory appointments. These are now required to be advertised and to undergo a formal merit-based selection process, with recommendations to the Minister by a panel headed by the Portfolio Secretary. If the Minister chooses not to follow the advice of the panel or to appoint someone outside the merit process, this has to be justified when seeking Cabinet approval. Two rounds of appointments to the Commission have been made

under this system. The new system has proven beneficial both in identifying people (with about 100 applying in each round) and in securing the most suitable appointees.

There is also legislative provision for 'Associate Commissioners' to be appointed for specific inquiries; this has often been utilised. Such appointments can add greatly to the Commission's authority and credibility in areas where a deeper knowledge or background are important. The Minister has unfettered discretion in making these appointments, apart from having to consult with the Chairman first (and of course obtaining agreement with relevant ministerial colleagues). The crucial requirement is that an Associate be capable of bringing not only knowledge and experience that is relevant to the topic, but also an open mind and willingness to follow the evidence to what is in the wider community's interests.

Relationship with 'the Minister'

As noted, the Commission has no executive powers and its reporting relationships within government are quite different to those of a department of state. These might be best summarised as 'the Minister can tell the Commission what to do, but not what to *say*'.

The Minister has formal responsibility for the Commission's work program and the Commission reports to and through the Minister. It is the Minister who formally commissions studies. However, proposals for Commission inquiries do not emerge only from the Minister's (Treasury) portfolio. They can originate from other portfolios, community groups, from State governments, and indeed from the Parliament or from the Council of Australian Governments (COAG). The Minister is required to table the Productivity Commission's final reports in the Parliament within 25 'sitting days', which reflects the organisation's dual role of advising government and informing Parliament and the wider community.

The tasks given to the Commission are set out formally in Terms of Reference which are made public. While the Commission is consulted as to their feasibility and workability (eg timing, staff resources etc), the Terms of Reference come from the Minister and ultimately reflect his or her judgment and that of the Prime Minister about what is appropriate. Any other instructions from the Minister are also made public.

So the intent of the Act is clear, for public inquiries the Commission's relationship with the Minister or, more broadly, with the government, needs to be transparent and at arms length.

A number of protocols and practices have been developed over time. Periodic briefings are given by the Chairman to Ministers and to Parliamentary Committees on the Commission's activities and progress. The specifics of particular inquiries underway and what might be recommended in these are not discussed at these briefings.

However, it is a reasonable expectation on the part of any government that there be 'no surprises', particularly with the Commission making recommendations in what are sometimes very sensitive policy areas. Accordingly, there is a long standing convention that the Government of the day receive briefings on a report in advance of its public release—but only after it has been signed and 'gone to the printer'.

This degree of separation has not been the norm for 'independent' reviews. In many of these it seems that emerging findings have been raised with the Minister in advance. Indeed desirable outcomes for a review may have been canvassed at the outset. However the public credibility of such reviews has not always been high.

The portfolio matters

Portfolio responsibility for the Productivity Commission is not specified in the Act. It has little direct bearing on the Commission's formal independence but can make a big difference to its relationship with the Minister and the government of the day and, more importantly, to the contribution of the organisation to public policy.

The Commission's predecessors arguably prospered least when they reported to Ministers with responsibility for particular sectors of the economy (Rattigan, 1986; Banks and Carmichael, 2007). The Commission's job is to assess industry or group claims for policy changes in a community wide context, which can sometimes be at odds with such a Minister's perceived role. When located in the Industry Portfolio in the 1980s, the IAC was 'withering on the vine'—to use the words of the departmental secretary at the time—whereas the institution had a second lease of life when it was moved into the Treasury portfolio in 1987. Since then its responsibility has been widened and its role enhanced.

Funding and resourcing

The Act is also silent on the manner and extent of the funding or resourcing of the Commission. In practice these factors can have a significant bearing on an organisation's independence or, more precisely, on its capacity to exercise it.

Policy advisory bodies—whether standing ones like the Productivity Commission or ad hoc ones appointed for specific tasks—are most independent where they have control over their own staffing. Reviews headed by independent figures, but provided with secretariats from the relevant policy departments can, in practice, be constrained or compromised. (As Sir Humphrey put it, 'I don't care who chairs the meeting, as long as we can write the minutes.')

The Productivity Commission and its predecessors have always benefited from having their own staff and that has enabled the organisation to build expertise in analysis and in operational processes. Over time it has also helped create a culture of independence throughout the organisation. The Commission has always been funded through a single annual appropriation, which has given it desirable flexibility in allocating its resources. (Although, I would hasten to add, never more funding than was *needed*!)

Over the years, the organisation has managed to resist two funding innovations that arguably undermined the independence of other research and advisory agencies in the public sector. One of these is project based funding. Apart from uncertainty, it has the downside of potentially enabling greater leverage or capacity to provide pressure by the funder. The Commission also resisted proposals for external funding. Private funding requirements for public research bodies was heralded in the 1990s as enabling those organisations to become more 'relevant', while boosting their resourcing. In practice it merely displaced government funding, with the result that the capacity of those organisations was little changed, while their independence was compromised, at least as perceived publicly.

What difference has independence made?

If anything surprises visiting foreign officials more than the Commission's independence, it is the organisation's *survival.* The Commission in its modern form has been in operation for nearly four decades. It has operated under three successive statutes, had two name changes and has seen its responsibilities widen under both Labor and Coalition Governments. That suggests that governments have seen the Commission as making a useful contribution to public policy, even though they have not always agreed with or been

able to accept its recommendations. The generally accepted objectivity of the Commission's work and the transparency of its processes have, in my view, been central to that.

Against the background of the twin challenges in public policy—the technical challenge of what to do and the political challenge of how to implement it—the Commission and its predecessors have been able to add value in a number of ways.

Impartial and considered advice

The most fundamental of these is that, in a world of many self-interested claimants for preferment and advocates for 'causes', governments have been able to rely on the Commission for advice which, by its mandate, must be motivated only by the public interest. At the same time, governments have been able to depend on the evidence and analysis contained in the Commission's reports and know that its findings and recommendations have been informed by extensive consultations and subject to public scrutiny.

Those two features have seen the organisation being called on by governments to assist in a wide range of policy areas; areas that are both complex and contentious, but with the prospect of a high payoff to the community from getting it right.

This is illustrated by some of the inquiries conducted in 2011. These include aged care, disability support, international carbon pricing policies, the education workforce, urban water policy, rural R&D support, airport regulation, urban planning and zoning, and the retail sector (Productivity Commission, 2011). The previous year's inquiries included bilateral trade agreements, public v private hospital performance, paid parental leave, gambling policy, the not for profit sector, and executive remuneration.

The Commission has also been an honest broker on policy issues with inter-jurisdictional dimensions and has become a resource for the Council of Australian Governments. The question in 'cooperative federalism' of which jurisdictions should regulate or fund which activities has often been an issue in Commission inquiries (disability services being an important recent example). The Commission has also been asked by COAG to provide advice in policy areas that could be expected to remain a state responsibility, such as gambling, urban water, and the education workforce. The Commission has assisted the 'competitive federalist' process by conducting benchmarking of regulation and government service provision (the latter as Secretariat to a COAG senior officials group).

'Ammunition' and education

The third way in which the Commission has assisted is by providing 'ammunition' for governments (and sometimes opposition parties as well), in advocating certain policies to the public and Parliament and in countering policy proposals from special interest groups. For example, the evidence and analysis in Commission reports have been actively employed by the Australian Government recently in areas such as paid parental leave (against an alternative model strongly advocated by the Opposition during the last election), gambling (against the strident opposition of industry interests) and executive remuneration (against some vocal corporate objections). Wide ranging reform programs such as the National Competition Policy and the National Reform Agenda have been successfully advanced, in part due to evidence produced by the Commission of substantial potential gains (Productivity Commission, 2005).

In some cases, the Commission's work has helped build active constituencies for reform, by demonstrating to certain industries or groups the costs to them of the status quo and the benefits of a change in policy direction. Examples of this include the role played by the

farming and mining associations in tariff reform, and business support for the reform of public utilities. It has also been a factor in some of our more recent work in social policy areas, such as aged care and indigenous disadvantage.

The Commission has arguably made government's 'selling' job a bit easier through its own consultative processes, which on key policy issues, such as those mentioned above, have assisted public understanding and approval.

Finally, the Commission's processes and, in particular, its draft reports can provide a source of political learning for governments, giving them an opportunity to observe how the public responds to different policy proposals and thus better judge the politics of different options. In some cases this has led government to accept and implement 'bold' recommendations (eg the modification of community rating in private health insurance—long regarded as untouchable); in others, it has led it to reject or defer reforms (eg the ban on parallel importation of books).

These benefits have seen the Commission being assigned an increasingly diverse range of tasks, with a large number underway at any one time. Unfortunately, resourcing has not always kept pace. There is rough justice in using a blunt rule like the annual 'efficiency dividend' to oblige government departments across the board to be cost-conscious and to reduce unnecessary or low payoff spending. While research agencies may also need prompting to be cost effective in their activities, there is a limit to the production of quality outputs with fewer inputs, particularly when the research agenda itself is externally imposed. The American economist William Baumol's analogy of the futility of trying to get ever higher productivity out of an orchestra is apt (Baumol and Bowen, 1966)—ultimately you would be left with a drum and a fife to play a Beethoven symphony!

The role of Parliament

Some new demands on the Commission have arisen under the so called 'new paradigm' of minority government at the Federal level. The Commission has been called on to play an informational role in the context of negotiations with minority parties and independents - negotiations which have become important to policy outcomes. Examples include the studies on gambling, private v public hospitals, and comparative carbon policies. This is essentially an extension of the Commission's 'honest broker' role and one that it is well placed to perform.

However, there has been a further development in the past year, whereby the Parliament has sought to override executive government by commissioning work directly from the Productivity Commission. This has taken two forms. One has been by introducing legislation requiring the Commission to undertake certain tasks. Examples of this are the recent Bill on a cost benefit analysis for the NBN (defeated) and another on foreign ownership of agricultural land (which passed the lower house). The second, and more problematic route has been through Orders by the Senate for the Commission to provide it with reports on certain matters (one related to default superannuation fund allocation mechanisms in industrial awards and another to the introduction of a sovereign wealth fund.)

These initiatives are unprecedented in the nearly four decades of the institution's existence. If successful, the latter route in particular would pose obvious problems for the effective operation of the Commission, in terms of logistics and the disruption of existing inquiries. More importantly, it would undoubtedly also become a threat to its continued existence. Losing control over what policy issues the Commission examines would be likely to tip the balance, from a government's point of view, from the organisation being seen as an asset to it being seen as a liability.

In the event, advice was received from the Australian Government Solicitor that such orders —going beyond requiring the Commission to furnish documents based on information in its possession, ie to undertake new work—would exceed the Senate's powers (PM&C 2011). The AGS advice states in conclusion:

> ... the power of the House of Parliament to require production of documents is not a power to require original work to be undertaken and it cannot be exercised to usurp the power of the Executive.

It also cites an earlier authority, Hearn's *Government of England* (1886):

> It is the duty of Parliament to advise, but not to command, the Crown ... It cannot of itself issue orders even to the doorkeepers of any public departments.

Whether this will be accepted as the last word, remains to be seen.

Conclusion

Policy making occurs in a complex and conflicted arena, one that in many cases is hindered by lack of evidence and biased in ways that can favour special interests over the public interest. Independent policy advisory processes and institutions can play an important role not only by helping governments determine what to do amid such competing or conflicting claims but also by helping them achieve it through fostering greater public understanding and a more benign political environment.

There are degrees of independence. The Productivity Commission and its forebears were created and expressly designed to attain it to a high degree. This has enabled the organisation to contribute to better policy development in an increasingly wide array of areas. Those qualities may be at a premium right now under the 'new paradigm' federally and this phenomenon is also bringing some new challenges for the organisation.

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THE MALAYSIAN CASE, HOB GOBLINS, HUMPTY DUMPTY AND LORD ATKIN

Robert Lindsay*

At the Prime Minister's press conference in Brisbane on 1 September 2011, one day after the decision of the High Court holding invalid the declaration for removal of asylum seekers to Malaysia (*Plaintiff M70/2011 v MIMC* (*Malaysian case*)), the Prime Minister said 'the High Court's decision basically turns on its head the understanding of the law in this country prior to yesterday's decision'. She also said that the Chief Justice 'considered comparable legal questions when he was a judge of the Federal Court and made different decisions to the one the High Court made yesterday'[1].

In relation to the accusation that the Chief Justice had altered his position, there were only two decisions to which the Prime Minister could have been alluding, both were referred to in the judgment of Justice Heydon, who was the only dissenter in the *Malaysian case*.

The first case referred to by Justice Heydon was *Patto*[2], in which the author was Counsel. Patto was an Iraqi national who fled Iraq in the time of Saddam Hussein and settled in Greece with his family for seven years, but was unsuccessful in securing asylum in that country. He then came to Australia and applied for a protection visa, which was refused by the Refugee Review Tribunal. This decision was set aside by Justice French because the Tribunal had erred in concluding that Patto had 'a right to return to Greece' when the evidence did not support that he had any such right because he was not a Greek National and had no current passport. Affidavit evidence from a lawyer about Greek migration law indicated that Patto would not be allowed re-entry to Greece.

However, during the course of his judgment in *Patto*, Justice French said that where there is a 'safe third country' it need not be a party to the Refugee Convention 'if (the country) would otherwise afford effective protection to the person'[3]. His Honour referred to a Federal Full Court case where it was said that 'so long as, as a matter of practical reality and fact, the applicant is likely to be given effective protection by being permitted to enter and live in the third country' where he will not be at risk of being returned to his original country, this protection will suffice[4].

In making these comments Justice French was referring to Article 33 of the Refugee Convention which prohibits expulsion to any territory where a refugee's life or freedom would be threatened.

In so saying he was not expressing a view which differed from what he said in the *Malaysian case* and it accorded with the view of the Full Federal Court, which he was bound, as a single judge at that time, to follow[5].

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The *Malaysian Case*

The *Malaysian case*[6] involved considering the Minister of Immigration's powers under s 198A(3) of the *Migration Act 1958* (Cth), which allows the Minister to send persons to a declared country where that country provides access to effective procedures for assessing protection; provides protection for persons seeking asylum; provides protection for persons who are given refugee status; and meets relevant human rights standards in providing that protection.

All but Justice Heydon found that Malaysia did not afford these protections. The majority comprised a joint judgment of Gummow, Hayne, Crennan and Bell JJ, with French CJ and Kiefel J writing separate judgments concurring with the joint judgment. Chief Justice French pointed out that Malaysia does not recognise the status of refugees in domestic law and that it was open to the Malaysian authorities to prosecute 'offshore entry persons' such as the plaintiff, under s 6 of the Malaysian *Immigration Act 1959/63*, which provided for such a person, upon conviction, to receive a term of imprisonment of up to five years and be liable to a whipping of up to six strokes[7].

Nowhere in his judgment did the Chief Justice contend that a declaration could not be made in respect of a country which was not a member of the Refugee Convention, provided that the country in question complied with the requirements of s 198A(3) of the Act. Nor was there anything in the Full Federal Court judgment about the adequacy of protection, which Justice French followed when he heard Patto's case, that contradicts what was said by the majority in the *Malaysian case*.

The second case upon which the Prime Minister must be taken to have relied, which was also referred to in Justice Heydon's dissenting judgment, was *P1/2003 v The Minister for Immigration & Multicultural & Indigenous Affairs (P1/2003)*[8] where the validity of s 198A(3) of the Act was at issue following a Ministerial declaration that Nauru was a country to which the plaintiff could be removed.

The applicant was a young Afghani national who, as a minor, had been removed to Nauru and then subsequently returned to the Australian mainland for medical treatment. At the time the plaintiff moved to the mainland for medical treatment, the plaintiff's minority had passed and the duties dependent upon that status no longer existed. The lawfulness of the plaintiff's removal was attacked on the basis that Nauru did not meet the requirements set out in that sub-section, because it did not provide access to effective procedures for assessing applications for protection by minors and did not meet relevant human rights standards in providing that protection. The lawfulness of his removal was also assailed upon the basis that s 198A is not a valid exercise of the legislative power of the Commonwealth. The basis for this attack did not appear from the amended statement of claim but, in submissions, it was said the Commonwealth could not determine the fate of aliens beyond the borders of the Commonwealth. His Honour said in *P1/2003* that the argument advanced for invalidity of s 198A 'was somewhat tentative. No positive argument was put forward.....the Court is left with, at least, a pale shadow of a constitutional argument .....'[9].

His Honour said 'the form of the section suggests a legislative intention that the subject matter of the declaration is for a Ministerial judgment. It (the declaration) does not appear to provide a basis on which a court could determine whether the standards to which it refers are met. Their very character is evaluative and polycentric and not readily amenable to judicial review. *That is not to say that such a declaration might not be invalid if a case of bad faith or jurisdictional error could be made out*'[10] (emphasis added).

In the *Malaysian case* Chief Justice French said the declaration made in regard to Malaysia was again one which required 'an evaluative judgment' by the Minister and if the Minister proceeds 'to make a declaration on the basis of a misconstrued criterion, he would be making a declaration not authorised by Parliament. The misconstruction of the criterion would be a jurisdictional error'[11].

In both *P1/2003* and the *Malaysian case* the Chief Justice said that the Minister's task was 'to form, in good faith, an evaluative judgment based upon matters set out in s 198(A)(3) 'properly construed'. He said in the *Malaysian case* 'a declaration under section 198A(3) affected by jurisdictional error is invalid'[12].

In determining that jurisdictional error had arisen, the Chief Justice said that the declaration set out in s 198A(3)(a) is not limited by those things necessary to characterise the declared country as a safe third country. They are statutory criteria, albeit informed by the core obligation of *non-refoulement* which is the key protection. The Minister must ask himself whether the protection afforded has been provided and this cannot be answered without reference to the domestic laws of the specified country and the international legal obligations to which it has bound itself. The Minister did not look to, and did not find, any basis for his declaration in Malaysia's international obligations or relevant domestic laws[13].

The joint judgment said that s 198A(3) required more than an examination of what has happened, is happening or may be expected to happen in a relevant country. The access and protections to which the sub-paragraphs referred must be provided as a matter of legal obligation[14]. Kiefel J said that s 198A(3)(a) must be taken to require that a country 'provide' the necessary recognition and protection pursuant to its laws[15]. As the Department of Foreign Affairs advised, Malaysia is not a party to the Refugee Convention; it does not recognise or provide for recognition of refugees in its domestic law. Although membership of the Refugee Convention is not a necessary condition, Malaysia does not bind itself, in its immigration legislation, to *non-refoulement*[16].

The Chief Justice said that the mere fact that a Minister makes a declaration is not enough to secure its validity. Where the Minister proceeds to make a declaration on the basis of a misconstrued criterion he would be making a declaration not authorised by the Parliament. Such a misconstruction would be a jurisdictional error[17]. One way of approaching the scope of Ministerial power under s 198A(3) is to treat it as being by necessary implication, conditioned upon the formation of an opinion or belief that each of the matters set out in s 198A(a)(i) – (iv) is true. The requisite opinion or belief is a jurisdictional fact. If based upon a misconstruction, the opinion or belief is not that which this sub-section requires in order that the power be enlivened[18].

The Prime Minister was mistaken to suggest that the Chief Justice had shifted his ground. Several points are salient: firstly, in Patto's case the decision was consistent with the Full Court's view, which Justice French was obliged at the time to follow, and also consistent with both Article 33 relating to *non-refoulement* and article 1E, which states that the Convention does not apply to a person who is recognized as having the rights and obligations attached to the possession of a nationality of a safe third country. These articles do not mandate that a safe third country is confined to those who subscribe to the Refugee Convention. However, such member countries may more readily meet the necessary criteria under s 198A(3) of the Act because of the obligations, owed to asylum seekers, which are placed upon member states by the articles of the Convention. These obligations, as pointed out in the joint judgment in the *Malaysian case*, include giving them the same treatment as nationals in relation to freedom of religion, access to education and courts of law, and freedom of movement[19]. As the joint judgment found, a country does not provide the necessary protection under s 198A(3) unless its domestic law expressly provides the protections to the

classes of persons mentioned or it is internationally obliged to provide the particular protections[20].

Secondly, Patto's case was not concerned with s 198A of the Act, unlike the *Malaysian case*. In *Patto*, Justice French was referring to article 33 of the Refugee Convention which relates to *non-refoulement* to a country where a refugee's life and freedom is at risk. As his Honour said, in the *Malaysian case* the criteria for a declaration set out in s 198A(3)(a) are not limited to those things necessary to characterise the declared country as a safe third country. They are statutory criteria.

Thirdly, although *P1/2003* was concerned with a declaration under the same provision being considered in the *Malaysian case*, the declaration was in respect of a different country (Nauru), proclaimed by a different Minister and, furthermore, was issued at a time when the law relating to the scope of jurisdictional error was thought to be more confined[21]. The joint judgment explained that, at least in the case of Nauru, both the assessment of refugee status and maintenance of protection was to be done by Australia not Nauru, and the arrangement with Nauru created obligations absent from that which Australia had with Malaysia.[22]

It is therefore perplexing that the Prime Minister says that the court turned on its head the understanding of the law. It was of course also a criticism made by Justice Heydon in dissent that the majority of the court had altered the law, as previously propounded by the Federal Court, which Court Justice Heydon considered more experienced than State Courts in considering these matters[23]. Yet Chief Justice French, Gummow, Crennan and Kiefel JJ, who together with Hayne and Bell JJ formed the majority, had all been long serving members of the Federal Court.

Hob goblins

The High Court majority could fairly claim what Maynard Kaynes was reported once to have claimed when charged with inconsistency 'when the facts change, so also my opinion changes, what about you sir?' In this context, it may be said that when the country which is the subject of declaration differs from that country previously under consideration, so too the legal result may be different. However, inconsistency in itself is hardly a badge of dishonour, if the High Court needs to extend or alter legal principles to achieve a just result according to law. As Ralph Emerson once said 'consistency is the hob goblin of little minds', but here the principles of law adopted by the majority do indeed have an echo in historical Anglo Australian law.

Mr Perlzweig, Mr Liversidge and Lord Atkin[24]

The controversy over how far a Minister's discretion should be examined by a court harks back to at least the Second World War and the decision in *Liversidge v Anderson*, notable for Lord Atkin's celebrated dissenting judgment.

In his speech Lord Atkin said: 'I view with apprehension the attitude of Judges who on a mere question of construction when face to face with claims involving the liberty of the subject show themselves more executive minded than the executive'[25]. In *Liversidge*, Emergency War Regulations provided that 'if the Secretary of State has reasonable cause to believe any person to be of hostile origin or associations.....and that by reason thereof it is necessary to exercise control over him, he may make an order against that person directing that he be detained'.

Was it enough to justify an order of detention that the Secretary of State, acting in good faith, thought he had reasonable cause to believe Liversidge to be a person of hostile associations and to detain him? Or was it necessary that the Secretary of State should actually have reasonable cause?

The Minister declined to give details requested by the detainee of his basis for 'reasonable cause'. The other Law Lords held that those responsible for the national security must be the sole judges of what the national security required. Lord Atkin in his dissent said that the requirement of reasonable cause had always in the past been understood as requiring proof of an objective fact. In rejecting the majority's construction of the section his Lordship said:

> I know of only one authority which might justify the suggested method of construction; "when I use the word", Humpty Dumpty said in rather a scornful tone, "it means just what I choose it to mean, neither more nor less". "The question is," said Alice, "whether you can make words mean so many different things." "The question is," said Humpty Dumpty, "which is to be master – that's all".[26]

As early as 1951 the view of the majority in Liversidge was distinguished by the House of Lords[27]. In *Ridge v Baldwin*[28] Lord Reid described the decision as 'the very peculiar decision of this House' and in 1980 Lord Diplock, with the support of other Law Lords, held that Lord Atkin had been right[29].

In commenting upon this case the late Lord Bingham, Senior Law Lord, in a lecture in 1997 to the London Reform Club said:

> there is a simple but crucial distinction between a condition which requires the existence of an objective fact (on the existence of which the court can, if necessary, rule) and the existence of a subjective belief (which requires little more than good faith or an absence of gross irrationality, which leave little room for review by the Court). Lord Atkin's central legal argument was surely correct[30].

Whilst having due regard for the statutory distinctions, the case shares similarities with the *Malaysian case*. As in *Liversidge* the decision required the Minister to determine the objective facts: as to whether a specified country would provide protection for persons seeking asylum, and give refugee status, and that the country would meet relevant human rights standards in providing that protection. The recognition that in such circumstances intervention may be made by a court, where there has been an executive failure to appraise correctly the existence of these objectives, necessitated the setting aside of such a declaration on the grounds of jurisdictional error. Both cases involved construing Ministerial power, though the Minister in the *Malaysian Case* did divulge the basis upon which he had determined to make the declaration.

It is evident, however, as the High Court itself found, that it was the legal advisers to the Minister who misconstrued the relevant legal principles rather than any altered judicial approach to that which had previously been adopted in Anglo Australian Law dating back at least as far as vindication of Lord Atkin's dissenting judgment by the House of Lords over thirty years ago.

Endnotes

1 Transcript of Press Conference in Brisbane 1 September 2011, http://www.pm.gov.au/press-office/transcript-joint-press-conference-Brisbane-1.
2 *Patto v Minister for Immigration* [2000] FCA 1554 (*Patto*).
3 *Patto* supra at [36].
4 *Patto* supra at [40] citing *MIMA v Al Sallal* [1999] FCA 1332 (Full Court) approving Emmett J in *Al-Zafiry v MIMA* [1999] FCA 1472.
5 Supra Al Sallal.
6 *Plaintiff M70/2011 v MIMC*; *Plaintiff M106/2011 v MIC* [2011] HCA 32. This article is concerned with Plaintiff M70/2011 and not Plaintiff M106/2011 who was a minor and also succeeded.

7 *Plaintiff M70/2011* supra at [30].
8 *P1/2003 v MIMIA* [2003] FCA 1029.
9 *P1/2003* supra at [48].
10 *P1/2003* supra at [49].
11 *Plaintiff M70/2011* supra at [59].
12 *Plaintiff M70/2011* supra at [59].
13 *Plaintiff M70/2011* supra at [66].
14 *Plaintiff M70/2011* supra at [116].
15 *Plaintiff M70/2011* supra at [244].
16 *Plaintiff M70/2011* supra at [249].
17 *Plaintiff M70/2011* supra at [59].
18 *Plaintiff M70/2011* supra at [59].
19 *Plaintiff M70/2011* supra at [117].
20 *Plaintiff M70/2011* supra at [126].
21 See now enlargement of jurisdictional error in cases such as *Plaintiff S157/2002 v the Commonwealth* (2003) 211 CLR 476; *Kirk v Industrial Relations Commission* [2010] HCA 1
22 *Plaintiff M70/2011* supra at [128].
23 *Plaintiff M70/2011* at [164] and [165].
24 Tom Bingham, *The Business of Judging: Selected Essays and Speeches 1985-1990* (Oxford University Press, 2011). Paperback Edition pp 210-221. Perlzweig was the true name of Liversidge. I am much indebted to this wonderful lecture for what appears hereafter.
25 Tom Bingham quoting Lord Atkin at 215.
26 Tom Bingham quoting Lord Atkin at 216.
27 Tom Bingham supra at [220] *Nakkuda Ali v Jayaratne* [1951] AC 66.
28 [1964] AC 40.
29 *Inland Revenue Commissioners v Rossminster* [1980] AC 952.
30 Tom Bingham supra at 220.

PRIVACY LAW REFORM: CHALLENGES AND OPPORTUNITIES

Timothy Pilgrim*

In May 2012 the Attorney-General announced major legislative reforms to the Privacy Act that will be achieved through amendments scheduled to be introduced into the Parliament in the winter sitting period. These include many of the changes anticipated since the Australian Law Reform Commission released its 2008 report into Australia's privacy laws, *For your information: Australian privacy law and practice.*

In making this announcement, the Attorney identified a number of consumer benefits as a result of these reforms. There will also be more powers for the Privacy Commissioner to resolve complaints, conduct investigations and promote privacy compliance.

While Australia's privacy framework may be undergoing reform, and while we may be witnessing revolutionary new technologies that are changing the way we think about the handling of personal information, community concern about privacy is a determined constant.

This quotation, for example, concerns community perceptions of privacy:

> Recent inventions and business methods call attention to the next step which must be taken for the protection of the person….photographs and newspaper enterprises have invaded the sacred precincts of private and domestic life, and numerous mechanical devices threaten to make good the prediction that what is whispered in the closet shall be proclaimed from the house tops.[1]

Given recent media reporting of the impact of new technologies on people's privacy, incidents like the *News of the World* phone hacking scandal, and the imminent changes by Google to its privacy policy, you could be forgiven for thinking that this quotation is contemporary.

It is actually from the late 19th century.

These words were written by Samuel D Warren and Louis D Brandeis (who later became a US Supreme Court judge); they show the impact of the rise of the newspaper enterprise and of the emergence of new technologies, such as instantaneous photographs, on people's privacy.

The following are more recent comments, made by Mark Zuckerberg, the creator of Facebook:

> ...people have really gotten comfortable not only sharing more information and different kinds, but more openly and with more people. That social norm is just something that has evolved over time. You have one identity. The days of you having a different image for your work friends or co-workers and for the other people you know are probably coming to an end pretty quickly. Having two identities for yourself is an example of a lack of integrity.

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* *Privacy Commissioner Timothy Pilgrim presented this paper to the Emerging Challenges in Privacy Law Conference, 23 February 2012, several months prior to the May announcement.*

And, Scott McNeally, co-founder of Sun-Microsystems, famously said in 1999 that 'You have zero privacy – get over it'.

Privacy – a human right

How do such views, which it could be said are driven from the perspective of particular business models, sit with the concept of privacy as a human right?

I have no doubt that, innately, people continue to feel strongly about their right to have their privacy protected. That is why privacy is recognised as a basic human right, enshrined in Article 17 of the International Covenant on Civil and Political Rights (ICCPR).

At a time when Australia was signing as a party to the ICCPR, the late Sir Zelman Cowan delivered six lectures entitled *The Private Man* – as part of the ABC's annual Boyer lecture series. In one of these he observed that '… a man without privacy is a man without dignity; the fear that Big Brother is watching and listening threatens the freedom of the individual no less than the prison bars.'

The recognition of privacy as a human right, deserving of the protection of law, is one of the reasons we have the Privacy Act. Today, this is mainly the prism through which we view the concept of privacy. All too often, privacy is seen as an impediment to business practices or an administrative inconvenience—another box to be ticked on a compliance checklist. It is important to remember that privacy is a fundamental human right and is of key importance to the preservation of our free and democratic society.

Of course, we also recognise that privacy rights are not absolute – they must be balanced against other important rights and ideals, such as freedom of expression and national security.

Privacy law reform

In 2006, almost 20 years after the *Privacy Act 1988* (Cth) was introduced, the Government asked the Australian Law Reform Commission (ALRC) to conduct an inquiry into how well Australia's privacy framework was functioning.

In 2008, after significant public consultation, the ALRC concluded its inquiry with the release of its report, *For Your Information: Australian Privacy Law and Practice*, which contained 295 recommendations for reforms to the Commonwealth privacy regime. In the course of its consultations, the ALRC found that Australians care about privacy. They want a simple, workable system that provides effective solutions and protections. Australians also want the considerable benefits of the information age, such as shopping and banking online, and communicating instantaneously with friends and family around the world.

ALRC recommendations

While the ALRC report concluded that the Privacy Act had worked well, it proposed refinements to bring it up to date. These included:

- a new set of harmonised privacy principles to cover both the public and private sector;
- provisions introducing comprehensive credit reporting to improve individual credit assessments and supplement responsible lending practices;
- provisions relating to the protection of health information;

- a review of the exemptions to the Act;
- mandatory data breach notification; and
- a statutory cause of action for a serious invasion of privacy.

Given the significant size of the ALRC's report, the Australian Government decided to respond in a two-stage process. The Government released its first stage response to 197 of the 295 recommendations contained in the Report in October 2009, and is in the process of implementing these changes. These include the harmonised set of privacy principles, credit reporting and strengthening and clarifying the Commissioner's powers and functions.

Government's first stage response

The Privacy Law Reform agenda is ultimately the responsibility of the Government, not the Office of the Australian Information Commissioner (OAIC). In late 2011, the Government announced that, subject to its broader legislative program, it intended to introduce a Bill into Parliament during the autumn 2012 sitting, and that this Bill would include the Australian Privacy Principles, changes to credit reporting and a strengthening of the Commissioner's powers. [2]

We hope to see the Bill introduced soon. While the draft Bill hasn't been publicly released, we have seen exposure draft legislation of a number of the elements that the Government has said it will include. For example, there was wide consultation on the Exposure Draft of the Australian Privacy Principles (APPs).

The APPs will replace the two separate sets of principles which currently cover the public sector and the private sector in Australia. Having a consistent set of privacy principles covering business and government will simplify compliance obligations, particularly in the context of private sector contracted service providers to Australian Government agencies.

The changes proposed to the credit reporting provisions will allow for more comprehensive credit reporting. For example, it may be that the changes would allow credit reporting agencies to report on data sets, including credit limits on accounts, dates that accounts were opened and closed, and limited information on repayment history.

Commissioner's powers

In October 2009, the Government stated that it intended to give the Commissioner a range of new powers, including accepting enforceable undertakings and seeking civil penalties in the case of serious or repeated breaches. It also accepted the ALRC's recommendation that the Commissioner be empowered to make enforceable determinations following own-motion investigations.

No exposure draft legislation has been released in relation to what changes will be made to the Commissioner's powers at this stage. The former Minister for Privacy and Freedom of Information stated late last year that changes that would be included in the upcoming Bill would be likely to include new powers to approve external dispute resolution services and to implement the proposed new Credit Reporting Code of Conduct.

If the Commissioner is given stronger enforcement powers, this would have significant implications for privacy compliance in Australia. As the Privacy Act currently stands, we are unable to impose a sanction on an organisation when we have initiated an investigation on our own motion, without a complainant. Our role is to work with the organisation to ensure ongoing compliance and better privacy practice. Additional powers would provide added

credibility to the enforcement of privacy law, reinforce the significance of privacy compliance, and give departments and agencies an even greater incentive to take their privacy responsibilities seriously.

Overseas experience

Overseas experience indicates that regulators with the power to pursue large penalties will often do so. The United States is perhaps the best example of this. One notorious data breach in the USA was the disclosure by ChoicePoint, a large identification and credential verification organisation, of sensitive information it had collected on 145,000 individuals. A Federal Trade Commission investigation of this matter led to the imposition of a $15 million fine.

There have been many other breaches. Last year, Massachusetts General Hospital was fined $1 million for losing the medical records of 193 patients,[3] and in 2009, HSBC Bank was fined £3 million by the Financial Services Authority in the UK for failing to secure customer data.[4]

However, it is important to realise that privacy enforcement is about more than just financial penalties. In November 2011, the Federal Trade Commission (FTC) in the USA reached a settlement with Facebook over allegations of deceptive conduct in relation to its privacy practices. As part of the settlement, Facebook must obtain independent, third-party audits certifying that it has a privacy program in place that meets or exceeds the requirements of the FTC order every two years for the next 20 years. The FTC accepted an undertaking in similar terms in settlement of a matter involving Google Buzz earlier in 2011.

On the other hand, the French Data Protection Authority issued a €100,000 fine to Google due to breaches of French law caused by Google Street View. It is interesting to compare and contrast these approaches to enforcement. One wonders how effective a €100,000 fine would be for a multi-billion dollar organisation like Google.

Enforcement by the OAIC

Regardless of whether the Government decides to strengthen the Commissioner's powers, we have been changing our approach to privacy law enforcement.

In its current form, the Privacy Act only gives the Commissioner the power to make determinations on complaints received from individuals. In these complaints, we usually adopt a conciliation-focused approach.

However, for particularly serious privacy breaches or, for example, where conciliation is not achieving an outcome, we have demonstrated that we are prepared to use our power to make determinations directing how complaints should be resolved. Our determinations are enforceable in the Federal Court.

In late 2011, I held a hearing and issued the first determination made under section 52 of the Privacy Act in seven years. The determination arose from a complaint by an individual against a club.

The complainant gambled at the club. The complainant and the complainant’s ex-partner were engaged in child custody proceedings. The complainant's ex-partner provided the club with a subpoena requiring information about the complainant's gambling to be given to the court. Instead, the club gave the information directly to the complainant's ex-partner. The complainant alleged that this was an improper disclosure of their personal information. I

found in the complainant's favour. I determined that, to redress this matter, the club needed to:

- apologise in writing to the complainant within three weeks;
- review its training of staff in the handling of personal information and legal requests for personal information, including court subpoenas, and no later than six months from the date of this determination confirm that this review of training has been completed and advise me of the results of review; and
- pay the complainant $7,500 for non-economic loss caused by the interference with the complainant's privacy.

The full detail of the determination is available on the OAIC's website and on AustLII.

While it is still my focus to resolve most complaints via conciliation, I will not shy away from using my determination powers where it is appropriate to do so.

Determinations are important, not just because they provide an avenue for resolving complaints where conciliation fails but because they provide a public record of the OAIC's views on how privacy laws should be interpreted and can assist complainants and respondents to better understand how privacy laws will apply.

A number of other complaints are now in the process of determination.

The Office of the Information Commissioner is also changing its approach to particularly serious or high profile privacy incidents. The publication of investigation reports will increase the transparency of our investigation process and help organisations and agencies better understand their privacy responsibilities.

Four investigation reports are available on our website; they provide information about investigations into incidents involving Vodafone, Telstra, Sony and Professional Services Review.

The most recent report published was that concerning the Sony PlayStation Network investigation, which concluded in September 2011. We opened this investigation in the previous April after a media report stated that an unauthorised person accessed the personal information of approximately 77 million customers of the Sony PlayStation Network, including customers in Australia. It was alleged that individuals' names, addresses and other personal data, potentially including credit card details, had been compromised by the incident. Our investigation looked at Sony's data security practices.

We concluded that Sony had not breached the Privacy Act when it fell victim to a cyber-attack, because it had taken reasonable steps to protect its customers' personal information; this included encrypting credit card information and ensuring that appropriate physical, network and communication security measures were in place. However, while I found no breach of the Privacy Act by Sony, I was concerned about the time that elapsed—seven days—between Sony becoming aware of the incident and notifying customers and the OAIC.

Immediate or early notification that financial details have been compromised can limit or prevent financial loss to individuals, by enabling them to re-establish the integrity of their personal information. Evidence shows it can be very difficult for individuals to re-establish the authenticity of their identity when their personal information has been stolen and used fraudulently. I raised this concern publicly, both in a media release and in my investigation

report, by stating that I would have liked to have seen Sony act more swiftly to let its customers know about this incident.

While there is no requirement in Australian law for organisations to notify individuals or the OAIC of a data breach, I strongly recommended that Sony review how it applies the OAIC's *Data breach notification: a guide for handling personal information security breaches.*

The OAIC faced an interesting challenge in establishing whether it had jurisdiction to investigate this matter, due to Sony's corporate structure. We sought information from Sony Computer Entertainment Australia Pty Ltd. SCE Australia is a subsidiary of Sony Computer Entertainment Europe Limited (SCE Europe). A separate subsidiary of Sony Computer Entertainment Europe—Sony Network Entertainment Europe Limited—operates the PlayStation Network for individuals in Australia, holding their information in a data centre in San Diego, California.

The investigation involved a review of the acts and practices of both SCE Australia and the other Sony companies mentioned. As the incident occurred outside Australia, the Privacy Act only applies where the requirements of the extraterritorial application provisions in section 5B of the Act are met.

Section 5B of the Act prescribes that an act or practice engaged in outside Australia will be covered by the Act if that act or practice relates to personal information about an Australian citizen and the organisation responsible for that act or practice has an organisational or other link to Australia. Where an entity does not have an organisational link with Australia, the Act will only apply to the handling of personal information about Australian citizens where the organisation carries on a business in Australia and the personal information was collected by, or held by, the entity in Australia.

Whether the conduct of Sony Network Entertainment Europe falls under the jurisdiction of the Australian Privacy Act in this case is a complicated question. However, as the conduct in question by the Sony companies did not constitute a breach of the Act, we were not required to come to a settled view on jurisdiction.

In 2009–2010, organisations and agencies came to us on 44 occasions to report that they had been subject to a data breach. This increased to 56 in 2010–2011, and we are on track to receive a similar number in 2011–2012. We now receive more data breach notifications than we implement own-motion investigations. Increasingly, it is the organisation or agency subject to a breach rather than a tip-off or media report that brings our attention to these issues.

Industry is standing up and taking notice

Since the adoption of our new approach to privacy compliance, public commentary has indicated increased awareness by business of the need for compliance. Since my 2011 determination, we have noticed that some respondents have adopted a more proactive approach to conciliation of privacy complaints and have shown a greater willingness to offer compensation. So far, this is only anecdotal evidence gathered over a short period of time, but I think that it bodes well for the future of privacy compliance in Australia. The challenge to business and government in Australia is to ensure that privacy practices and procedures are rigorous, and that they will stand up to scrutiny if there is a data breach. All privacy complaints should be taken seriously.

Other challenges and opportunities

In the 1980s, when the Privacy Act was introduced, fax machines were still a relatively new addition to the office environment. The term 'hacking' meant having a bad round of golf. The commercialisation of the internet was still a decade away. The vast majority of filing was physical, and personal information was mostly held in paper records. Securing these documents was relatively easy—all you really needed was a lock and key.

In our modern world of cloud computing, portable storage devices, electronic databases and hackers, the parameters around data security and document storage have shifted immeasurably. All it takes is a single careless incident to cause a massive data breach. In the UK in 2007, two computer disks belonging to Her Majesty's Revenue and Customs were lost. The disks were thought to contain names, addresses, national insurance numbers and banking details of approximately 25 million people in the UK. A data breach on this scale would have been inconceivable when the Privacy Act was introduced.

The Sony incident, which I have already mentioned, involved hackers compromising records relating to 77 million people. Again, a breach of this kind could not have been imagined when the Privacy Act came into existence.

Data security has emerged as a major challenge for organisations and agencies. They must ensure that they have implemented robust information-security measures. However, data breaches can occur even when all reasonable steps have been taken to protect information. Organisations and agencies need to have contingency plans in place so that if a data breach occurs, they can deal with it swiftly, mitigating any risk of harm that the breach may cause.

While a data breach alone can cause reputational damage, recent experience shows that customers can be understanding if an organisation openly acknowledges a breach, apologises and acts promptly to resolve it. Greater reputational damage can occur if an organisation is seen to try to cover up a breach.

Communicating with clients about privacy is another key challenge for businesses. Too often, privacy policies are unwieldy documents, littered with legal jargon with which the average consumer is unable to engage.

In 2010, as an April Fool's Day prank, the British gaming retailer Gamestation.co.uk slipped an ‘immortal soul clause’ into its privacy agreement, knowing full well that most people would never read it. It was proven right—thousands of people unwittingly sold their souls to the company. My point is not that privacy policies are insignificant—this is far from the truth. The challenge for organisations is to ensure that their privacy policies are clear, relevant and easily understandable.

The importance of privacy policies is demonstrated by the recent example of Google; the company has recently reviewed its privacy policies. This policy (implemented in March 2012) includes some significant changes to the way Google interacts with the personal information of its users. These changes have caused significant public controversy and have attracted media attention. The OAIC is currently examining the privacy policy to determine whether it complies with the requirements of the Australian Privacy Act.

Globalisation of information flows is a particular challenge for privacy regulators. A company might be based in the USA, hold information in databases in Europe and provide services online to customers in Australia. If that information is compromised, it can be very difficult to establish which country's privacy regulator has jurisdiction to investigate the matter.

Australia's Privacy Act only applies to Australian organisations and to organisations with an organisational link to Australia. In the scenario mentioned above, it may be that the organisation concerned is not covered by the Privacy Act.

Privacy commissioners world-wide are working together to address this issue. For example, APEC economies have recently established the APEC Cross-border Privacy Enforcement Arrangement, under which privacy regulators can cooperate and share information to assist in the enforcement of laws in cross-border privacy matters. The Global Privacy Enforcement Network, established in response to an OECD recommendation, is an informal network that facilitates cross-border cooperation in the enforcement of privacy laws. A particular challenge in this area is that there are subtle differences between privacy laws in different countries. An act or practice that breaches one country's privacy laws might be lawful in another country.

Cross-border cooperation in privacy enforcement is still a relatively new concept, and I expect that, as we gain more experience in this area, we will unlock the opportunities presented by the prospect of greater global collaboration.

Regarding Google and the changes it is making to its privacy policy, members of the Asia Pacific Privacy Authorities Forum, which includes Australia and 11 other privacy enforcement authorities in the region, have asked its cross-jurisdictional Technology Working Group to review the changes. The Asia Pacific Privacy Authorities Forum has also been in contact with the European Union's Article 29 Data Protection Working Party about the changes. The French Data Protection Authority is investigating the changes on behalf of the Working Party. We will monitor developments in this area.

Finally, privacy law reform in Australia presents a number of challenges and opportunities. As well as the key aspects of the government's first stage response to the ALRC report—the APPs, credit reporting, and powers and functions—there are a number of other changes on the horizon. Once the Government has implemented its first stage response, it will move on to the second stage. This includes the prospect of mandatory data breach notification and consideration of some of the exemptions in the Privacy Act.

The Government released an *Issues Paper* on the introduction of a statutory cause of action for serious invasion of privacy in September 2011. It received more than 70 submissions from a variety of stakeholders. When or whether these reforms will take place is still not entirely clear, but depending on how the process unfolds, they could present both challenges and opportunities, as individuals, business and government come to grips with these new rights and responsibilities and take a further step in the evolution of privacy law in Australia.

Privacy awareness

Privacy Awareness Week is a joint initiative of the Asia Pacific Privacy Authorities – a group of 12 data protection authorities from countries including Mexico, the USA, Canada, Hong Kong, Japan and New Zealand.

The theme of Privacy Awareness Week in 2012 is *Privacy: It's all about you*.

This message is directed both at individuals and organisations. It reinforces the idea that individuals can take responsibility for their own privacy by taking some common sense steps, such as updating their privacy settings when they use social media, and not sharing passwords. It also shows that organisations have a responsibility to treat their customers' personal information with respect, by only collecting as much information as they actually need and by appropriately securing that information.

If you have not yet done so, I recommend you visit the Privacy Awareness Week campaign website at http://www.privacyawarenessweek.org. There you will find many educational resources that we encourage you to use, as well as all kinds of suggestions about how you can protect the personal information of others, as well as your own.

Endnotes

1 Louis Brandeis & Samuel Warren, '*The Right to Privacy*', 4 Harvard Law Review 193-220 (1890-91) http://groups.csail.mit.edu/mac/classes/6.805/articles/privacy/Privacy_brand_warr2.html

2 As mentioned in the first paragraph, a press release of 2 May 2012 by the Attorney-General states that this Bill will now be introduced into parliament in the winter sitting period of 2012.

3 http://www.infosecurity-magazine.com/view/16228/mass-general-takes-1-million-hit-for-losing-193-patient-records/

4 http://www.itpro.co.uk/613063/hsbc-fined-3-million-by-fsa-over-data-security

DOES THE EXPANSION OF JUDICIAL REVIEW POSE A THREAT TO DEMOCRATIC GOVERNANCE?

MRLL Kelly*

Two areas chosen to explore this question are the expansion of the natural justice hearing rule (or procedural fairness) and the evolution in the High Court of the concept of jurisdictional error.

ADJR Act and *Kioa*

The *Administrative Decisions (Judicial Review) Act 1977* (Cth) (*ADJR Act*) came into operation in 1980; its intention was to streamline grounds of judicial review for Commonwealth administrative decisions made under an enactment. Attorney-General Ellicott said the Act's purpose was '… to establish a single simple form of proceeding in the Federal Court of Australia for judicial review of Commonwealth administrative actions …,'[1] noting that

> Judicial review by the Federal Court … will not be concerned at all with the merits of the decision… The court will not be able to substitute its own decision for that of the person or body whose action is challenged.[2]

This vaunted simplicity was overtaken by the legal professions' appreciation of the potential breadth of the Act and the consequent creative argumentation by counsel and experimentation by the Courts. This attitude can be summed up by Kirby P in *Osmond v Public Service Board of NSW*, who said:

> where a number of relevant Parliaments have enacted laws elaborating modern conceptions of administrative justice and fairness, it is appropriate for the judiciary in development of the common law in those fields left to it, to take reflection from the legislative changes and to proceed upon a parallel course.[3]

While that view was repudiated on appeal to the High Court[4] by Gibbs CJ[5] (Wilson J,[6] Brennan J[7] and Dawson J[8] agreeing; Deane J also agreeing[9]), in the intervening year the High Court heard the matter of *Kioa v West (MIEA)*[10] (*Kioa*).

The *ADJR Act* had enabled judicial review of administrative decisions made under the *Migration Act 1958*. Consequently, after obtaining reasons pursuant to s 13 of the *ADJR Act* for the decision to deport them, the Kioas sought ADJR review for breach of the natural justice hearing rule. The facts of that case (spelled out in the reasons of Chief Justice Gibbs) are well known, and the case has been forensically examined by Professor McMillan.[11]

Of significance to this paper is the appellant's submission 'the coming into operation of the *ADJR Act*, [has] rendered those decisions [*Ratu*[12] and *Salemi*[13]] distinguishable and inapplicable.'[14] Those decisions had held that there was no obligation to accord natural justice in relation to deportation decisions. Notwithstanding that all members of the Court

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found that the mere itemization of a breach of natural justice as a ground of review in s 5 of the *ADJR Act* did not import an obligation for decision-makers under relevant Acts to accord natural justice,[15] another aspect of the *ADJR Act* (s 13) would prove crucial to the decision. Mason J acknowledged that 'the primary object of the *ADJR Act* was to 'achieve procedural reform and *not to work a radical substantive change* (author's emphasis) in the grounds on which administrative decisions are susceptible to challenge at common law.'[16] Later Mason J said: 'The legislative amendments which have been made since *Salemi* [No. 2] and *Ratu* were decided in 1977 are of such significance that we should not regard those decisions as foreclosing the answers to the questions that the appellant's argument now raises. The *most important change is that brought about by s. 13 of the ADJR* Act. '[17] While Mason J acknowledged that 'The *Migration Act* plainly contemplates that in the ordinary course of events a deportation order will be made *ex parte*,'[18] he later stated:

> In one very important respect there has been *a radical legislative change* (author's emphasis). The exercise of the power is susceptible of judicial review and an element in that review is the obligation, on request, to furnish a statement setting out material findings of fact, referring to the evidence and other materials, and giving the reasons for the decision. In the light of this it can scarcely be suggested now that the existence of an obligation to comply with the requirements of procedural fairness is inconsistent with the statutory framework.[19]

Essentially, in *Kioa*, Mason J[20] appears to be adopting something very close to Kirby P's reasoning in *Osmond v PSB (NSW)*—that is, the fact that the Commonwealth *ADJR Act* enables, by s 13, that the giving of reasons on request by a person with appropriate standing is sufficient to import into *the statute under which the decision was made*, a requirement to accord natural justice. Nothing of this kind had been in contemplation in the Kerr or Ellicott Reports, nor had it ever occurred to the government or the legislature of the time that this may be a consequence of s 13. The prime reason for the inclusion of s 13 was to override, in relation to relevant enactments, the common law position where neither administrators[21] nor judges[22] are required to give reasons for a decision. As Gibbs CJ had noted in *Osmond:*

> It has long been the traditional practice of judges to express the reasons for their conclusions by finding the facts and expounding the law … That does not mean that a judicial officer must give his reasons in every case; it is clear, to use some of the words of Woodhouse P. in *R. v Awatere*,[23] that there is no "inflexible rule of universal application" that reasons should be given for judicial decisions. Nevertheless, it is no doubt right to describe the requirement to give reasons, as Mahoney J.A. did in *Housing Commission (NSW) v Tatmar Pastoral Co.*,[24] as "an incident of the judicial process", subject to the qualification that it is a normal but not a universal incident.[25]

Natural justice and reasons

Meanwhile, Deane J in the Federal Court had developed his ideas of natural justice to include fact finding based on 'logically probative material,'[26] a standard far higher than that required under the *Uniform Evidence Act* (original decision-makers and administrative review bodies are not required to comply with the rules of evidence).[27] On the High Court in *Osmond*, while Deane J agreed with Gibbs CJ, he said in dicta that:

> … the statutory developments [ie *ADJR*] referred to in the judgments of Kirby P and Priestley JA in the Court of Appeal in the present case are conducive to an environment within which the *courts should be less reluctant than they would have been in times past to discern in statutory provisions a legislative intent that the particular decision-maker should be under a duty to give reasons or to accept that special circumstances might arise in which contemporary standards of natural justice or procedural fair play demand that an administrative decision-maker provide reasons for a decision to a person whose property, rights or legitimate expectations are adversely affected by it.* Where such circumstances exist, statutory provisions conferring the relevant decision-making power should, in the absence of a clear intent to the contrary, be construed so as to impose upon the decision-maker an implied statutory duty to provide such reasons. As has been said however, the circumstances in which natural justice or procedural fair play requires that an administrative decision-maker give reasons for his decision are special, that is to say, exceptional.[28]

In considering the dictum in *Craig v South Australia*[29] that reasons do not form part of the record for courts, the Court in *Kirk v Industrial Court (NSW)* (a case in which the relevant Court by statute was required to give reasons)[30] doubted the viability of the *Craig* reasoning.[31] However, it appears that *Kirk* accepted Gibbs CJ's conclusions in *Osmond* as to the common law rules with regard to the giving of reasons, subject to their displacement by statute.[32] Even more recently, the accepted view in *Osmond has* been subject to some interrogation by the High Court in *Wainohu v New South Wales,*[33] as to whether the common law would repair an omission of the legislature in a statute, deliberate or otherwise, to require reasons from an administrator or a judge, (whether sitting on a court or not), stating that it 'does not have to be answered for present purposes.'[34] Heydon J dissenting reiterated the current position, relying on *Osmond*—'Statute apart, administrators have no duty to give reasons for their decisions.'[35] But both the plurality and French CJ and Kiefel J gave comfort to Deane J's very extended notion of natural justice as including the giving of reasons;[36] Heydon J did not accept the Deane 'doctrine'[37] as being correct.[38]

However, the High Court in *Osmond*,[39] and later in *Re Minister for Immigration and Multicultural and Indigenous Affairs v Palme*,[40] made it clear that the giving of reasons occurs subsequent to the making of a decision, and in *Palme* the plurality denied any relevance of s 13 of the *ADJR Act* in conflating reasons with natural justice, noting that it was the 'overall scheme' *of the relevant Act* that was the determining factor.[41] If this is so, it is difficult logically to see how a failure to give reasons could be an error of procedural fairness going to the jurisdiction of the relevant decision-maker.[42]

This analysis has proceeded at some length, to demonstrate an infirmity in the grounds upon which the *Kioa* decision was made (ie importing assumptions as a result of the passage of the *ADJR Act* as to a connection between *ADJR* reasons and a requirement to provide natural justice was an error). Moreover, as McMillan has noted, while *Kioa* is often credited with requiring natural justice in decisions under the *Migration Act*, 'it is … clear from the facts that the Department [of Immigration] was already providing a hearing of sorts to people facing deportation, despite an earlier High Court decision in 1977 saying that it didn't have to.'[43]

Subsequent to *Kioa*, judicial review of decisions, particularly of those affecting non-citizens under the *Migration Act*, proceeded apace. It is in the migration jurisdiction that the development of administrative law principles has primarily evolved.

Kioa, the ADJR Act and unintended consequences

Clearly, the result in *Kioa* was a consequence unintended by the legislature at the time. But *Kioa* had further unintended consequences.

Procedural fairness—ADJR Act

Perhaps influenced by the wording of s 5(1)(b) of the *ADJR Act*,[44] or perhaps by Stephen J's dicta dissent in *Salemi*[45] that 'The rules of natural justice are "in a broad sense a procedural matter"[46]' as opposed to 'substantive law,' and that, in relation to the Minister's discretionary power to order deportation, the exercise of the power required 'due observance of long-established patterns of procedural fairness,'[47] Mason J proposed the use of the words 'procedural fairness' instead of the term 'natural justice' to apply to administrative decisions.[48] This term has been used extensively by High Court judges since, and has continued to evolve.[49]

The content of procedural fairness has varied markedly. As the judges themselves noted in *Kioa*, procedural fairness or natural justice is 'flexible,' 'chameleon-like,' 'variable,'[50] and is a

'duty to act fairly' depending on 'the circumstances of the case [including] the nature of the inquiry, the subject-matter and the rules under which the decision-maker is acting.'[51] However, procedural fairness would not be required when its provision would serve only to facilitate evasion and frustrate the objects of the statute.[52] Thus both the content and applicability of the appropriate 'fairness' is variable.

In addition, some dicta of the judges in *Kioa* assumed the status of a principle of law—for example, Brennan J suggested that in '…the ordinary case where no problem of confidentiality arises an opportunity should be given to deal with adverse information that is *credible, relevant and significant to the decision to be made*.'[53] This remark was factored by a later High Court into a principle in its own right.[54] Similarly, Wilson J's remark on the need by decision-makers for 'proper consideration'[55] was later fashioned by Gummow J into a concomitant of the 'duty to act fairly' as the need to give '*proper, genuine and realistic consideration to the merits of the case*.'[56]

Justice Kirby noted the 'expanded notion of procedural fairness in Australia.'[57] As a result of the enabling of judicial review by the *ADJR Act* on multiple grounds, and irrespective of whether the decision in question was one of duty or discretion, the notion of natural justice in s 5(1)(a) of the *ADJR Act*, expanded.

The natural justice hearing rule (or procedural fairness) under the *ADJR Act* thus came to be seen by some to include:

- A duty to make inquiries[58]
- A duty to consider the legitimate expectations of an applicant as a result of a holding out by the Executive [59] and this despite there being no estoppel in public law[60]
- The need for rational/logical probative evidence;[61] and/or 'arguably a minimum degree of "proportionality"'.[62]

The Deane J dilemma

Deane J said in *Pochi* (1980)[63] that it would be 'both surprising and illogical …if …the rules of natural justice were restricted to the procedural steps' which would amount only to 'an illusion of fairness.'. He referred to a '…requirement that findings of material fact of a statutory tribunal must ordinarily be based on logically probative material and the requirement that the actual decision of such a tribunal must, when relevant questions of fact are in issue, ordinarily be based upon such findings of material fact and not on mere suspicion or speculation.'[64] This is difficult to reconcile with the fact that decision-makers are not courts, do not deal with evidence in the legal sense but rather with information provided in response to applications, that judicial review may occur only for errors of law, and that there is no error of law in making a wrong finding of fact.[65] Deane J's view in *Pochi* was repudiated by Mason CJ in *Bond* (1990),[66] who said: 'The approach adopted in [that case] has not so far been accepted by this Court.'

But in *Bond*, Deane J further extrapolated his view of natural justice saying:

> If the actual decision could be based on considerations which were irrelevant or irrational or on findings or inferences of fact which were not supported by some probative material or logical grounds, the common law's insistence upon the observance of such a duty [to accord natural justice] would represent a guarantee of little more than a potentially futile and misleading facade[67]

Further, in relation to administrative tribunals, he suggested that their obligation to accord natural justice includes 'arguably a minimum degree of "proportionality"…'[68]

Deane J's position has still not been accepted, though it would appear likely to have influenced Justice Gummow in *Eshetu*, *SGLB* and *SZMDS*.[69] The current law was explained by Gleeson CJ—there must be *some* evidence (or data). The Chief Justice in *MIMA v Rajamanikkam*[70] referred to the Deane dicta, but concluded[71] that the rule is that a decision-maker must base a decision upon evidence, going on to observe:

> The distinction between judicial review of administrative decision-making upon the ground that there has been an error of law, including a failure to comply with the requirements of procedural fairness, and comprehensive review of the merits of an administrative decision, would be obliterated if every step in a process of reasoning towards a decision were subject to judicial correction. The duty to base a decision on evidence, which is part of a legal requirement of procedural fairness, does not mean that any administrative decision may be quashed on judicial review if the reviewing court can be persuaded to a different view of the facts.[72]

Clearly, to adopt the Deane position or that taken by Gummow A-CJ and Kiefel J in *SZMDS,*[73] runs grave risks of crossing the merits/legality divide and thus breaching the separation of powers doctrine. It would have the consequence of judges interrogating the rationality and logicality of decisions reached by administrators in circumstances and for purposes different from those to which the judiciary is accustomed, substituting their views for those of the executive, and by so doing causing disruption to policy implementation and incurring costs to both the executive and the judiciary in terms of time and money.

Kioa: the two approaches to procedural fairness

The remarkable thing about *Kioa* was the divergence in approach by Mason J and Brennan J as to the basis upon which natural justice would be implied in a statute authorizing decisions. Mason J asserted that:

> The law has now developed to a point where it may be accepted that there is a common law duty to act fairly, in the sense of according procedural fairness, in the making of administrative decisions which affect rights, interests and legitimate expectations, subject only to the clear manifestation of a contrary statutory intention.[74]

Brennan J stated that:

> There is no free-standing common law right to be accorded natural justice by the repository of a statutory power. There is no right to be accorded natural justice which exists independently of statute and which, in the event of a contravention, can be invoked to invalidate executive action taken in due exercise of a statutory power.[75] …
>
> The supremacy of Parliament, a doctrine deeply imbedded in our constitutional law and congruent with our democratic traditions, requires the courts to declare the validity or invalidity of executive action taken in purported exercise of a statutory power in accordance with criteria expressed or implied by statute. There is no jurisdiction to declare a purported exercise of statutory power invalid for failure to comply with procedural requirements other than those expressly or impliedly prescribed by statute.[76]

In addition, a further difference between the two justices was their approach to 'legitimate expectation'—Mason J affirming that its existence gave rise to a duty to accord procedural fairness, and Brennan J denying the legal efficacy of the term and warning that its use could facilitate a breach of the merits/legality divide.[77]

Some commentators (including Sir Anthony Mason himself)[78] and judges[79] have suggested that there is no difference between the two approaches and the High Court itself has refused to examine whether there is in fact any difference.[80] There is, however, one fundamental difference— the basic assumption from which the judges proceed: one approach proceeds from the supremacy of the common law as requiring the duty (subject to statutory exclusion); the other gives due respect to the supremacy of parliament, operating from the 'threshold question' of whether it was parliament's intention that decisions be made according to

natural justice principles. The first emphasises the judicial power and the power of the courts, the second emphasises statutory intention and the power of the legislature.[81] There are serious ramifications arising from which of these divergent views judges adopt: one highlights common law judicial power, the other pays respect to the legislature.

As the Hon JJ Spigelman CJ noted, while courts may presume that parliament did not intend to deny procedural fairness to persons affected by the exercise of public power,[82] 'the judiciary must always remember that the interpretive principles are rebuttable.'[83] The Chief Justice further noted:

> The task of the court is to interpret the words used by Parliament. It is not to divine the intent of the Parliament.[84] The courts must determine what Parliament meant by the words it used. The courts do not determine what Parliament intended to say.[85] ...The position in Australia is that identified by Stephen J: 'It is no power of the judicial function to fill gaps disclosed in legislation.'[86] Indeed Justice Stephen subsequently said: 'To read words into any statute is a strong thing and, in the absence of clear necessity, a wrong thing.'[87,88]

Legitimate expectations?

Partly as a result of the expansion of the content of natural justice (as well as of improper purpose, relevant and irrelevant considerations and unreasonableness under the *ADJR Act*) by the courts, the Labor Government with bipartisan support removed the majority of migration decisions from both the *ADJR* Act and the s 39B jurisdiction,[89] and established through what became Part 8 of the *Migration Act 1958* (Cth) only certain confined grounds of review that excluded the natural justice hearing rule, unreasonableness and relevant and irrelevant considerations. While the constitutionality of this measure was upheld in *Abebe v Commonwealth*[90] as being consistent with s 77 of the *Constitution*, expansion of the concept of natural justice actually continued to grow.

Firstly, outside the Commonwealth jurisdiction, relying on Mason J's dicta in *Kioa*[91] and that of Deane J in *Haoucher v Commonwealth*,[92] the High Court in *Annetts v McCann*[93] found that the *Coroners Act 1920* (WA) did not display a legislative intention to exclude the appellants' 'common law right to be heard' in relation to themselves and their deceased son.[94] Brennan J dissented on the ambit of natural justice requiring consideration of 'legitimate expectations.'[95] In *Ainsworth v Criminal Justice Commission*,[96] again relying upon Mason J's dictum in *Kioa* as endorsed by the plurality in *Annetts*,[97] the majority found a breach of the rules of procedural fairness in the making of a report by a statutory authority, though again Brennan J dissented on the inclusion of 'legitimate expectation' as part of a criterion for the application of procedural fairness.[98]

Secondly, the doctrine of 'legitimate expectation' has had a mixed history. In *Attorney-General (NSW) v Quin,*[99] Mason CJ discussed the concept at some length, noting that 'there may be some cases [involving 'legitimate expectation'] in which substantive protection can be afforded and ordered by the court, without detriment to the public interest.'[100] In the same case, Brennan J again disputed the existence of any doctrine of 'legitimate expectation' in Australian administrative law,[101] his prime concern being, as it had been in *Kioa* and in *Annetts*, that such a doctrine had the potential to 'divert inquiry from what is procedurally reasonable and fair into an examination of the merits' of a case.[102]

Quin was decided on 7 June 1990 by a 3:2 majority (Mason CJ, Brennan J, Dawson J: Deane J, Toohey J dissenting). Earlier that year on 7 February 1990, the Full Court of the Federal Court had considered in *Kurtovic* (an ADJR case) the questions of 'legitimate expectation,' procedural fairness and 'substantive fairness.'[103] The case was an appeal from Marcus Einfeld, then a judge of the Federal Court, who had restrained the Minister from deporting Kurtovic.[104] Counsel submitted that an estoppel arose against the then Minister on

the basis of a letter written on behalf of one of his predecessors on 17 December 1985 and that, on the basis of a holding out by virtue of Ministerial policy announcements made by his predecessor in 1983 and 1984,[105] Kurtovic had an expectation that the substantive matters mentioned in the policy announcement would be adhered to.[106] The Court considered and dismissed both these arguments, stating that only procedural fairness could arise; Gummow J considered UK decisions where 'substantive fairness' rather than 'procedural fairness' had received support.[107]

On 7 June, the same day that *Quin* was decided, the High Court also brought down its decision in the ADJR case of *Haoucher*.[108] This case raised the concept of 'legitimate expectation' in circumstances not dissimilar to those that had been at issue in *Kurtovic*, where a published Ministerial policy was said to be sufficient to engender a 'legitimate expectation' that must sound in procedural fairness. It is interesting that the two minority judges in *Quin* (Deane J and Toohey J), together with McHugh J who did not sit in *Quin*, formed the *Haoucher* majority, while Dawson J (in the majority in *Quin*) together with Gaudron J (who did not sit in *Quin*), formed the *Haoucher* minority.

While the factual and legislative circumstances of *Quin* and *Haoucher* were different, there were two compelling similarities: both involved a policy and its repudiation in the light of circumstances, and both involved what was said to be a 'legitimate expectation.' In the first case, the capacity of the executive to change its policy in accordance with circumstances was acknowledged, in the second it was repudiated; in the first, policy changes could not give rise to administrative law consequences; in the second they did. In the first, the lack of applicability of the private law doctrine of estoppel to policy changes was acknowledged, Gummow J's explication of the issues in *Kurtovic* being acknowledged;[109] in the second the applicability of estoppel to policy was implicitly acknowledged, and *Kurtovic* was not mentioned at all. More worrying still, the dictum of Deane J in *Haoucher*, that is so often partially cited with approval, actually foreshadowed even more radical change; relying on *Kioa*,[110] he said:

> Indeed, the law seems to me to be moving towards a conceptually more satisfying position
>
> - where common law requirements of procedural fairness will, in the absence of a clear contrary legislative intent, be recognized as applying generally to governmental executive decision-making[111] and
> - where the question whether the particular decision affects the rights, interests, status or *legitimate expectations* of a person in his or her individual capacity is *relevant to the ascertainment of the practical content*, if any, of those requirements in the circumstances of a particular case and *of the standing* of a particular individual to attack the validity of the particular decision in those circumstances.[112]

Effectively this is a statement endorsing the capacity of 'legitimate expectation' (based on Mason J's understanding in *Kioa*) to provide the practical content of and a substantive outcome for the provision of 'procedural fairness' as well as being determinative of standing; moreover, such 'procedural fairness' is to apply at each stage of the decision-making process.[113] It was a move not only towards an administrative nightmare but also towards 'substantive fairness,' as was later recognized by J J Spigelman QC when he appeared for the Commonwealth in *Teoh*.[114] Dawson J's dissent starkly put the consequences of the majority position: 'To accede to the appellant's argument would be to require the Minister to give a further hearing on every occasion upon which he wished to depart from the recommendation of the Tribunal. To impose such a requirement accords neither with principle nor with authority.'[115] This too, no doubt, was the view of the Labor Immigration Minister who had already tabled in the Parliament reasons for not accepting AAT recommendations in 10 deportation cases, one of which was that of Mr Haoucher.[116]

This analysis shows a more than disquieting split in the High Court in its analysis of both the factual and policy circumstances and of the appropriate law to be applied in a relevant case, and in its appreciation of the roles of the executive and the legislature in making and implementing policy. There was no coherence at all in the approaches of members of the Court in these two cases. Certainty for administrators would appear not to have been a consideration for the *Haoucher* majority. (As it turned out, the Minister's position in *Haoucher* was vindicated.[117])

While in *ABT v Bond*[118] (another ADJR case decided prior to *Quin* and *Haoucher*), the High Court appeared to recognize at least some of the dangers in Deane J's approach emerging from *Pochi* (as to logical probative evidence)[119] and later in *Haoucher* (as to applicability of natural justice to every stage of the decision-making process),[120] in that the Court repudiated both these stances, from an administrator's point of view, worse was to come.

Teoh

In 1995, the High Court in *Teoh* found that a legitimate expectation to be accorded procedural fairness arose if a decision-maker failed to take into account any obligation the Commonwealth had assumed under a ratified treaty that was relevant to the matter under decision, and that this was so whether or not the applicant or the decision-maker was aware of the obligation. The ratification by the Executive under the prerogative or executive power was said to constitute a holding out not only to the international community but also to the domestic community, and failure to take that into account (and notifying the application of the intention not to take it into account) was a breach of procedural fairness. Neither *Kurtovic* nor 'substantive fairness' was mentioned in the decision, though both had been raised by JJ Spigelman for the Minister.[121]

Mason CJ and Deane J said:

> …ratification of a convention is a positive statement by the executive government of this country to the world and to the Australian people that the executive government and its agencies will act in accordance with the Convention. *That positive statement is an adequate foundation for a legitimate expectation, absent statutory or executive indications to the contrary, that administrative decision-makers will act in conformity with the Convention*[122] and treat the best interests of the children as "a primary consideration". It is not necessary that a person seeking to set up such a legitimate expectation should be aware of the Convention or should personally entertain the expectation; it is enough that the expectation is reasonable in the sense that there are adequate materials to support it.[123]

The Labor Government immediately issued[124] a joint press release (Minister for Foreign Affairs, Mr Gareth Evans, and the Attorney-General, Mr Michael Lavarch), stating (amongst other things) that entry into a treaty was no reason for raising any expectation that government decision-makers would act in accordance with the treaty. On the change of government, the Coalition Minister for Foreign Affairs (Mr Alexander Downer), the Attorney-General (Mr Daryl Williams) and the Minister for Justice (Senator Amanda Vanstone) issued a Joint Ministerial Statement to the same effect on 25 February 1997. In addition, the Labor Government introduced into the Senate on 28 June 1995, the *Administrative Decisions (Effect of International Instruments) Bill 1995* to achieve legislatively the same effect that the joint press statement had done executively; but it lapsed with the change of government. On 18 June 1997, the Coalition government introduced the *Administrative Decisions (Effect of International Instruments) Bill 1997* but it too lapsed when Parliament was dissolved pending the election. On 13 October 1999, the Coalition government re-introduced the *Administrative Decisions (Effect of International Instruments) Bill 1999*; while it passed the House of Representatives on 11 May 2000, it faced opposition in the Senate on matters of detail and never became law. These moves were intended as the appropriate executive and/or legislative statement of intention as envisaged in Mason CJ's and Deane J's reasons.

A reasonable person may well have thought that this would put an end to the matter, the government and the Opposition both being exercised at what they interpreted as an inappropriate if not unlawful intrusion into, and blatant subversion of, the executive and legislative decision-making fields by the High Court. However, Federal Court judges continued to accept *Teoh* as authority, despite the evidence of contrary executive intention (approved as it would have been by Cabinet). Goldberg J in *Tien v MIMA*[125] said:

> Notwithstanding the publication of this statement I do not consider that the statement has the effect apparently intended. I consider that the reference to "statutory or executive indications to the contrary" referred to by Mason CJ and Deane J in *Teoh* is a reference to indications made at or about the time the relevant treaty is ratified.[126]

The authority of the doctrine of legitimate expectation and the authority of *Teoh* were severely undermined by the plurality reasons in *Re MIMIA; Ex parte Lam (Lam),*[127] a 2003 procedural fairness case arising in the High Court's s 75(v) jurisdiction. The Court found no breach of procedural fairness. McHugh and Gummow JJ stated that on 'legitimate expectation' the views of McHugh J dissenting in *Teoh*[128] and Brennan J in the majority in *Quin*[129] should be accepted as representing the law in Australia—'The decision in *Teoh* does not require any contrary or other understanding of the law.'[130] On *Teoh* itself, McHugh and Gummow JJ expressed considered doubt as to the reasoning, especially having regard to the separation of powers,[131] as did Hayne J[132] and Callinan J.[133]

By no means, however, can one consider that the 'legitimate expectation' doctrine is dead, despite Kirby J's acknowledgement of it as a 'fiction' now of 'limited utility' given the 'expanded notion of procedural fairness in Australia.'[134]

Post Lam

There has been some loose use of the words 'legitimate' and 'expectation' together in a fashion with no administratively legal meaning.[135] However, the High Court, in coming to a number of recent decisions has continued to use the rubric of Mason J from *Kioa* that asserts that the content of natural justice and whether it applies arises from 'a common law duty to act fairly, in the sense of according procedural fairness, in the making of administrative decisions which affect rights, interests and legitimate expectations, subject only to the clear manifestation of a contrary statutory intention.'[136]

There are a number of High Court dicta on 'legitimate expectation' in the sense of passing comments that were not critical to the ratio of the relevant case—Gleeson CJ[137] and Callinan J[138] in *Jarratt v Commissioner of Police (NSW);* Kirby J in *Shi v Migration Agents Registration Authority*;[139] and in some cases, members of the High Court have refused, or found it unnecessary, to consider the content of 'legitimate expectation'—eg *Sanders v Snell*[140] and more recently in *SZMDS.*[141]

However, in *Plaintiff M61 v Commonwealth*[142] the unanimous Court reiterated the view of Mason CJ, Deane and McHugh JJ in *Annetts v McCann*[143] 'that it can now be taken as settled that when a statute confers power to destroy, defeat or prejudice a person's rights, interests *or legitimate expectations*, principles of natural justice generally regulate the exercise of that power.[144] Of course, that plurality in *Annetts* used Mason J's definition of procedural fairness from *Kioa*, not that of Brennan J, who had continued to repudiate the existence of any such doctrine. It appeared that in *Lam*, the High Court had moved towards accepting the Brennan view. In *Annetts*, Brennan J had warned again of the potential for courts' engagement with 'legitimate expectations' to facilitate courts crossing the Rubicon of the merits/legality divide.[145] He noted that there is no 'explicable legal principle' ie *no legal content*,[146] to any notion of 'legitimate expectation.'[147] Without such principle or content, he warned, as he had in *Quin*, that 'the courts will be perceived to be asserting an authority to

intervene in the affairs of the Executive Government whenever the court determines for itself that intervention is warranted. The essential authority of the courts to enforce the law governing the extent and exercise of executive and administrative power would be undermined.'[148]

In *M61* the Court apparently turned its back upon Brennan's view not only with respect to legitimate expectations but also with regard to its understanding of natural justice or procedural fairness itself. The Court not only reiterated the Mason-*Kioa* rubric as adopted by the plurality in *Annetts*, it said that:

> *It is unnecessary to consider* whether identifying the root of the obligation remains an open question[149] or whether the competing views would lead to any different result.[150]

It was 'unnecessary to consider' this matter, but nevertheless the Court implicitly approved the Mason J view from *Kioa*, by stating: 'It is well established, as held in *Annetts*,[151] that the principles of procedural fairness may be excluded only by "plain words of necessary intendment".'[152] It can only be concluded that the doctrine of legitimate expectation on the basis of the Mason J *Kioa* view, and not the Brennan approach, now finds favour with the modern Court, despite its preoccupation with the separation of powers.[153]

***Wider still and wider*[154]**

Despite attempts by successive governments to translate their policies endorsed by the electorate into law through legislation,[155] especially the Labor amendments to Part 8 of the *Migration Act*, the ambit of the natural justice hearing rule has widened.

In *Re Refugee Review Tribunal; Ex parte Aala*[156] the High Court found, despite 2 Refugee Review Tribunal (RRT) hearings and 2 reviews by the Federal Court, that a statement by the RRT member that s/he would take into account all the material that had been before the Federal Court, but in fact had failed to consider 4 handwritten bits of paper that had been supplied to that Court, was a breach of procedural fairness, as it prevented the applicant from putting his case in relation to the actual state of affairs. The case is also authority for the fact that writs mentioned in s 75(v) are to be known as 'constitutional writs;'[157] that certiorari in the High Court's original jurisdiction (75(v)) is ancillary to prohibition and mandamus;[158] that a breach of natural justice/procedural fairness by an officer of the Commonwealth will occur when making a decision under a statute that did not 'relevantly (and validly) limit or *extinguish any obligation to accord procedural fairness*';[159] and that a breach of procedural fairness, even a trivial breach, constitutes a jurisdictional error.[160]

In *Re Minister for Immigration Multicultural and Indigenous Affairs; Ex parte Miah*[161] the High Court held with regard to an original decision-maker that there was a breach of procedural fairness in not advising Miah of the change of government (based on the country information available) and giving him an opportunity to make a case as to why he still would be persecuted. Gaudron J adverted to the 2 competing theories as to natural justice that arose from Mason J and Brennan J in *Kioa*, and said, relying on her dicta with Gummow J in *Aala* that whichever approach was adopted, in the end the question is whether the legislation, on its proper construction, relevantly (and validly) limits or extinguishes the obligation to accord procedural fairness.[162]The provisions in the statute, even though entitled a 'Code,' did not constitute a Code, and the statute did not exclude compliance with the rules of natural justice.[163]

The Court in *Miah* also noted that the *Explanatory Memorandum* and any statement by the Minister in introducing the Bill (ie Second Reading speech) are not relevant in that the 'court will not give the enactment that meaning if such a reading is not justified. The need to act on

the text of the enactment and not the Minister's statements is particularly important when the Minister's meaning has serious consequences for an individual[164].'[165] Interestingly, no reference was made to sections 15 AA or 15 AB of the *Acts Interpretation Act 1901* (Cth). It was also said that the existence of a right of appeal in the statute, or a *de novo* merits review, would only cure defects in natural justice in certain circumstance.[166]

Those cases had occurred on the basis of the Part 8 inserted in the *Migration Act*. However, given the clear intention of the Court to ignore the legislature's intention, the Coalition government, with bipartisan support, enacted the *Migration Legislation Amendment (Procedural Fairness) Act 2002* (Cth), which inserted sections into the Act declaring that certain provisions in respect of decision-making under that Act were to be taken to be 'an exhaustive statement of the requirements of the natural justice hearing rule.'

In anticipation of hearing a case reviewing a decision made under this new legislation, the High Court majority in *SAAP v Minister for Immigration, Multicultural and Indigenous Affairs*[167] (which concerned a decision made before the *Procedural Fairness Act* came into operation) adopted what can only be described as an intensely literal approach to interpreting the words of specific provisions. Any reference to *Kioa* was eschewed and instead of implying natural justice in the statute by virtue of what was not specifically excluded, the majority looked instead at what was specifically *included*, concentrating on finding a jurisdictional error through failure to comply with the exact words of the statute. This time, McHugh J examined the Explanatory Memorandum and Second Reading speech, finding them 'neutral.'[168] As a result of this case, (together with *Minister for Immigration and Multicultural Affairs v Al Shamry*[169] and *SZEEU v Minister for Immigration and Multicultural Affairs and Indigenous Affairs*[170]) the Commonwealth Parliament moved to enact the *Migration Amendment (Review Provisions) Act 2007* (Cth) to attempt to overcome the problem.[171]

In *NAIS* v *Minister for Immigration and Multicultural and Indigenous Affairs* [172] in which the decision occurred also before the entry into force of the *Procedural Fairness Act*, such an extended delay occurred that the majority held that a breach of procedural fairness may arise not only from a denial of an opportunity to present a case but also *from denial of an opportunity to consider it*; the excessive delay amounted to 'self disablement' by the RRT, effectively equivalent to the self disablement caused by bias.[173] Gummow J dissenting referred to Brennan J's dicta in *Quin*. [174] He noted that the High Court proceeding was a Chapter III proceeding involving the judicial power of the Commonwealth and that 'maladministration is not to be confused with the illegality which founds judicial review.'[175]

SZFDE v Minister for Immigration and Citizenship[176]*,* decided by a unanimous High Court after the *Procedural Fairness Act* entered into force, concerned fraud by a purported solicitor and migration agent. The Court held that a fraud perpetrated upon an applicant in this fashion amounted to a fraud upon the Tribunal, and that this conclusion was strengthened by the new provision exhausting natural justice—fraud subverts the Tribunal's capacity to accord procedural fairness and 'given the significance of procedural fairness for the principles concerned with jurisdictional error, sourced in s 75(v) of the *Constitution',* this was a 'matter of the first magnitude.'[177]

Fairness? Administrative justice?

Despite Brennan J's warning in *Quin* that, given the separation of the judicial power doctrine, there can be no attempt by courts to pursue 'administrative justice' to rectify perceived wrongs,[178] the remit of the courts being confined to determining legality according to the power conferred on the decision-maker, that phrase has become popular. In recent times its main proponent has been Kirby J.[179]

The AIAL National Forum in 2010 devoted its programme to the concept of administrative justice.[180] Chief Justice French has spoken of the term as having been 'born with a noble purpose, but also to have been engaged for most of its life as a concept in search of meaning.'[181] French CJ suggests that the expression ought to have content that 'identif[ies] at least normative standards which can legitimately be said to answer to the designation 'just' and which are capable of general application to our system of administrative law and practice.'[182] Academic writers have also adopted the expression.[183]

The loose use of the phrase, whose content (like that of other terms in legal use such as 'rule of law,' 'natural justice', 'procedural fairness' and 'jurisdictional error') is subject to different meanings depending on the perception of those who use it, is not helpful when confronting the morass of administrative applications which daily require decisions. The Chief Justice referred to Sir Francis Bacon writing *On Judicature* in his address,[184] but perhaps he forgot that Sir Francis also wrote in that essay that:

> JUDGES ought to remember that their office is *jus dicere*,[185] and not *jus dare*;[186]*;* to interpret law, and not to make law, or give law. Else will it be like the authority claimed by the Church of Rome, which under pretext of exposition of Scripture doth not stick to add and alter; and to pronounce that which they do not find; and by show of antiquity to introduce novelty. Judges ought to be more learned than witty, more reverend than plausible, and more advised than confident. Above all things, integrity is their portion and proper virtue.[187]

This concept of integrity is of overwhelming importance; former Chief Justice Spigelman devoted all three of his 2004 Lectures for the AIAL to that subject.[188] 'Administrative justice' is a chimera, a lawyers' mare's nest, the result of transposition of legal thinking and legal attitudes onto the legislature and the executive, a metaphoric repositioning of powers. The legal system itself cannot be said to be 'just'—judges are to 'do right according to law'—and if judges fail, why graft an inapposite concept onto administrators whose purpose is to implement policy. The idea that the legal system is not always just may be seen by reference to a few examples.

Perhaps the most significant development in natural justice has been that following from Chief Justice Gleeson's Delphic utterance in *Lam* that:

> Fairness is not an abstract concept. It is essentially practical. Whether one talks in terms of procedural fairness or natural justice, the concern of the law is to avoid practical injustice.
>
> No practical injustice has been shown.[189]

'Fairness' means different things to different people, depending upon their circumstances and personal disposition; but 'practical unfairness' or 'practical injustice' in the administrative context has now entered the lexicon. *Parker v Comptroller General of Customs*[190] was a case involving 'extraordinary delay,' where the appellant had been pursued through the courts for well over a decade for an alleged offence of failing to pay duty on one imported bottle of Cheval Napoleon Old French Brandy. He was finally fined over $1 million.[191] Parker alleged a breach of procedural fairness by the courts, in that he was not given an adequate opportunity to make his case. The Court, Heydon J dissenting, found against him, French CJ saying that '[no] practical unfairness' had been shown towards Mr Parker.[192]

In addition, the rule against bias for judges has been compromised, the High Court in *Ebner v Official Trustee in Bankruptcy*[193] doing away with the common law rule of automatic disqualification for judges on the basis of pecuniary interest. Unlike politicians and Ministers,[194] judges do not have to disclose their interests.[195] In breach of the maxims that judges must not sit in their own cause,[196] and that 'justice should not only be done, but should manifestly and undoubtedly be seen to be done,'[197] Australian judges themselves hear application to recuse themselves, the High Court saying this is 'the ordinary and

…correct practice.'[198] The recent case of *British American Tobacco Australia Services Ltd v Laurie*[199] may, however, prove to be a turning point. There the joint majority found apprehended bias against a judge;[200] some of its reasoning could well open up the concept of bias in judges who, sitting on Chapter III courts, perennially deal with the same kind of issue.[201]

Jurisdictional error and natural justice

The paper has concentrated upon natural justice/procedural fairness for the reason that *Aala*[202] saw a breach of procedural fairness emerging as a jurisdictional error. The decision in *Aala* is always cited as being authority for the proposition that a breach of natural justice/procedural fairness is a jurisdictional error. It is also cited as authority for the proposition that to enliven the original jurisdiction under the constitutional writs in s 75(v) of the Constitution, a jurisdictional error needs to be proved. The citations almost always do not have any references to specific pages or paragraphs in *Aala*.[203]

As noted above, the passage of the *Procedural Fairness Act 2002* in the Migration jurisdiction spurred the High Court to the adoption of a strict literal interpretation of the *Migration Act 1958* (Cth). The extended nature of procedural fairness, a breach of which all the Court now uncritically accepted as a jurisdictional error, and the accepted necessity to show a jurisdictional error thus enlivening its original jurisdiction, meant that creative thinking became a hallmark of High Court jurisprudence, encouraged on occasion it could be said by over-zealous assistance by members of the Court.[204]

Craig, Kirk, and jurisdictional errors

The dictum of the unanimous Court in *Craig v South Australia*[205] stated a position on jurisdictional errors for administrators as follows:

> If such an administrative tribunal [i.e. one subject to the separation of powers doctrine] falls into an error of law which causes it to identify a wrong issue, to ask itself a wrong question, to ignore relevant material, to rely on irrelevant material or, at least in some circumstances, to make an erroneous finding or to reach a mistaken conclusion and the tribunal's exercise or purported exercise of power is thereby affected, it exceeds its authority or powers. Such an error of law is jurisdictional error which will invalidate any order or decision of the tribunal which reflects it.[206]

This was accepted in *Minister for Immigration and Multicultural Affairs v Yusuf* [207] by McHugh, Gummow and Hayne JJ with the addendum that this list was 'not exhaustive,' that any such error of law as identified in *Craig* ***will be*** a jurisdictional error, and noting in the footnote that according to *Aala* any breach of natural justice will also be a jurisdictional error.[208] The logical conclusion from *Craig* and *Yusuf* is that for Commonwealth administrators at least, there was very little margin for error, as any error of law could be a jurisdictional error, and this would not be known until a court had ruled on it, since the administrator or tribunal is incapable of determining the limits of their own jurisdiction.[209] However, *Craig* maintained the distinction between jurisdictional and intra-jurisdictional errors for courts,[210] refusing to follow the UK line of cases developing from *Anisminic*.[211]

The ambit of what constitutes a 'jurisdictional error' is now so wide and uncertain as to be preposterous. No executive government or any legislature can be capable of determining what constitutes a jurisdictional error, as this is an aspect of the judicial power arrogated to Chapter III courts. [212]

More recently, the *Craig* position with respect to both tribunals and courts has received considerable analysis by the Court in *Kirk*,[213] the Court noting that no application had been made to reconsider *Craig;*[214] *Kirk* itself acknowledged frailties in the *Craig* reasoning on

jurisdictional error and threw doubt upon the segregation of courts from the whole category of jurisdictional errors.[215] [216] [217]

While the *Kirk* position may go some way towards ameliorating the burden under which administrators work, a burden of error far greater than that which Courts apply to themselves, this has to be doubted on a careful reading of *Kirk*.

'Jurisdiction' and 'authority to decide'

It has long been the High Court's understanding that 'jurisdiction' means 'authority to decide'[218]; however, in *Kirk* the plurality in a discursive analysis[219] threw doubt on this proposition, particularly in relation to the idea of jurisdictional error as enunciated by Lord Denman in *R v Bolton*, where he said that '[t]he question of jurisdiction does not depend on the truth or falsehood of the charge [laid before the justices], but upon its nature: it is determinable on the commencement, not at the conclusion, of the inquiry.'[220] The plurality disagreed with this, noting on the basis of *Aala* that some errors going to jurisdiction appear only after commencement of the matter and become known only at its end.[221] Such a view is of course dependent on the correctness of the finding in *Aala* that even a trivial breach of procedural fairness is for administrators an error going to jurisdiction (of course this is not necessarily the case for courts)[222].

The *Bolton* approach can be assimilated to that adopted by Brennan J in *Quin*. An administrator would agree that, logically, one cannot begin to make a decision until one is empowered or authorized to do so; and a mistake while exercising that authority is a legal error that occurs during the exercise of authority. Courts are now saying that if an official makes a mistake while exercising authority, in fact the official had never had any authority at all. [223] This flies in the face of logic and experience.[224]

What is concerning in *Kirk*, is that the plurality[225] endorsed the view that the 'concept of jurisdiction takes insufficient account of the public policy necessity to compel inferior tribunals to observe the law.'[226] They asserted that '[a]s Jaffe rightly points out'[227]:

> it is important to recognise the use to which the principles expressed in terms of 'jurisdictional error' and its related concept of 'jurisdictional fact'" are put. The principles are used in connection with the control of tribunals of limited jurisdiction on the basis that a 'tribunal of limited jurisdiction should not be the final judge of its exercise of power; it should be subject to the control of the courts of more general jurisdiction'. Jaffe expressed the danger, against which the principles guarded, as being that 'a tribunal preoccupied with special problems or staffed by individuals of lesser ability is likely to develop distorted positions. In its concern for its administrative task it may strain just those limits with which the legislature was most concerned'.[228] It is not useful to examine whether Jaffe's explanation of why distorted positions may develop is right. What is important is that the development of distorted positions is to be avoided. And because that is so, it followed[229], in that author's opinion, that denominating some questions as 'jurisdictional' is almost entirely functional: it is used to validate review when review is felt to be necessary '.[230]

Concern arises from first the Court's apparent willingness to embrace public policy in relation to the determination of jurisdictional error, something for which Courts are not equipped.[231] Secondly, the paragraph displays significant lack of regard or respect for the executive. Thirdly, the Court appears to endorse an open-ended approach to determining jurisdictional error, leaving it to the Court's discretion as to when it is 'felt' 'necessary' to find a jurisdictional error. Fourthly, by apparently treating with disregard the only logical approach to what is and what is not outside the authority to decide, the Court maintains the uncertainty surrounding administrative decision-making, where administrators wander in a court-created morass of conflicting views, which can only be settled in a court by the court providing its view.[232] Finally, while one would agree that the development of distorted positions is to be avoided, the Court could assist in this by leading by example.

What is a 'jurisdictional error'?

It would be appropriate for the High Court, were it comprised of poets, to say there is no 'bright line'[233] between jurisdictional and non-jurisdictional errors.[234] But it is neither satisfactory nor sufficient for the highest court in the land to say 'It is neither necessary, nor possible, to attempt to mark the metes and bounds of jurisdictional error.[235]'

This is the job of the High Court. Musings on how 'Twilight does not invalidate the distinction between night and day,'[236] are fine in a philosopher, but applying this to the law is apt to leave administrators in the Twilight Zone.[237] One of the basic underlying principles of the law is that it applies equally to all and is known to all. Fuller, for example, set down a number of principles concerning good laws:[238]

> In *The Morality of Law*, Fuller identifies eight requirements of the rule of law.[239] Laws must be general , specifying rules prohibiting or permitting behavior of certain kinds.[240] Laws must also be widely promulgated , or publicly accessible. Publicity of laws ensures citizens know what the law requires. Laws should be prospective specifying how individuals ought to behave in the future rather than prohibiting behavior that occurred in the past. Laws must be clear . Citizens should be able to identify what the laws prohibit, permit, or require. Laws must be non-contradictory . One law cannot prohibit what another law permits. Laws must not ask the impossible. Nor should laws change frequently; the demands laws make on citizens should remain relatively constant Finally, there should be congruence between what written statutes declare and how officials enforce those statutes. So, for example, congruence requires lawmakers to pass only laws that will be enforced, and requires officials to enforce no more than is required by the laws. Judges should not interpret statutes based on their personal preferences and police should only arrest individuals they believe to have acted illegally.

If courts actually 'make' the law, as Kirby J suggested,[241] then perhaps the 'laws' made should be scrutinised more carefully. As it is, the judicial position on interpretation of the law, common, statute or constitutional, is penned around with thickets of obscurity; how judges actually make decisions is something to be viewed through a glass darkly, and Ministers and administrators may find themselves threatened with contempt of court for lack of appropriate deference.[242] Some examples of opaque High Court reasoning follow.

Saeed v Minister for Immigration and Citizenship

In *Saeed*, the High Court found a jurisdictional error through scrutinising the respective relevance of the singular and the plural of the word 'matter',[243] which led to a jurisdictional error for an action that was not therefore protected by the exhaustive statement of natural justice inserted by the *Migration Legislation Amendment (Procedural Fairness) Act 2002*.

- The *Explanatory Memorandum* and the Minister's Second Reading speech were not taken into account.[244]
- A stringent literal meaning was given to the words of the statute, as had been foreshadowed in *SAAP*.[245]

Plaintiff M61/2010E v Commonwealth

In devising a successor to the Coalition government's arrangements for dealing with asylum seekers arriving unlawfully on Australian shores, usually off Christmas Island and Ashmore Reef, the Labor Government in 2008 established what it thought was a non-statutory scheme for assessing, on Christmas Island, claims for refugee status.[246] The reasoning in *M61* is difficult to follow, what follows is merely an attempt to understand it. It appears to proceed on the basis that for the detention of alien asylum seekers on Christmas Island to be lawful, it had to have been authorized under the *Migration Act 1958* (Cth),[247] therefore, the Court could and would use the case law under the *Migration Act 1958* (Cth) to apply to

the asylum seekers. However, the asylum seekers could not make a valid visa application under the Act, and the original and review assessment regime established on the island was merely to recommend to the Minister whether he should consider granting a visa to such a person, but he was under no duty either to make a decision, or to consider making a decision.

What the Court did was to state that an announcement by the Minister on 29 July 2008 that the assessment and review process would be strengthened, in fact amounted in law to a decision to consider whether to consider the recommendations if any of the original and reviewing decision-makers on the Island.[248] Subsequently, for a number of reasons, the Court found that there had been a denial of procedural fairness,[249] one ground being that because the asylum seekers were outside the Migration zone and their review processes were not established under the *Migration Act 1958* (Cth) they were obliged to be given notice of the 'country information'[250]

As opposed to many recent cases where important Ministerial statements made in parliament, such as the Second Reading speeches, have received short shrift,[251] here a Ministerial announcement was said to have legal force amounting in effect to a decision.

Privative clauses and Hickman

Hickman

R v Hickman; Ex parte Fox and Clinton,[252] was a case concerning the *National Security (Coal Mining Industry Employment) Regulations* enabling Local Reference Boards to settle disputes 'as to any local matter likely to affect the amicable relations of employers and employees in the coal-mining industry.' The Board's decisions were protected by a privative clause (reg 17). The Court held that, as the prosecutors were engaged in the transport industry and not the coal-mining industry, the Board's decision was made without jurisdiction and was thus void (or, to use Starke J's words,[253] 'without authority and bad'). Latham CJ noted that:

> Such a provision cannot, in my opinion, fairly be construed as declaring an intention of Parliament that a Board constituted under the Regulations should have jurisdiction to make decisions in matters which have no relation to the coal mining industry… If reg. 17 were construed so as to give an unlimited jurisdiction to the Board to make any order whatever in relation to any person whatever in respect of any matter whatever (whether industrial or not industrial), the validity of the Regulations would obviously be open to question. In my opinion, therefore, the Regulations, including reg. 17, should be construed as limited in their operation to the coal mining industry, and the powers of a Local Reference Board should be interpreted accordingly.[254]

Latham CJ had earlier said[255] of the same privative clause 'that it did not profess to give validity to an invalid award' and also: 'Further, if a pretended award were so completely beyond any possible jurisdiction that it could not reasonably be said to be "an award" other questions would come up for consideration.'[256]

In that case, Dixon J developed his view of how in the middle of the 20th century privative clauses were to be construed, into what became known as the *Hickman* principle:

> Such a clause is interpreted as meaning that no decision which is in fact given by the body concerned shall be invalidated on the ground that it has not conformed to the requirements governing its proceedings or the exercise of its authority or has not confined its acts within the limits laid down by the instrument giving it authority, provided always that its decision is a bona fide attempt to exercise its power, that it relates to the subject matter of the legislation, and that it is reasonably capable of reference to the power given to the body.[257]

He found that there was no authority for the Board to make such a decision because the words in the regulation, 'in the coal mining industry', were 'words of final limitation upon the powers, duties and functions of the Board(s)'[258]—ie a jurisdictional fact was contravened. He would later put the same concept of 'jurisdictional fact' into other words in the *Metal Trades Employers' Association case,* where 'imperative duties or inviolable limitations or restraints'[259] had been infringed. These 'imperative duties or inviolable limitations or restraints' are sometimes said to be an addition to the *Hickman* provisos—but Dixon J himself in the *Metal Trades* case stated that it added nothing to what he had said in *Hickman*.[260]

There is certainly an argument to be made for thinking that the intention was in the 20th century, that the High Court would not invalidate certain decisions protected by a privative clause, even if they did exhibit jurisdictional errors.[261] Spigelman CJ has noted that 'The concept underlying the *Hickman* principle is that there was a core content of jurisdictional error, narrower than the full range of jurisdictional error, which would remain subject to judicial review, almost by way of a conclusive presumption of the law of statutory interpretation.'[262] The question then is, what has so changed in the relationship between the judiciary and the other two arms of government that this situation is no longer even considered to be tenable?

Plaintiff S157

In the period leading up to *Plaintiff S157 v Commonwealth* the government had sought advice from 6 independent counsel before enacting the privative clause in the *Migration Act*. In the Second Reading speech to the *Migration Legislation Amendment (Judicial Review) Bill 2001* the Minister stated:

> The legal advice I received was that a privative clause would have the effect of narrowing the scope of judicial review by the High Court, and of course the Federal Court. That advice was largely based on the High Court's own interpretation of such clauses in cases such as *Hickman's case*, as long ago as 1945, and more recently the *Richard Walter case* in 1995. Members may be aware that the effect of a privative clause such as that used in *Hickman's case* is to expand the legal validity of the acts done and the decisions made by decision makers. The result is to give decision makers wider lawful operation for their decisions, and this means that the grounds on which those decisions can be challenged in the Federal and High Courts are narrower than currently.
>
> In practice, the decision is lawful provided: the decision-maker is acting in good faith; the decision is reasonably capable of reference to the power given to the decision maker—that is, the decision maker had been given the authority to make the decision concerned, for example, had the authority delegated to him or her by the Minister for Immigration and Multicultural Affairs, or had been properly appointed as a tribunal member; the decision relates to the subject matter of the legislation—it is highly unlikely that this ground would be transgressed when making decisions about visas since the major purpose of the Migration Act is dealing with visa applications; and constitutional limits are not exceeded—given the clear constitutional basis for visa decision making in the Migration Act, this is highly unlikely to arise.[263]

The Minister was relying directly on the finding in *Hickman*, and what the Court had been saying was the law. [264]

The Solicitor-General later noted of the insertion of the privative clause that it:

> represented an attempt as the highest example yet of cooperation between the courts and the Legislature. The Court had told Parliament that certain words will be construed as having a particular effect and Parliament took the hint and used those precise words with the expressed intention of having that precise effect.[265]

The validity of the privative clause was challenged in *NAAV v Minister for Immigration and Multicultural Affairs* ,[266] but before any appeal was heard on the finding in *NAAV*, the High

Court heard *Plaintiff S157.*[267] (David Bennett QC later noted that an example of 'what one might see as an example of litigious "queue jumping,"'[268] the High Court voluntarily depriving itself of the benefit of the concerted knowledge of five senior judges in *NAAV*[269]

NAAV had upheld both the constitutionality and the operation of the privative clause inserted into the *Migration Act* by the *Migration Legislation Amendment Act 2001* (Cth).

In *NAAV* the Full Bench of the Federal Court endorsed the Hickman principle with its three provisos, adding that the purported exercise of power must not contravene any inviolable limitation upon the powers of the decision-maker.[270] Three judges (Black CJ, Beaumont and von Doussa JJ) also adhered to the 'extension of the jurisdiction of the decision-maker' idea of privative clauses, in that they 'validated' decisions by extending the authority and powers of decision-makers so as to render lawful 'irregularities that would otherwise constitute jurisdictional error in the broad sense of that term'.[271] In the event, the application of the privative clause to protect the impugned decisions was upheld by a majority, subject to its inapplicability to a fundamental jurisdictional fact of the kind on which jurisdiction itself is founded[272].

Plaintiff S157 was a different story. Relying on *Aala* and *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002),[273] counsel for *Plaintiff S157* argued that if there were a breach of procedural fairness, then this constituted a jurisdictional error, which would render the 'decision' under the Act no decision at all, and therefore it could not be a 'decision under this Act' and could not be protected by the privative clause, which serves only to protect 'decisions' and not 'non-decisions'. The finding rendered the privative clause impotent.

With the greatest respect, the outcome in this case leads the High Court down the road of *doublethink,*[274] running the same risk as Humpty Dumpty.[275] Moreover, in relation to the Second Reading speech, and the Minister's reliance on earlier judicial comments on 'expanding' the jurisdiction of decision-makers, the plurality said:

> Of course, the Minister's understanding of the decision in *Hickman* cannot give s 474 an effect that is inconsistent with the terms of the Act as a whole.[276]

The reasons in *Plaintiff S157* are redolent of the notion that the purpose of judicial review is to be a check on the executive[277](rather than to serve the citizen); its secondary purpose is to ensure that the court is the sole arbiter of what constitutes 'the rule of law.'[278] The Court said the privative clause would:

> … confer authority on a non-judicial decision-maker of the Commonwealth to determine conclusively the limits of its own jurisdiction and, thus, at least in some cases, infringe the mandate implicit in the text of Ch III of the Constitution that the judicial power of the Commonwealth be exercised only by the courts named and referred to in s 71.[279]

Plaintiff S157 demonstrates, as few other cases can, both the disregard into which the High Court has cast the Executive and the Legislature, and also the dangers that the developments outlined above pose to the doctrine of *stare decisis*, once thought to be a foundational concept of the common law.

Plaintiff S157, Blue Sky and Futuris

In *Plaintiff S157*, other approaches were available to the Court. In *Project Blue Sky v Australian Broadcasting Authority* the plurality had said that the test for determining whether a decision is invalid will depend on

> whether there can be discerned a legislative purpose to invalidate any act that fails to comply with the condition. The existence of the purpose is ascertained by reference to the language of the statute, its subject matter and objects, and the consequences for the parties of holding void every act done in breach of the condition. Unfortunately, a finding of purpose or no purpose in this context often reflects a contestable judgment.[280]

However, the Court in *Plaintiff S157* made only passing reference to the case, and did not refer to the principle.

More recently, the High Court has tried to bring some clarity as to why 'jurisdictional errors' are called 'jurisdictional errors.' In the High Court joint judgment of Gummow, Hayne, Heydon, Crennan JJ in *Federal Commissioner of Taxation v Futuris Corporation Ltd* [281] they said:

> In Parisienne Basket Shoes Pty Ltd v Whyte[282] Dixon J referred to the maintenance of "the clear distinction ... between want of jurisdiction and the manner of its exercise". His Honour in this context also used the phrase "excess of jurisdiction"[283] and, with respect to relief under s 75(v) of the Constitution, the same idea had been conveyed as early as 1914 in The Tramways Case (No 1),[284] by such expressions as "usurp jurisdiction", "wrongful assumption of jurisdiction" and "proceeding without or in excess of jurisdiction". Thereafter, in his submissions in R v Kirby; Ex parte Transport Workers' Union of Australia,[285] Dr Coppel QC is reported as using the term "jurisdictional error".

Such references might have suggested that the Court was rethinking its position on the utter voidness of a decision made by an administrator marred by any error of law, and certainly in *Futuris* the Court did apply the *Project Blue Sky* approach to ascertaining the intention of Parliament as to the consequences of invalidity, rather than first adopting a wide-ranging judicial definition of 'jurisdictional error.' This, together with the *Parisienne* reference, may have suggested that some judges at least were beginning to consider that there is a clear (and maybe a constitutional) difference between a 'jurisdictional' error, and an 'intra-' or 'non-jurisdictional' error (or, to define 'intra-jurisdictional' error another way as did those judges, an error '*within, not beyond*' jurisdiction.)[286] If so, it could well be that Commonwealth executive administrators, of whom the Taxation Commissioner is one, may in fact make both jurisdictional and intra-jurisdictional errors, just as Commonwealth judicial administrators may in the Chapter III courts.

Administrators should not get excited about this possibility. In the same paragraph in which the four judges refer apparently approvingly to Dixon J's *Parisienne* observation, in a footnote they simultaneously refer to the very confusing analysis in *Craig*. Again, any jubilation among Commonwealth Ministers and administrators at any incipient demise of the *Plaintiff S157* interpretation on privative clauses must be constrained, firstly, because in *Futuris* the judges specifically did not address the privative clause issue (the relevant clause was a 'saving' clause), saying only '*Plaintiff S157/2002* has placed "the *Hickman* principle" in perspective;'[287] there is nothing overt in the judges' reasons to suggest that they disapproved of *Plaintiff S157*; and in fact the joint judgement refers to that case five times, thrice in the text and twice in footnotes.

All this of course occurred before the developments in *Kirk*. It also occurred before the High Court began flexing its judicially powered muscles to render unconstitutional and inoperative provisions in State legislation containing privative clauses,[288] and before State legislatures began to feel the constitutional restrictions attendant on the notion of federal judicial power.[289]

Democracy, judicial review and respect

Australia is a representative democracy, with a representative and responsible government[290], where the power to make laws for the people has been given to the

Parliament.[291] Governments govern; they make decisions; they have to regard the national not sectional or individual interests. While majoritarianism seems to be out of favour, this is how democracy works; and even the High Court operates on the basis of majority rule.

Perhaps judges and lawyers have been misled by the passing comments of John Marshall in *Marbury v Madison*:

> It is, emphatically, the province and duty of the judicial department to say what the law is.[292]

Again with respect, it is not courts who say what the law is; it is the legislatures. The 'great case' of *Marbury* is often misunderstood,[293] as it certainly was by Andrew Inglis Clark who is responsible for the inclusion of s 75 in the *Constitution*. Contrary to those who think the founding fathers knew what they were doing when they agreed to insert s 75 at the last moment, Justice Heerey has written:[294]

> At the 1898 Convention debate arose as to whether the clause which later became s 75(v) should be struck out. Clark, following proceedings closely from Hobart, telegraphed Barton to remind him of the United States Supreme Court decision in *Marbury v Madison*. Barton wrote back thanking Clark and saying:
>
> > *None of us had read the case mentioned by you, or if seen it had been forgotten – it seems to be a leading case. I have given notice to restore the words on reconsideration of the clause.*[295]
>
> The clause was duly restored by Barton, citing the American decision – although without public acknowledgement of Clark. 'None of us' must presumably have included Griffith, Kingston and Deakin.

The ramifications of s 75 are being felt severely today by both state and Commonwealth governments.[296]

The High Court has traditionally used the axiomatic principle of *Marbury* to justify their capacity to interpret the law and the *Constitution*. As was said in *Attorney-General v Marquet*:

> First, constitutional norms, whatever may be their historical origins, are now to be traced to Australian sources.
>
> Secondly, unlike Britain in the nineteenth century, the constitutional norms which apply in this country are more complex than an unadorned Diceyan precept of parliamentary sovereignty. Those constitutional norms accord an essential place to the obligation of the judicial branch to assess the validity of legislative and executive acts against relevant constitutional requirements. As Fullagar J said, in *Australian Communist Party v The Commonwealth*, 'in our system the principle of *Marbury v Madison* is accepted as axiomatic'. It is the courts, rather than the legislature itself, which have the function of finally deciding whether an Act is or is not within power.[297]

But Fullagar J did not say simply that *Marbury* was axiomatic. His comment was:

> But in our system the principle of *Marbury v. Madison* is accepted as axiomatic, modified in varying degree in various cases (but never excluded) *by the respect which the judicial organ must accord to opinions of the legislative and executive organs*.[298]

The Court has not given the respect due, as Fullagar J said in the *Communist Party case*, 'to opinions of the legislative and executive organs.' This was obvious in cases such as the *Corporation of the City of Enfield v Development Assistance Corporation*.[299] There the Court eschewed any doctrine of deference to the executive, specifically refusing to apply the *Chevron* doctrine, which arose from *Chevron USA Inc v Natural Resources Defense Council Inc*.[300] That doctrine established for the US Supreme Court that where a statute regulating administrative or agency action is reasonably open to more than one interpretation, the court should defer to the agency's interpretation of the legislation. The reason for the High Court's

approach is based ironically on 'the principle' of *Marbury v Madison.*[301] In Australia, the separation of the judicial power is of prime importance, and the merits/legality divide is said by the Court to be a crucial tenet of administrative law respecting the exercise of discretionary powers.[302]

Deference is not perhaps the correct word. Respect is really what is owed by the judiciary to the executive and the legislature. What could be called distaste if not contempt for the elected government representatives has been articulated by senior judges of the Court. Mason J, in *The Queen v. Toohey; Ex parte Northern Land Council*, said:

> [T]he doctrine of ministerial responsibility is not in itself an adequate safeguard for the citizen whose rights are affected. This is now generally accepted and its acceptance underlies the comprehensive system of judicial review of administrative action which now prevails in Australia.[303]

Kirby J said in *Hot Holdings Pty Ltd v Creasy*:

> When this analysis [of ministerial accountability] is kept in mind, it is easier to understand the recent growth of administrative law remedies. In common law countries they have developed to such an extent that Lord Diplock described them as the most significant legal advance of his judicial lifetime[304]. It is not coincidental that this growth in administrative law remedies has occurred at a time when the theory of ministerial responsibility, as an effective means of ensuring public service accountability, has been widely perceived as having serious weaknesses and limitations[305],[306].

This view is misplaced.

The entire administrative law system has been the result of successive executive governments, aided by Parliament to make the laws under which the current merits and judicial review regimes operate.[307] Ministers are more accountable in the 21st century than they have ever been: to their constituents, to the members of Parliament, to the people generally at elections and, continually, to the media and the population at large through the 24 hour news cycle. They must answer questions in parliament both with and without notice, declare their interests in a register of interests, not mislead the parliament, and not sit in cabinet on a matter in which they have a personal interest. They give speeches, make policy statements, debate their policies in parliament, are interviewed regularly by the media, their personal and public personas are criticised and evaluated constantly. They and their departments are subject to wide-ranging freedom of information laws.

By comparison, the judiciary is sequestered, and is jealous of its power. Neither individual High Court judges, nor the High Court itself is subject to judicial review,[308] although as Chapter III judges they are subject to removal pursuant to *Constitution* s 72, and have to retain the good will of the Australian people and their representatives. Thomas Jefferson wrote:

> The great object of my fear is the Federal Judiciary. That body, like gravity, ever acting with noiseless foot and unalarming advance, gaining ground step by step and holding what it gains, is engulfing insidiously the special governments into the jaws of that which feeds them.[309]

The chilling effect of judicial review

The following adverse effects on good government arise from the developments discussed in this paper.

The uncertain status of the content of procedural fairness means that decision-makers cannot know whether they are abiding by the law. Trivial errors may invalidate a decision made in good faith. Continual review of the same decision is good neither for the applicant nor for the relevant decision-maker. Review fatigue and stress will adversely affect the

applicant and court time is taken up with multiple reviews of the same matter. Morale amongst the decision-makers is bound to decrease. Continual re-interpretation by the courts of statutory provisions designed to implement government policy which has received the imprimatur of both Houses of Parliament results in Government and the legislature constantly amending the law to ensure that the policy is implemented the way the executive and the parliament want (this is particularly obvious in the *Migration Act* and the *Income Tax Act* contexts).

This is not a matter of government or the legislature playing 'catch up' or trying to undermine the judiciary; rather it is a matter of ensuring proper implementation of policy according to the law. There is strain on the relationship between the executive and the legislature and the judiciary. Politicization occurs of the original decision-making, the merits review, and the judicial review due to constraints arising from past knowledge of similar cases which may lead to the establishment of a 'culture'[310] which in turn may lead to bias.[311]

The current understanding or lack of understanding of what will constitute a 'jurisdictional error' in any given situation leads to uncertainty and an inability in government decision-makers effectively and efficiently to implement programmes. Since administrators can never determine the limits of their own jurisdiction because of the Courts' interpretation of the separation of the judicial power doctrine, there are almost insuperable difficulties for drafters in attempting to provide certainty in the texts of legislation to guide administrative decision-makers. Since only a court may determine what is and what is not a jurisdictional fact or other kind of jurisdictional error,[312] there can never be any certainty in decision-making.

The adoption of the concept of 'subjective' jurisdictional fact in relation to an opinion or degree of satisfaction has had the effect of converting a duty subject to such satisfaction or opinion imposed by the legislature onto the executive into a discretion subject to a malformed *Wednesbury* review. Dixon J had noted in *Parisienne Basket Shoes* that sensible legislatures would never fetter an executive authority as it would always be likely to be subject to judicial review.[313] The legislature had adopted the formula of 'satisfaction' or 'opinion' to circumvent the problems associated with 'jurisdictional facts,' so that authority to decide was not conditional upon the existence of a fact but rather on an opinion.[314] The criterion on which such 'subjective jurisdictional facts' are to be said to be valid is still uncertain.[315] But a sensible criterion could well be the view of Latham CJ in *R v Connell; Ex parte Bellbird Collieries*[316] to the effect that in cases where a power is conditional upon the existence of an opinion or satisfaction, 'the legislation conferring the power is treated as referring to an opinion which is such that it can be formed by a reasonable man who correctly understands the meaning of the law under which he acts. If it is shown that the opinion actually formed is not an opinion of this character, then the necessary opinion does not exist.' The increasing use by courts of this process blurs even more the distinction between what is an error of fact (which is not usually judicially reviewable—*Waterford*[317]) and what is an error of law, again raising problems for the separation of powers.

The increasing willingness of judges to entertain criteria such as 'irrationality,' 'illogicality,' and 'unreasonableness' when applied to the degree of satisfaction demanded by the legislature of a Minister or his/her delegate, has a number of consequences. It amounts to a subversion by the courts of the legislature's intention, displaying less trust in and respect for the administration than do its political opponents (bearing in mind that Bills must pass both houses, one of which is mostly hostile to the government). It also amounts to the judiciary substituting its opinion for that of the decision-maker. What is 'irrational,' 'illogical' or 'unreasonable' differs from person to person and profession to profession, even among psychiatrists.

The use of terms such as 'rational probative material,' 'logical probative evidence,' 'probative

evidence,' 'probative material,' or 'logical grounds' in relation to administrative decision-making wrongly imports legal standards used in courts into the executive. These standards are derived from but are in fact superior to those demanded in courts. Administrative decision-makers rely on data and information provided by applicants in the first instance; there are no rules of evidence for administrators. Use of such terms by judicial members of administrative bodies has contributed to the judicialization of administrative review bodies.[318] Such review bodies are to use the same powers and discretions of the original decision-maker, and 'stand in the shoes of the original decision-maker'[319]: original decision-makers do not use rules of evidence nor anything remotely like them. When these phrases become a standard for determining invalidity of a decision, there is a very real risk of judicial officers crossing the merits/legality divide and breaching the separation of the judicial power doctrine.

Privative clauses were designed to serve a purpose within the structure of government under a separation of powers, while having regard to the entrenched High Court jurisdiction in s 75 of the *Constitution*. As Kirby P acknowledged in *Svecova v Industrial Commission of NSW*,[320] it is not impossible for courts logically to see that such clauses may well serve a legitimate purpose in certain circumstances. Section 75 remains the same, the need for privative clauses that had always existed has not diminished and has perhaps grown, the structure of government remains the same. Perhaps all that has changed is the culture of the courts; or a growing distrust amongst the legal profession of politicians; but politicians are a necessity for good governance (see *Constitution* ss 7, 24, 30, 64). If there is a legitimate need to protect decisions in certain circumstances, who is to determine the need, and the circumstances? Whoever does it, this is a political decision.

The spread of international human rights norms, especially those arising from continental Europe's civilian system, has seen the increased attempt to establish 'proportionality' as a free-standing ground of judicial review of administrative decisions. This term is used only (and then in the author's view, somewhat doubtfully) in judicial review in relation to delegated legislation,[321] and in constitutional review of purposive powers and of certain express or implied constitutional prohibitions.[322] To date, Australian courts have not adopted proportionality as a freestanding ground in judicial review of administrative decisions.[323] To do so would certainly run the risk of breaching the separation of powers, and once thus breached, the floodgate could well open, legislative change proving constitutionally difficult. The weighing of competing policy demands against a single individual's (or group's) interest, is something courts are neither equipped nor empanelled to do—the government and the legislature have that task.[324]

The spread into State jurisdictions, through the High Court's use of the judicial power of the Commonwealth, of High Court concepts with regard to jurisdictional errors and privative clauses, as well as of its view on an integrated Australian legal system, has seen it invalidate laws made by State parliaments,[325] and also deprive State legislation of its intended policy purpose.[326] These moves may well hold the seeds of the demise of the federation, and the Court and governments need to give serious consideration to the ramifications of the trend of recent decisions.

Future civility

This summary may suggest that the author is not enamoured of judicial review. This is not the case. It has served citizens and subjects well for centuries, and will continue to do so. However, when principles developed over 36 years since *Kioa v West* are considered, there are areas of administrative law that need improvement. The paper has suggested that these developments proceed from the enactment of the *ADJR Act*, and the legal profession's response to it. Unintended consequences as outlined have come to fruition.

What is needed now is consideration by all three arms of government of these developments, so as to guard against further unintended consequences in the future. If the key-stone of the arch of Australian governance is not to falter, then cultivation of mutual respect amongst the three branches as envisaged by Justice Fullagar in 1951 may well be a good place to start.

Endnotes

1 *House of Representatives Hansard*, 28 April 1977, Second Reading speech, 1394-6, 1394.
2 Ibid.
3 *Osmond v Public Service Board NSW* [1984] 3 NSWLR 447, 465.
4 *Public Service Board (NSW) v Osmond* (1986) 159 CLR 656 (*Osmond*).
5 *Osmond,* 668-70.
6 Ibid 671.
7 Ibid 675.
8 *Osmond*, 678.
9 Ibid 676; but he also endorsed Kirby P's reference to the proactive effect of enactments such as ADJR: *see* 675. Note also Deane J's predilection for natural justice to include the giving of reasons: *Osmond*, 675-6 and *ABT v Bond* (1990) 170 CLR 321, 566-7.
10 *Kioa v West* (1985) 159 CLR 550.
11 See John McMillan, 'Judicial Restraint and Activism in Administrative Law,' (2002) 30(2) *Federal Law Review* 335; also John McMillan, 'The courts vs the people: have the judges gone too far?' Paper presented to the Sixth Colloquium of the Judicial Conference of Australia Inc, 27 April 2002 (http://www.jca.asn.au/attachments/mcmillan.pdf).
12 *R v MacKellar; Ex parte Ratu* (1977) 137 CLR 461.
13 *Salemi v. MacKellar* [No. 2] (1977) 137 CLR 396.
14 *Kioa v West (MIEA)*, (1985) 159 CLR 550, 560 (Gibbs CJ), 576 (Mason J).
15 *Kio*a, 566-6 (Gibbs CJ); 576-7 (Mason J); 594-5 (Wilson J); 625 (Brennan J); 630 (Deane J).
16 *Kioa*, ibid 577 (Mason J).
17 *Kioa*, ibid 578; see also 596-7, 600 (Wilson J); 630-1, 632 (Deane J); contra Brennan J 625 (but note qualification on 626).
18 *Kioa*, (1985) 159 CLR 550, 586.
19 *Kioa*, ibid 585-6.
20 Deane J agreed with Mason J, and also endorsed Kirby P's understanding of the impact of the *ADJR Act 1977—Kioa*, 603, 632-3 respectively (Deane J).
21 *Osmond* (1986) 159 CLR 656, 662, 670 (Gibbs CJ).
22 *Osmond*, ibid 666-7 (Gibbs CJ); note however that dicta (French CJ and Kiefel J) in *Wainohu v New South Wales* [2011] HCA 24 {s. 75(v) special case}—[6:1 for W: French CJ and Kiefel J; Gummow, Hayne, Crennan and Bell JJ: Heydon J dissenting]—[57], [58], [68] states that the giving of reasons is 'an [essential] incident of the judicial function,' or is 'an essential incident of the judicial process' [54], [55], and is 'a hallmark of [judicial] office;' the plurality (Gummow, Hayne, Crennan and Bell JJ) stated that the giving of reasons was 'a hallmark distinguishing substantive judicial decisions from arbitrary decisions' [92], with the qualification at [98] that only substantive judicial decisions require reasons. However, the plurality adverted in the NSW statutory context to the possible applicability of Deane J's dictum in *Osmond*, that reasons for administrative decision-makers should be a concomitant of natural justice (in its extended sense covering legitimate expectations), and in the absence of a statutory provision, courts should imply the requirement into the statute. ((1986) 159 CLR 656, 676); Heydon J did not necessarily accept that dictum as being correct [145]. French CJ and Kiefel J at [54] quote elliptically and considerably misleadingly from Gibbs CJ in *Osmond*—the complete relevant text of Gibbs CJ's reasons accompanies n. 39.
23 (61 (1982) 1 NZLR at p. 649).
24 (62 [1983]3 NSWLR 378, 386.).
25 *Osmond*, n. 21, 666-7 (Gibbs CJ).
26 *MIEA v Pochi* (1980) 44 FLR 67.
27 The *Evidence Act 1995* (Cth) is riddled with references to 'evidence' of 'probative value.' 'Probative value' is defined in the Act to mean 'the extent to which the evidence could rationally affect the assessment of the probability of the existence of a fact in issue'—Dictionary, Part 1. See also discussion below.
28 *Osmond*, 167 (Deane J) author's emphasis.
29 *Craig v South Australia* (1995) 184 CLR 163 (*Craig*).
30 *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531, 578 [89] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).
31 *Kirk*, ibid 577-7 [84]-[89] especially [87].
32 Kirk, ibid 277 ff, [83] ff.
33 *Wainohu v New South Wales* [2011] HCA 24.
34 *Wainohu*, n 22 above, [68] (French CJ and Kiefel J).

35 *Wainohu*, ibid [147] (Heydon J).
36 See n 22 above.
37 See text accompanying n 28.
38 *Wainohu*, ibid [145] (Heydon J); see also [182].
39 *Osmond*, ibid 666-7, 670 (Gibbs CJ).
40 *Re MIMIA; Ex parte Palme* (2003) 216 CLR 212, 225 [44], (Gleeson CJ, Gummow and Heydon JJ). Cf *Evans v The Queen*, (2007) 235 CLR 521, 595-596, [246] (Heydon J), [34] Gummow and Hayne JJ] [2007] HCA 59; *Wainohu v New South Wales* [2011] HCA 24 [98], (Gummow, Hayne, Crennan and Bell JJ).
41 *Palme*, 225-6 [47], (Gleeson CJ, Gummow and Heydon JJ)—though of course by the time that the decision at issue in *Palme* was made, most *Migration Act* decisions had been removed from *ADJR* jurisdiction (*Migration Reform Act 1992*(Cth) Part 4B (later renamed Part 8) s 166LK (later s 485)).
42 Cf *Re RRT; Ex parte Aala*, (2000) 204 CLR 82.
43 John McMillan, 'Better decision-making: in whose eyes?' *The Canberra Times*, 4 June 2002.
44 *Kioa*, (1985) 159 CLR 550, 576-7 (Mason J).
45 *Salemi* 1977, n 13 above, 442.
46 *Commissioner of Police v Tanos* (1958) 98 CLR 383, 396.
47 *Salemi*, n 13 above, 442 (Stephen J)
48 *Kioa*, (1985) 159 CLR 550, 583-4 (Mason J).
49 *See* the concept of 'practical fairness' or practical unfairness as enunciated by Gleeson CJ and French J: text accompanying notes 189-192 refers.
50 *Kioa*, 612 (Brennan J).
51 *Kioa*, 584-5 (Mason J).
52 *Kioa*, 586 (Mason J), 615 (Brennan J).
53 *Kioa*, 628-9 (Brennan J).
54 See *SZBEL v MIMIA* (2006) 228 CLR 152 at 162 [32], (Gleeson CJ, Kirby, Hayne, Callinan and Heydon JJ), as confirmed in *Saeed v MIAC* (2010) 241 CLR 252, 261 [19] (per curiam, French CJ, Gummow, Hayne, Crennan and Kiefel JJ); see also *VEAL v MIMA* (2005) 225 CLR 88, *per curiam*; also see *MIAC v Kumar* [2009] HCA 10, *MIAC v SZIAI* [2009] HCA 39.
55 *Kioa*, (1985) 159 CLR 550, 604 (Wilson J).
56 *Re: Sabrina Khan; Khan v MIEA* [1987] FCA 457 [25]-[26], [43]—this was an *ADJR* case concerning improper purpose. See also *Hindi v MIEA* (1988) 20 FCR 1, 12-15(Shepherd J); and note Spigelman CJ's cautionary words in *Bruce v Cole* (1998) 45 NSWLR 163, 186.
57 *NAFF v MIMIA* (2004) 221 CLR 1, 22-3 [68] (Kirby J); see also *Ainsworth v Criminal Justice Commission*, (1992) 175 CLR 564, 581 ((Mason CJ, Dawson, Toohey and Gaudron JJ).
58 *Teoh v MIEA* (1994) 49 FCR 409, 422-3 (Lee J), 434, 439-40 (Carr J); c.f. *Prasad v Minister for Immigration and Ethnic Affairs* (1985) 6 FCR 155, 164-70 (Wilcox J).
59 *MIEA v Kurtovic* (1990) 21 FCR 193; *Haoucher v Commonwealth* (1990) 169 CLR 648 [1990] HCA 22 (contra *Attorney-General (NSW) v Quin* (1990) 170 CLR 1, [1990] HCA 21); *MIEA v Teoh* (1995) 183 CLR 273.
60 *MIEA v Kurtovic* (1990) 21 FCR 193, 201 (Ryan J), 207-219 (Gummow J); *Annetts v McCann* (1990) 170 CLR 596, 605 (Brennan J); *Attorney-General (NSW) v Quin* (1990) 170 CLR 1, 17 (Mason CJ).
61 *Re Pochi and MIEA* (1979) 36 FLR 482, 490-2 (Brennan J); *MIEA v Pochi* (1980) 44 FLR 41; (1980) 31 ALR 666, 685, 689, 690 (Deane J); *ABT v Bond* (1990) 170 CLR 321, 366-7 (Deane J).
62 *ABT v Bond* (1990) 170 CLR 321, 367 (Deane J)
63 *Pochi*, (1980) 31 ALR 666, 689-690; (1980) 44 FLR 41, 67-8 (Deane J).
64 *Pochi*, ibid (Deane J).
65 *Waterford v. The Commonwealth* (1987) 163 CLR 54, 77 '[t]here is no error of law simply in making a wrong finding of fact,' (Brennan J) *Corporation of the City of Enfield v Development Assessment Commission* (2000) 199 CLR 135, 154 [44] (Gleeson CJ, Gummow, Kirby and Hayne JJ).
66 *ABT* v *Bond*, (1990) 170 CLR 321, 357 (Mason CJ).
67 *Bond*, ibid 366 (Deane J).
68 *Bond,* ibid 367 (Deane J).
69 See *MIMA v Eshetu* (1999) 197 CLR 611, 650 [127] (Gummow J); *MIMA v SGLB* (2004) 207 ALR 12, 20 [38] (Hayne and Gummow JJ); *MIAC v SZMDS* (2010) 240 CLR 611, 625 [40] [2010] HCA 16 (Gummow ACJ and Kiefel J).
70 *MIMA v Rajamanikkam* (*Rajamanikkam*) (2002) 210 CLR 222, 232-3 (Gleeson CJ).
71 *Rajamanikkam* 232 [26] (Gleeson CJ).
72 *Rajamanikkam*, (2002) 210 CLR 222, 232-3 [26] (Gleeson CJ).
73 *MIAC v SZMDS* (2010) 240 CLR 611, 625 [40] [2010] HCA 16 (Gummow ACJ and Kiefel J).
74 *Kioa v West (MIEA)*, (1985) 159 CLR 550, n 14 above, 584 (Mason J).
75 *Kioa*, ibid 610 (Brennan J); see also *Annetts v McCann* (1990) 170 CLR 596, 606 (Brennan J)—'The only sound foundation for judicial review is, in my opinion, the statute which creates and confers the power, construed to include any terms supplied by the common law.'
76 *Kioa*, ibid 611 (Brennan J).
77 *Kioa*, 584, 585, 587, 588 (Mason J); 617-622, 623, 627 (Brennan J).
78 Sir Anthony Mason, 'Judicial Review: The Contribution of Sir Gerard Brennan,' in R Creyke and P Keyzer (eds), *The Brennan Legacy: Blowing the Winds of Legal Orthodoxy*, (Federation Press, 2002).

79 See, eg *Abebe v The Commonwealth* (1999) 197 CLR 510, 553 [112] (Gaudron J); *Re RRT; Ex parte Aala*, (2000) 204 CLR 82, 100 [38] (Gaudron and Gummow JJ); *Re MIMA; Ex parte Miah* (2001) 206 CLR 57, 83 [89] (Gaudron J); *Saeed v MIAC* 241 CLR 252, 258-9 [11]-14] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ); *Plaintiff M61 v Commonwealth* (2010) 85 ALJR 133, 147-8 [74] *per curiam* (French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ).
80 *Plaintiff M61 v Commonwealth* (2010) 85 ALJR 133, 147-8 [74] *per curiam* (French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ).
81 See *Kioa*, 611 (Brennan J), n. 76 above; see also 622-3 (Brennan J).
82 Relying on '*Commissioner of Police v Tanos* (1958) 98 CLR 383 at 395–396; *Annetts v McCann* (1990) 170 CLR 596 at 598; *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564 at 575–576.'
83 Hon J. J. Spigelman Chief Justice of NSW, 'The Common Law Bill of Rights,' First Lecture in the 2008 McPherson Lectures: *Statutory Interpretation & Human Rights*, University Of Queensland, 10 March 2008; at http://acthra.anu.edu.au/resources/McPherson%20Lectures%2010%5B1%5D.3.08%20First.doc.
84 See *State v Zuma* (1995) (4) BCLR 401 at 402; [1995] (2) SA 642; *Matadeen v Pointu* [1999] 1 AC 98 at 108; *R v PLV* (2001) 51 NSWLR 736 at [82]; *La Compagnie Sucriere de Bel Ombre Ltee v Government of Mauritius* (Unreported, Privy Council, 13 December 1995); *Pinder v The Queen* [2003] 1 AC 620 at [24].
85 *R v Bolton; Ex parte Beane* (1987) 162 CLR 514 at 518; *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410 at 459; *Wik Peoples v Queensland* (1996) 187 CLR 1 at 168–169; *Stock v Frank Jones (Tipton) Ltd* [1978] 1 All ER 948 at 953d; [1978] 1 WLR 231 at 236G; *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AC* [1975] AC 591 at 613G, 645C–V; *R v Young* (1999) 46 NSWLR 681 at [5]; *Dossett v TKJ Nominees Pty Ltd* (2003) 218 CLR 1 at [10]; *Donselear v Donselear* (1982) 1 NZLR 97 at 114.
86 *Marshall v Watson* (1972) 124 CLR 640 at 648; see also *Council of the City of Parramatta v Brickworks Ltd* (1971) 128 CLR 1 at 12; *Ruzicka* at [6]; *VOAW* at [12]; *Cornwell v Lavender* (1991) 7 WAR 9 at 23.
87 *Western Australia v Commonwealth* (1975) 134 CLR 201 at 251.
88 Hon J. J. Spigelman Chief Justice of NSW, 'Legitimate and Spurious Interpretation,' Third Lecture in the 2008 McPherson Lectures: *Statutory Interpretation & Human Rights*, University Of Queensland, 12 March 2008, at http://acthra.anu.edu.au/resources/McPherson%20Lectures%2012%5B1%5D.3.08%20Third.doc.
89 *Migration Reform Act 1992* (Cth): see n 41 above—(Part 4B (later renamed Part 8) s. 166LK (later s 485)).
90 *Abebe v The Commonwealth* (1999) 197 CLR 510.
91 *Kioa*, (1985) 159 CLR 550, 584 (Mason J)—n 74 above refers.
92 *Haoucher v Commonwealth* (1990) 169 CLR 648, 653 (Deane J)
93 *Annetts v McCann* (1990) 170 CLR 596 (*Annetts*).
94 *Annetts*, ibid 598-9 (Mason CJ, Deane and McHugh JJ).
95 *Annetts*, ibid 605-7 (Brennan J).
96 *Ainsworth v Criminal Justice Commission*, (1992) 175 CLR 564.
97 *Ainsworth*, (1992) 175 CLR 564, 576 (Mason CJ, Dawson, Toohey and Gaudron JJ).
98 *Ainsworth*, ibid 591-2 (Brennan J).
99 *Attorney-General (NSW) v Quin* (1990) 170 CLR 1, [1990] HCA 21 (*Quin*).
100 *Quin*, (1990) 170 CLR 1, 23 (Mason CJ).
101 *Quin*, ibid 35 (Brennan J)—'The question can be put quite starkly: when an administrative power is conferred by the legislature on the executive and its lawful exercise is apt to disappoint the expectations of an individual, what is the jurisdiction of the courts to protect that individual's legitimate expectations against adverse exercises of the power? I have no doubt that the answer is: none. Judicial review provides no remedies to protect interests, falling short of enforceable rights, which are apt to be affected by the lawful exercise of executive or administrative power. If it were otherwise, the courts would be asserting a jurisdiction, in protection of individual interests, to override the law by which a power to affect those interests is conferred on the repository.'
102 *Kioa*, (1985) 159 CLR 550, 627 (Brennan J); see also *Annetts*, n 93 above, 604-7 (Brennan L).
103 *MIEA v Kurtovic* (1990) 21 FCR 193, (1990) 92 ALR 93, (Neaves, Ryan and Gummow JJ) (*Kurtovic*).
104 See the orders No. 2 and No. 5 reproduced in the reasons of Neaves J, *Kurtovic*, ibid 194.
105 *Kurtovic*, 224 (Gummow J).
106 *Kurtovic*, 226 (Gummow J).
107 *Kurtovic*, 226-7 (Gummow J) referring to R *v Secretary of State for the Home Department; Ex parte Kahn* [1984] 1 WLR 1337; [1985] 1 All ER 40; R *v Secretary of State for the Home Department; Ex parte Ruddock* [1987] 1 WLR 1482; [1987] 2 All ER 518, and *Oloniluyi v Secretary of State for the Home Department* [1989] Imm AR 135; he also referred to Forsyth, 'The Provenance and Protection of Legitimate Expectations' (1988) CLJ 238.
108 *Haoucher v Commonwealth* (1990) 169 CLR 648, [1990] HCA 22.
109 *Quin*, 17-18 (Mason CJ).
110 *Haoucher*, 653 (Deane J), most particularly, Mason J's dictum at
111 Footnote reference here to '(Cf. Halsbury's Laws of England, 4th edn. (1989), vol. 1(1), par 85).'
112 *Haoucher*, 653 (Deane J)—the author has kept the exact words of the dictum, but has inserted the footnote and reformatted the sentence for greater ease of understanding, together with emphases.
113 *Haoucher*, 653 (Deane J).
114 *MIEA v Teoh* (1995) 183 CLR 273, 276-7 (JJ Spigelman QC in argument).
115 *Haoucher*, 663 (Dawson J).

116 On 8 December 1988, Senator Ray, the Immigration minister, had tabled in the Senate a *Ministerial Statement on Criminal Deportations*. This conveyed information relating to ten cases where he and his predecessors had not accepted AAT recommendations not to deport: one of these related to the complainant in *Haoucher v MIEA* (1990) 169 CLR 648. He said: 'And, occasionally, the Tribunal appears to have misunderstood the Government's policy and intent to which it must have regard. It is hoped that this statement will provide it with a better understanding of the Government's aims in this matter. In general, I would hope that, consistent with the Government policy, the Tribunal gives weight to the need to protect Australian society from non-citizen residents convicted of serious or multiple offences. Conversely, the Government considers that it could give a reduced weighting to the views of the offender and that person's family and to the adverse consequences for them of deportation.' (Hansard, Senate, 8 December 1988, 3769).
117 See Roger Douglas (ed.), *Douglas and Jones's Administrative Law*, (5th ed, Federation Press, 2006), 522-3.
118 *ABT v Bond* (1990) 170 CLR 321, [1990] HCA 10.
119 See text accompanying n 61 above; *ABT v Bond*, (1990) 170 CLR 321, 357 (Mason CJ); though at *Bond* 366-7 Deane J adhered to his earlier position in *MIEA v Pochi* [(1980) 44 FLR 41; (1980) 31 ALR 666, 685, 689, 690] adding to the natural justice requirements '…a minimum degree of "proportionality"…'.
120 *Bond*, 336, 341-2 (Mason CJ).
121 *Teoh*, 275, JJ Spigelman in argument.
122 'Cf *Simsek v Macphee* (1982) 148 CLR 636 at 644.'
123 *MIEA v Teoh* (1995) 183 CLR 273, 291 (Mason CJ and Deane J), author's emphasis. [A 4:1 decision—(Mason CJ and Deane J; Toohey J; Gaudron J: McHugh J dissenting).
124 *Teoh* was decided on 7 April 1995; the Ministerial statement as issued on 10 May 1995.
125 *Tien v MIMA* (1998) 89 FCR 80.
126 *Tien*, ibid 103 (Goldberg J).
127 *Re MIMIA; Ex parte Lam* (*Lam*) (2003) 195 CLR 502 (Gleeson CJ; McHugh and Gummow JJ; Hayne J; Callinan J).
128 *Teoh* (1995) 183 CLR 273, 311-312 (McHugh J).
129 *Quin* (1990) 170 CLR 1, 39 (Brennan J).
130 *Lam*, 28, [83] (McHugh and Gummow JJ).
131 *Lam*, 32-4 (McHugh and Gummow JJ).
132 *Lam*, ibid 38 (Hayne J).
133 *Lam*, ibid 45-8 (Callinan J).
134 *NAFF v MIMIA* (2004) 221 CLR 1, 22-3 [68] (Kirby J).
135 See, eg *Waterways Authority v Fitzgibbon* [2005] HCA 57, [40] (Kirby and Heydon JJ,); *Gypsy Jokers Motorcycle Club Incorporated v Commissioner of Police* [2008] HCA 4, [41] (Gummow, Hayne, Heydon. Heydon and Kiefel JJ, quoting Deane J in *Australian Broadcasting Commission v Parish* [1980] FCA 33; (1980) 29 ALR 228 at 255); *Saeed v MIAC* [2010] HCA 23 [62] (Heydon J—but neither he nor the majority decided that case on the 'legitimate expectation' doctrine); *Finch v Telstra Super Pty Ltd* [2010] HCA 36 [33] (French CJ, Gummow, Heydon, Crennan and Bell JJ); *South Australia v Totani* [2010] HCA 39 [240] (Heydon J).
136 The *Kioa* Mason J text is above at n 74.
137 *Jarratt v Commissioner of Police (NSW)* [2005] HCA 50; (2005) 224 CLR 44, 56-7, [24]-[26] (Gleeson CJ, at [24] relying on Mason CJ, Deane and McHugh JJ in *Annetts v McCann* 1990] HCA 57, (1990) 170 CLR 596, 598, who in turn had relied upon Mason J's definition in *Kioa v West* at (1985) 159 CLR 550, 584 (the Mason J text is above at n 74) and also upon his own dicta in *Al Kateb v Goodwin* [2004] HCA 37, (2004) 78 ALJR 1099, 1105 [20])—'Where Parliament confers a statutory power to destroy, defeat or prejudice a person's rights, interests or legitimate expectations, Parliament is taken to intend that the power be exercised fairly and in accordance with natural justice unless it makes the contrary intention plain. This principle of interpretation is an acknowledgment by the courts of Parliament's assumed respect for justice.
138 *Jarratt v Commissioner of Police (NSW)* [2005] HCA 50; (2005) 224 CLR 44, 88 [138] (Callinan J, quoting Mason CJ, Deane and McHugh JJ in *Annetts v McCann* 1990] HCA 57, (1990) 170 CLR 596, 598, who in turn had relied upon Mason J's definition in *Kioa v West* at (1985) 159 CLR 550, 584—the Mason J text is above at n 74.
139 *Shi v Migration Agents Registration Authority* [2008] HCA 31 [42] (Kirby J, quoting from *Minister for Aboriginal Affairs v Peko-Wallsend Ltd*, (1986) 162 CLR 24, 45 (Mason J)).
140 *Sanders v Snell* (1998) 196 CLR 329 at 348 [45] (Gleeson CJ, Gaudron, Kirby and Hayne JJ), referred to and quoted by Callinan J in *Jarratt* n 138 above at 89 [140].
141 *MIAC v SZMDS* (2010) 240 CLR 611, 620 [27] (Gummow A-CJ and Kiefel J refused to consider 'legitimate expectation' as it was not raised in argument.
142 *Plaintiff M61 v Commonwealth* (*M61*) (2010) 85 ALJR 133, 147-8 [74], [2010] HCA 41, per curiam (French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ).
143 *Annetts v McCann*, [1990] HCA 57, (1990) 170 CLR 596, 598.
144 Author's emphasis; *M61*, n 142 above, 147-8 [74].
145 *Annetts*, 606 (Brennan J).
146 Cf the majority in *NSW v Commonwealth* (2006) 229 CLR 1, 120-21 [196] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ) [2006] HCA 52.

147 *Annetts*, 697 (Brennan J).
148 *Annetts*, ibid.
149 *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82, 142-3 [168] (Hayne J); 75 ALJR 52; *Saeed v Minister for Immigration and Citizenship* (2010) 84 ALJR 507 at [11]-[13] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ).
150 *M61* 148 [74].
151 *Annetts v McCann* (1990) 170 CLR 596 at 598; 65 ALJR 167. See also *Commissioner of Police v Tanos* (1958) 98 CLR 383 at 396.
152 *M61*, n 150 above.
153 Eg *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51, *Re Wakim; Ex parte McNally* (1999) 198 CLR 511, *Baker v The Queen* (2004) 223 CLR 513, *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575, *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45, *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 234 CLR 532, *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501, *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319, *Kirk v Industrial Court(NSW)* (2010) 239 CLR 531, *Wainohu v New South Wales* [2011] HCA 24.
154 *Land of Hope and Glory*, lyrics, A. C. Benson, music Edward Elgar, 1902—'Wider still and wider shall thy bounds be set;…'.
155 Cf 'An aspect of the rule of law under the Constitution is that the role or function of Ch III courts does not extend to the performance of the legislative function of translating policy into statutory form or the executive function of administration.' *Lam*, n 127 above, 24-5 [76] (McHugh and Gummow JJ).
156 *Re RRT; Ex parte Aala* (2000) 204 CLR 82 (*Aala*).
157 *Aala*, ibid 93-4, 97 [24]-[25], [34] (Gaudron and Gummow JJ).
158 *Aala*, 90-91 [14], (Gaudron and Gummow JJ), affirmed *Plaintiff S157 v Commonwealth* (2003) 211 CLR 476, 507 [80] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).
159 *Aala*, ibid 97, 101; [34], [41] (Gaudron and Gummow JJ), author's emphasis.
160 *Aala*, ibid 109 [59]-[60] (Gaudron and Gummow JJ), relying on Deane J in *Kioa* (1985) 159 CLR 550, 632-633, and *Haoucher* (1990) 169 CLR 648, 652-653.
161 *Re MIMA; Ex parte Miah* (2001) 206 CLR 57 (*Miah*), s. 75(v) case: 3:2 (Gaudron J, McHugh K, Kirby J: Gleeson CJ and Hayne J dissenting).
162 *Miah*, ibid 84, [90] (Gaudron J).
163 *Miah*, ibid 86-7, 88 [98]-[99], [102], [104]-[105].
164 *Re Bolton; Ex parte Beane* (1987) 162 CLR 514 at 520 per Mason CJ, Wilson and Dawson JJ, 532 per Deane J.
165 *Miah*, n 161 above, 95[132] (McHugh J).
166 The majority denied any intention in the *Migration Act* to cure defects through RRT review, with McHugh J outlining seven factors which a court will consider in determining whether such an intention exists—*Miah*, 99-102; Cf *Twist v Randwick Municipal Council* (1976) 136 CLR 106.
167 *SAAP v MIMIA* (2005) 228 CLR 294, [2005] HCA 24, (*SAAP*), a s 39B matter on appeal from FCFCA], by 3:2 (McHugh, Kirby and Hayne JJ: Gleeson CJ and Gummow J dissenting). The case concerned *Migration Act* s 424A, interpreted to mean that certain information was to be given to the applicant in writing was construed strictly as being a mandatory requirement and failure to do so was a breach of procedural fairness; and that its effect was not confined to the pre-hearing stage.
168 *SAAP*, 62 [316] (McHugh J).
169 *MIMA v Al Shamry* (2001) 110 FCR 27.
170 *SZEEU v MIMIA* (2006) 150 FCR 214.
171 *See* Sue Harris Rimmer, 'Migration Amendment (Review Provisions) Bill 2006,' *Law and Bills Digest*, Commonwealth Parliamentary Library, 14 February 2007, at http://202.14.81.34/library/pubs/bd/2006-07/07bd075.pdf.
172 *NAIS v MIMIA* (2005) 228 CLR 470, [2005] HCA 77; (Appeal from FCFCA, s. 39B proceeding)— 4:2 (Gleeson CJ, Kirby, Callinan and Heydon JJ: Gummow J and Hayne J dissenting).
173 *NAIS*, 526, [172] (Callinan and Heydon JJ).
174 *Quin*, (1990) 170 CLR 1, 35-36.
175 *NAIS*, 447, [14] (Gummow J).
176 *SZFDE v MIAC* (2007) 232 CLR 189, 201 [31-32] per curiam (Gleeson CJ, Gummow, Kirby, Hayne, Callinan, Heydon and Crennan JJ)
177 *SZFDE*, ibid.
178 *Attorney-General (NSW) v Quin* (1990) 170 CLR 1, 25-37 (Brennan J)—'nor is the adversary system ideally suited to the doing of administrative justice' (37).
179 Kirby J began his mission as Kirby P in Osmond v PSB and continued in S20, Griffith University v Tang and in NAIS.
180 Australian Institute of Administrative Law (AIAL) National Forum, 'Delivering Administrative Justice,' 22-3 July 2010, http://law.anu.edu.au/aial/NationalForum/ANFIndex.html.
181 Chief Justice Robert French, 'Administrative Justice – Words in Search of Meaning,' Address to the Australian Institute of Administrative Law Annual Conference, National Administrative Law Forum 2010, 'Delivering Administrative Justice' 22 July 2010, at http://www.hcourt.gov.au/assets/publications/speeches/current-justices/frenchcj/frenchcj22july10.pdf.

182 French CJ, ibid.
183 See eg PP Craig, 'The Common Law, Reasons and Administrative Justice,' (1994) *Cambridge Law Journal* 282; AW Bradley, 'Administrative Justice: A Developing Human Right?' (1995) 1 *European Public Law* 347 at 351; R Creyke and J McMillan, 'Administrative Justice – The Concept Emerges' in R Creyke and J McMillan (eds) *Administrative Justice – The Core and the Fringe* (Australian Institute of Administrative Law, 2000); M Adler, 'A Socio-Legal Approach to Administrative Justice' (2003) 25 *Law & Policy* 323; R Creyke, 'Administrative Justice – Towards Integrity in Government' (2007) 31 *Melbourne University Law Review* 705; M Adler (ed) *Administrative Justice in Context* (Hart Publishing, Oxford. 2010); many of these were referred to by French CJ in his address to the AIAL Forum. 'Administrative Justice—Words in search of Meaning', 22 July 2010.
184 French CJ, n 181 above.
185 *jus dicere*—to declare the law. This word is used to explain the power which the court has to expound the law; and not to make it, *jus dare***.**
186 *jus dare* —to give or to make the law. *Jus dare* belongs to the legislature; *jus dicere* to the judge**.**
187 Sir Francis Bacon, Sir Francis Bacon, (1561–1626), *Essays, Civil and Moral*, LVI *Of Judicature* (The Harvard Classics, 1909–14).
188 See J J Spigelman 'The Integrity Branch of Government' (2004) 78 *Australian Law Journal* 724. J J Spigelman 'Jurisdiction and Integrity', The Second Lecture in the 2004 National Lecture Series for the Australian Institute of Administrative Law (2004) at 26; J J Spigelman 'The Significance of the Integrity System' (2008) 4(2) *Original Law Review* 39 at 47, reprinted in Tim D Castle (ed) *Speeches of a Chief Justice: James Spigelman 1998-2008* (2008), CS2N Publishing at 326; see also Hon J. J. Spigelman Chief Justice of NSW, 'The Common Law Bill of Rights,' First Lecture in the 2008 McPherson Lectures: *Statutory Interpretation & Human Rights*, University Of Queensland, 10 March 2008; at http://acthra.anu.edu.au/resources/McPherson%20Lectures%2010%5B1%5D.3.08%20First.doc; Hon J J Spigelman Chief Justice of NSW, 'Legitimate and Spurious Interpretation,' Third Lecture in the 2008 McPherson Lectures: *Statutory Interpretation & Human Rights*, University Of Queensland, 12 March 2008, at http://acthra.anu.edu.au/resources/McPherson%20Lectures%2012%5B1%5D.3.08%20Third.doc.
189 *Lam*, n 127 above, 14 [37]-[38] (Gleeson CJ).
190 *Parker v Comptroller-General of Customs* (2009) 83 ALJR 494, (4:1—French CJ, Gummow, Hayne, and Kiefel JJ: Heydon J dissenting.)
191 *Parker*, ibid—the facts may be found at 496, 497, 511 [4], [7], [9], [105].
192 *Parker*, 498, [12] (French CJ).
193 *Ebner v Official Trustee in Bankruptcy*; *Clenae v ANZ Banking Group* (2000) 205 CLR 337 (*Ebner* and *Clenae*), (6:1 (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ: Kirby J dissenting).
194 See Register of interests resolution of the House of Representatives on 8 October 1984 and the Senate on 17 March 1994; the registers were further extended in 2003 to increase the value of gifts received that must be declared; see also see *Cabinet Handbook* 2.24-2.26).
195 *Ebner and Clenae*, n 193 above, (Gleeson CJ, McHugh, Gummow and Hayne JJ, 205 CLR 337, 359-61 [66]-[73])—there is no duty on a judge to disclose relevant interests; rather, as a matter of 'prudence and professional practice' judges *should* disclose interests and associations '*if* there is a serious possibility that they are potentially disqualifying'—but failure to disclose has no legal significance other than possibly constituting evidence that may go towards showing apprehended bias.
196 Sir Edward Coke, *Dr Bonham's case*, 8 Co. Rep., 114a, 118a; *Dimes v Proprietors of the Grand Junction Canal* (1852) 3HCL 759, 10 ER 301, 793 (Lord Campbell).
197 *R v Sussex Justices; Ex parte McCarthy* (1924) 1 KB 256, 258-259 (Lord Hewart CJ).
198 *Ebner and Clenae*, (2000) 205 CLR 337, 361 [74] ((Gleeson CJ, McHugh, Gummow and Hayne JJ), contra Callinan J. 397 [185] (c.f. *Kartinyeri v Commonwealth* (1998) 156 ALR 300, [1998] HCA 52, 5 February 1998).
199 *British American Tobacco Australia Services Ltd v Laurie* (2011) 85 ALJR 348 [2011] HCA 2 (*BATAS*) (3:2 for BATAS— Heydon, Kiefel and Bell JJ: French CJ; Gummow J.
200 *BATAS* ibid 374, [117], [124], 376 [137], 377 [139], 378 [144]-[145] (Heydon, Kiefel and Bell JJ).
201 *BATAS* ibid 374, [117], 375-6 [133]-[134] [137], 377 [139], 378 [144] (Heydon, Kiefel and Bell JJ).
202 *Aala*, n 156 above.
203 See eg *Plaintiff S157 v Commonwealth* (2003) 211 CLR 476, 496 [45] re jurisdictional error); 508 [82] re enlivening 75(v) jurisdiction (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).
204 See, eg [2002] HCATrans 414 (30 August 2002) *Applicant S154* (Gaudron J) 795-860, 1025, 1160-80, 1340-1415, 1455-1710, 1775-1790, 1870-1890, 1980-2045; [2002] HCATrans 542 (1 November 2002), *Applicant S154* (Gaudron J) 2885-2920, 2970-3045,3155-3160, 3255-3300, 3360-3410; see also *Re MIMA; Ex parte S154* (2003) 77 ALJR 1909, 1909 [7], (2003) 201 ALR 437, 439 [7] (Gummow and Heydon JJ).
205 *Craig v South Australia* (1995) 184 CLR 163 (*Craig*).
206 *Craig*, ibid 179 per curiam (Brennan CJ, Deane, Toohey, Gaudron and McHugh JJ).
207 *MIMA v Yusuf* (2001) 206 CLR 323 (*Yusuf*), 351[82] (McHugh, Gummow and Hayne JJ).
208 *Yusuf,* ibid.
209 See *Plaintiff S157 v Commonwealth* (2003) 211 CLR 476, 484 [9] (Gleeson CJ, relying on *R v Coldham; Ex parte Australian Workers' Union* (1983) 153 CLR 415, 419); 505 [73] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).
210 *Craig*, n 205, 177-9.

211 *Anisminic v Foreign Compensation Commission* [1969] 2 AC 147.
212 *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254; see also nn 205 and 207 above.
213 *Kirk v Industrial Court NSW* 239 CLR 531, (*Kirk*) 572 ff [67] ff, (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).
214 *Kirk*, ibid 577 [85].
215 *Kirk*, 577-8 [86]-[87].
216 It will be recalled that *Craig* stated that courts will continue to be able to make errors of law that do not go to jurisdiction, where for example, a mistake occurs in the identification of relevant issues; a mistake occurs in the formulation of relevant questions; a mistake occurs in the determination of what is and what is not relevant evidence; there is a failure to take into account a relevant consideration; and where the court takes into account an irrelevant consideration—all these are jurisdictional errors for administrators.
217 *Craig*, ibid 179-80.
218 In *MIMA v B* (2004) 219 CLR 365, 377 [6] H (Gleeson CJ and McHugh J). Gleeson CJ and McHugh J said: 'In a legal context the primary meaning of jurisdiction is "authority to decide".
219 *Kirk*, n 213 above, 569-73 [60]-70] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).
220 *R v Bolton* (1841) 1 QB 66, 74, [113 ER 1054, 1057].
221 *Kirk*, n 213 above, 569 [60], footnote 174.
222 *Parker v Comptroller General of Customs* (2009) 83 ALJR 494, (4:1—French CJ, Gummow, Hayne, and Kiefel JJ: Heydon J dissenting); see n 190 above; *Ayles v The Queen* (2008) 232 CLR 410, [2008] HCA 6, [82] Kiefel J (majority, with whom Gleeson CJ and Heydon J agreed): Gummow and Kirby JJ dissenting; *Ayles v The Queen* (2008) 232 CLR 410, [2008] HCA 6, [82] Kiefel J (majority, with whom Gleeson CJ and Heydon J agreed): Gummow and Kirby JJ dissenting; *Stead v State Government Insurance Commission* (1986) 161 CLR 141, 145 per curiam (Mason, Wilson Brennan, Deane and Dawson JJ).
223 *MIMA v Bhardwaj* (2002) 209 CLR 597, 614-5 [51] 'A decision that involves jurisdictional error [defined as discussed above in this paper] is a decision that lacks legal foundation and is properly regarded, in law, as no decision at all' (Gaudron and Gummow JJ).
224 Cf Oliver Wendell Holmes Jnr, *The Common Law* (1881), 1—'The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed.'
225 LL Jaffe, 'Judicial Review: Constitutional and Jurisdictional Fact,' (1957) 70 *Harvard Law Review*, 953.
226 *Kirk*, n 213 above, 570 [62].
227 *Kirk*, n 213 above, 570 [64], referring to Jaffe, n 225 above, 962-963.
228 Jaffe, n 225 above, 963.
229 Jaffe, n 225 above, 963 (footnote omitted).
230 *Kirk*, n 213 above, 570 [64].
231 See *Quin*, n 178 above, 37 (Brennan J).
232 Cf *Corporation of the City of Enfield v Development Assessment Commission* (2000) 199 CLR 135.
233 *Kirk*, n 213 above, 571 [66].
234 *Aala*, (2000) 204 CLR 82, 141 [163] (Hayne J).
235 *Kirk*, n 213 above.
236 Murray Gleeson, 'Judicial Legitimacy,' (2000) 20 *Aust Bar Rev* 4, 11.
237 With apologies to the TV Series *Twilight Zone*.
238 The following is gratefully quoted from Colleen Murphy, 'Lon Fuller and the Moral Value of Law' *Law and Philosophy* (2005) 24: 239–262, 240-1.
239 'Fuller, Lon, *Morality of Law*, rev ed (New Haven: Yale University Press, 1969), p 39. Fuller has an extended discussion of each criterion from pp 46–90. My summary of Fuller is based on *The Morality of Law* as well as on Jeremy Waldron "Why Law- Efficacy, Freedom or Fidelity?", *Law and Philosophy* 13 (1994): 259–284, David Luban, "Natural Law as Professional Ethics: A Reading of Fuller", *Social Philosophy and Policy* (2001), and Gerald J. Postema, "Implicit Law", *Law and Philosophy* 13 (1994): 361–387.'
240 'Fuller notes that this generality requirement is consistent with general injunctions on behavior being issued to specific individuals or groups. To meet the generality requirement, laws need not apply to the entire population.'
241 See, eg The First Hamlyn Lecture 2003 (shortened version), The Hamlyn Lectures, Fifty-Fifth Series, '"Judicial Activism" Authority, Principle and Policy in the Judicial Method'. The Hon Justice Michael Kirby AC CMG, High Court of Australia, Delivered 19 November 2003, University Of Exeter, UK.
242 See eg 'Statement by the Chief Justice of the Federal Court with the concurrence of other members of the Full Court in the course of proceedings in the matter of *NAAV v MIMIA*' 3 June 2002, discussed in Enid Campbell and H P Lee, 'Criticism of Judges and Freedom of Expression, (2003) 8 *Media & Arts Law Review* 77, available at http://www.law.unimelb.edu.au/cmcl/malr/8-2-1%20Campbell%20Lee% 20Criticism% 20of%20Judges%20formatted%20for%20web.pdf.
243 *Saeed v MIAC* (2010) 241 CLR 252, 263-7 [27]-[41], [42] (per curiam); see also n 54 above.
244 *Saeed v MIAC* (2010) 241 CLR 252, 264-3 [30]-[31.]
245 See *SAAP*, n. 167 above.
246 See the relevant Administrative Arrangement Order (AAO) for 2008; the current AAO, 14 October 2010 states: Part 12, The Department of Immigration and Citizenship [administered by the Minister pursuant to

Constitution s 64] Matters dealt with by the Department : Entry, stay and departure arrangements for non-citizens; Border immigration control… the 2008 AAO would have included similar provisions.

247 *Plaintiff M61 v Commonwealth* (*M61*) (2010) 85 ALJR 133, [2010] HCA 41, 139-41 [21]-[35], 145-6, [63]-[65], 147 [71] per curiam (French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ); see also n 142 above.

248 *Plaintiff M61,* ibid 141 [35], 146, [66]-[67], 147 [71].

249 See, eg *Plaintiff M61,* ibid 148-9 [76]-[78].

250 *Plaintiff M61,* ibid 150-1 [91]. This was the matter which had been in issue in *Miah*, and which had been excluded from the ambit of judicial review by provisions of the *Procedural Fairness Act 2002* and the *Migration Litigation Reform Act 2005;* but these provisions applied only to protect the RRT and not the Christmas Island review processes.

251 See particularly *Plaintiff S157 v Commonwealth* (2003) 211 CLR 476, 499, 502 (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).

252 *R v Hickman; Ex parte Fox and Clinton*, (*Hickman*) (1945) 70 CLR 598.

253 *Hickman*, ibid 612 (Starke J).

254 *Hickman*, ibid 607.

255 *Australian Coal and Shale Employees Federation v Aberfield Coal Mining Co. Ltd*. (1942) 66 CLR 161, 177 (Latham CJ).

256 As referred to by Dixon J in *Hickman*, n 252 above, 616.

257 *Hickman*, ibid 615.

258 *Hickman*, ibid 618.

259 R v Metal Trades Employers' Association; ex parte Amalgamated Engineering Union, Australian section (1951) 82 CLR 208, 248 (Dixon J).

260 *Metal Trades Employers' Association*, ibid (1951) 82 CLR 208, 249-50 (Dixon J); c.f. *R v Murray; ex parte Proctor* (1949) 77 CLR 387, 400-401 (Dixon J).

261 See *Parisienne Basket Shoes Pty Ltd v Whyte* (1938) 59 CLR 369—see also text accompanying nn 282-286.

262 Spigelman CJ, 'The Centrality of Jurisdictional Error,' Keynote address, AGS Administrative Law Symposium: Commonwealth and New South Wales, Sydney, 25 March 2010, http://www.hrnicholls.com.au/articles/Other/spigelman250310%5B1%5D.pdf.

263 House of Representatives Hansard, 3 September 1997, 7615.

264 He also relied on statements of High Court judges when he referred to '*expand[ing] the legal validity of the acts done and the decisions made by decision makers.*' While this is not a felicitous means of describing the operation of a privative clause, the following judges have done so: Brennan J in *Deputy Commissioner of Taxation* v *Richard Walter Pty Ltd* (1995) 183 CLR 168, 194—The privative clause treats an impugned act as if it were valid. In so far as the privative clause withdraws jurisdiction to challenge a purported exercise of power by the repository, the validity of acts done by the repository is expanded*;* Mason CJ—[the privative clause] 'extends the limits of the award-making power and governs the effect of its exercise,' *O'Toole v Charles David* (1990) 171 CLR 232, 250-1 and Brennan J also in that case at 275; and Murphy J, *R v Coldham; Ex parte AWU* (1982) 153 CLR 415, 421-3.

265 David Bennett, 'Privative Clauses—An Update on the Latest Developments,' paper delivered at the Australian Institute of Administrative Law (AIAL) forum, Canberra, 13 March 2003, in AIAL Forum, No 37, April 2003, at 20.

266 *NAAV v MIMA* 123 FCR 298 [2002] FCFCA 228 (15 August 2002).

267 *Plaintiff S157 v Commonwealth* (2003) 211 CLR 476.

268 David Bennett QC, (then Solicitor General), 'Privative Clauses – An Update on the Latest Developments,' A paper delivered at the Australian Institute of Administrative Law forum in Canberra on Thursday, 13 March 2003; at http://www.ag.gov.au/agd/WWW/rwpattach.nsf/viewasattachmentpersonal/(CFD7369FCAE9B8F32F341DBE097801FF)~Privative20+March+2003.pdf/$file/Privative20+March+2003.pdf.

269 *NAAV v MIMA* (2002) 123 FCR 298 [2002] FCFCA 228 (15 August 2002).

270 *NAAV*, ibid see eg Black CJ 309 [12], Von Doussa J [624] relying on *R v Metal Trades Employers' Association; ex parte Amalgamated Engineering Union, Australian section* (1951) 82 CLR 208, 248 (Dixon J).

271 *NAAV* (2002) 123 FCR 298, 479 [636] per von Doussa J.

272 *R v Murray; ex parte Proctor* (1949) 77 CLR 387, 399 (Dixon J).

273 *MIMA v Bhardwaj*, see. n 223 above.

274 Cf George Orwell, *1984*, Secker and Warburg, London, 1949.

275 Lewis Carroll, *Through the Looking-Glass, and What Alice Found There* (1871) (Charles Lutwidge Dodgson). Chapter 6—`When *I* use a word,' Humpty Dumpty said in rather a scornful tone, `it means just what I choose it to mean -- neither more nor less.' `The question is,' said Alice, `whether you *can* make words mean so many different things.' `The question is,' said Humpty Dumpty, `which is to be master - - that's all.' Alice was too much puzzled to say anything, so after a minute Humpty Dumpty began again. `They've a temper, some of them -- particularly verbs, they're the proudest -- adjectives you can do anything with, but not verbs -- however, *I* can manage the whole of them! Impenetrability! That's what *I* say!'— This passage was used in Britain by Lord Atkin and in his dissenting judgement in *Liversidge v. Anderson*

(1942), where he protested about the distortion of a statute by the majority of the House of Lords. It also became a popular citation in United States legal opinions, appearing in 250 judicial decisions in the Westlaw database as of April 19, 2008, including two Supreme Court cases (*TVA v. Hill* and *Zschernig v. Miller*): see MRLL Kelly, '*Through the Looking Glass*—Reflections on People, Constitutional Law and Governance,' paper given to the Conference on National Engagement with International and Foreign Law and Governance, Sydney, 2 December 2010.

276 *Plaintiff S157 v Commonwealth* (2003) 211 CLR 476, 499 [554] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ). C.f. *Saeed v MIAC* (2010) 241 CLR 252, 264-3 [30]-[31].

277 Cf *Church of Scientology v Woodward* (1980) 154 CLR 25, 70 (Brennan J). see also *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391, [68] (Gaudron J) who says that s 75(v) 'provides the mechanism by which the Executive is subjected to the rule of law.'

278 See, eg *Saeed* (2010) 241 CLR 252, 259 [15] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ; see also *Corporation of the City of Enfield*, n 232 above and n 299 below, [59]-[60] (Gaudron J).

279 *Plaintiff S157*, 505-6 [73]-[75].

280 *Project Blue Sky v ABA* (1998) 194 CLR 355, 388-9 [91] (McHugh, Gummow, Kirby and Hayne JJ).—this was a s. 75(iii) case.

281 *Federal Commissioner of Taxation v Futuris Corporation Ltd* (*Futuris*) (2008) 82 ALJR 1177, 1182-3; [2008] HCA 32 [5] (Gummow, Hayne, Heydon, Crennan JJ).

282 *Parisienne Basket Shoes Pty Ltd v Whyte* (1938) 59 CLR 369 at 389. See, further, *Craig v South Australia* (1995) 184 CLR 163 at 176-180; 69 ALJR 873.

283 *Parisienne Basket Shoes Pty Ltd v Whyte* (1938) 59 CLR 369 at 389. Writing in the first edition of his work, published in 1959, Professor de Smith traced the development of judicial review in terms of jurisdiction to the 17th century: de Smith, *Judicial Review of Administrative Action* (1959), pp 65-66.

284 *R v Commonwealth Court of Conciliation & Arbitration; Ex parte Brisbane Tramways Co Ltd* (1914) 18 CLR 54 at 62, 65, 72.

285 *R v Kirby; Ex parte Transport Workers' Union of Australia* (1954) 91 CLR 159 at 168.

286 *Futuris*, n 281 above, [45] author's italics].

287 *Futuris*, n 281 above, [70].

288 See *Fish v Solution 6 Holdings Ltd* (2006) 225 CLR 180; *Batterham v QSR Ltd* (2006) 225 CLR 237, (Kirby and Heydon JJ dissenting in both cases); *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531.

289 See the line of cases through *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 through *Baker v The Queen* (2004) 223 CLR 513, *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 and *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45 to *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 234 CLR 532, *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501, *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319, to *Kirk v Industrial Court(NSW)* (2010) 239 CLR 531.

290 *Lange v Australian Broadcasting Commission* (1997) 189 CLR 520; *Constitution* ss 7, 24, 30, 51, 64.

291 *Constitution* s 1, s 51.

292 *Marbury v Madison* (1803) 1 Cranch 137, 177 [5 US 87 at 111] (Marshall CJ).

293 See MRLL Kelly, '*Marbury v Madison:* An Analysis,' 2005 *High Court Quarterly Review*, Vol. 1(2), 58 -141, (Sandstone Academic Press, South Yarra, Vic, Australia), ISSN 1449-9037.

294 Justice Peter Heerey, *Andrew Inglis Clark: The Man and His Legacy*, (2009) 83 ALJ 199, 200 ; 4 December 2008, available at National Archives of Australia**,** http://naa.gov.au/whats-on/constitution-day/talks/heerey.aspx --- an edited version of an address at the Supreme and Federal Court Judges' Conference, Hobart, 28 January 2009.

295 Barton to Clark, 14 February 1898, Clark papers, University of Tasmania Archives C 4/C 15, cited in FM Neasey and LJ Neasey, *Andrew Inglis Clark* (University of Tasmania Law School, 2001) 195.

296 Cf *Plaintiff S157*; *IFTC*; *Totani*; *Wainohu*.

297 *Attorney-General (WA) v Marquet* 2003] HCA 67; (2003) 78 ALJR 105 at 116 [66] (Gleeson CJ, Gummow, Hayne and Heydon JJ).

298 *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1, 263 (Fullagar J), author's emphasis.

299 *Corporation of the City of Enfield v Development Assessment Commission* (*Enfield*) [2000] HCA 5; (2002) 199 CLR 135; 169 ALR 400; 74 ALJR 490; see also n 232.

300 *Chevron USA Inc v Natural Resources Defense Council Inc* (1984) 467 US 837; for a discussion of developments in the deference doctrine in the US, see KE Hickman and MD Krueger, 'In Search of the Modern Skidmore Standard,' 2007 *Columbia Law Review*, Vol. 107:1235.

301 Cf *Enfield*, 152-3 (Gleeson CJ, Gummow, Kirby and Hayne JJ).

302 *Enfield*, 152-4, [43]-[44].

303 *The Queen v. Toohey; Ex parte Northern Land Council* [1981] HCA 74; (1981) 151 CLR 170, 222 (Mason J).

304 *Inland Revenue Commissioners v National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617 at 641.

305 Mulgan, "The Processes of Public Accountability", (1997) 56(1) *Australian Journal of Public Administration* 25 at 31; Thompson and Tillotsen, "Caught in the Act: The Smoking Gun View of Ministerial responsibility", (1999) 58 (1) *Australian Journal of Public Administration* 48 at 50. For similar observations in the context of the United Kingdom see Turpin, "Ministerial responsibility: Myth or Reality?", in Jowell and Oliver (eds), *The Changing Constitution*, 3rd ed (1994) 109 at 114-115, 144-145; Lewis and Longley, "Ministerial

responsibility: The Next Steps", (1996) *Public Law* 490 at 503-504; Scott, "Ministerial Accountability", (1996) *Public Law* 410 at 415.

306 *Hot Holdings Pty Ltd v Creasy* (2002) 219 CLR 438, [2002] HCA 51, [93] Kirby J.

307 Refer to John McMillan, The Ombudsman and the Rule of Law, (2005) 44 AIAL Forum, 1-16—Revised version of a paper presented at ANU Public Law Weekend, Canberra, 6 November 2004.

308 *Re Carmody; Ex parte Glennan* (2003) 198 ALR 259, 260 [6], (Gummow, Hayne and Callinan JJ).

309 Thomas Jefferson to Spencer Roane, 1821. ME 15:326.

310 Cf Inquiry into the Circumstances of the Immigration Detention of Cornelia Rau, (the Palmer Report).

311 Cf *BATAS*, n 199 above.

312 *Enfield*; *Plaintiff S157*.

313 *Parisienne Basket Shoes Pty Ltd v Whyte* (1938) 59 CLR 369, 389 (Dixon J).

314 *Bankstown Municipal Council v Fripp* (1919) 26 CLR 385, 403 (Isaacs and Rich JJ); see also *Re MIMA; Ex parte S20* (2003) 77 ALJR 1165, 1175 [54]; (2003) 198 ALR 59, 71-2 [54] (McHugh and Gummow JJ).

315 See *SGLB*, *SZMDS* (Gummow ACJ and Kiefel J dissenting); *SZJSS.*

316 *R v Connell; Ex parte Hetton Bellbird Collieries Ltd* (1944) 69 CLR 407, 430 (Latham CJ).

317 *Waterford v The Commonwealth* (1987) 163 CLR 54, 77 (Brennan J).

318 Cf *Re Pochi and MIEA* (1979) 36 FLR 482, 490-2 (Brennan J); *MIEA v Po*chi (1980) 44 FLR 41; (1980) 31 ALR 666, 685, 689, 690 (Deane J; Evatt J said 'I agree' (680); Smithers J dissented; in the author's view, Smithers J's views are more appropriate to an administrative decision-making body).

319 For the phrase, see Smithers J dissenting in *MIEA v Pochi* (1980) 31 ALR 666, 670-1.

320 *Svecova v Industrial Commission of NSW* (1991) 39 IR 328.

321 *South Australia v Tanner* (1988) 166 CLR 161.

322 Eg *Constitution* s. 51(5), s 92, the implied freedom of political communication, the implied nationhood power.

323 See eg Brennan J in *Quin*; Spigelman CJ (four other judges agreeing) in *Bruce v Cole* (1998) 45 NSWLR 163, 186.

324 Cf Brennan J in *Quin*.

325 See *Totani*.

326 See *IFTC*, *Kirk*.