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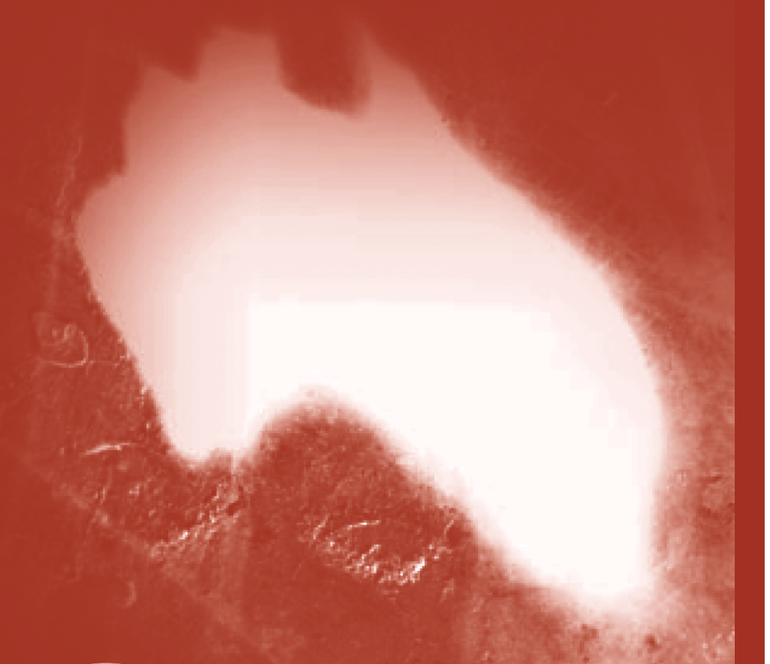

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Editor: Elizabeth Drynan

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Australian Institute of Administrative Law Incorporated.

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It is recommended that the style guide published by the *Federal Law Review* be used in preparing manuscripts.

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RECENT DEVELOPMENTS IN ADMINISTRATIVE LAW

Katherine Cook

New laws for handling complaints against judges

On 22 November 2012, laws to improve the way complaints against federal judges are handled passed Parliament.

Attorney-General Nicola Roxon welcomed the passage of the *Judicial Misbehaviour and Incapacity (Parliamentary Commissions) Bill 2012* and the *Courts Legislation Amendment (Judicial Complaints) Bill 2012* as an important part of the Government's court reform package.

'Australia's courts are held in the highest regard and our judiciary take their responsibilities very seriously,' Attorney-General Nicola Roxon said.

'These reforms ensure complaints against federal judicial officers are handled fairly and transparently while maintaining the constitutional independence of the judiciary.'

The legislation supports and augments existing complaints pathways, both within the federal courts and before the houses of parliament.

The *Judicial Misbehaviour and Incapacity (Parliamentary Commissions) Bill 2012* provides a mechanism that would assist the Parliament's consideration of the removal of a judge from office under paragraph 72(ii) of the Constitution.

'The changes enable Parliamentary Commissions to be established to investigate the most serious of allegations where a judge's misbehaviour or capacity may warrant their removal from office,' Ms Roxon said.

The *Courts Legislation Amendment (Judicial Complaints) Bill 2012* will implement measures to assist Chief Justices of the Federal Court, the Family Court and the soon to be Federal Circuit Court of Australia, when managing complaints within the courts.

Chief Justices will have the option to establish a Conduct Committee to investigate and report to them about a complaint.

'The Australian Government has put federal courts back on a firmer financial footing, with an additional $38 million over four years, changing court fees structures, and introducing legislation to merge the administrative functions of the Family Court and the Federal Magistrates Court,' Ms Roxon said.

'The laws passed today are part of a broad reform agenda that also includes expanding the diversity of judicial appointments, establishing the Military Court of Australia and introducing a new name for the Federal Magistrates Court of Australia that better reflects its modern role in the federal judicial system.'

http://pandora.nla.gov.au/pan/132822/20130204-0704/www.attorneygeneral.gov.au/Media-releases/Pages/2012/Fourth%20Quarter/22November2012-Newlawsforhandlingcomplaintsagainstjudges.html

Review of the Commonwealth FOI Act

Eminent former long-standing public servant Dr Allan Hawke AC will conduct an independent review of the *Freedom of Information Act 1982* and the *Australian Information Commissioner Act 2010*.

On 31 October 2012, Attorney-General Nicola Roxon announced that Dr Hawke will review the effectiveness of the Government's recent Freedom of Information law reforms. About $41 million of taxpayer money was spent by the Federal Government in 2011-12 processing FOI requests. The review will consider how the Government's FOI costs could be reduced, including the Information Commissioner's recent recommendations regarding the current charging regime.

'The review will consider how these Acts and related laws continue to provide an effective framework for access to government information,' Ms Roxon said.

'Importantly, the review will also assess the impact of reforms to Freedom of Information laws in 2009 and 2010.'

In 2011-12, more than 22,000 FOI requests were determined at an average cost of $1,876 per request.

'A wide range of stakeholders and users of Freedom of Information laws will be consulted as part of the review, which is expected to be completed within a six month timeframe.

'I look forward to receiving Dr Hawke's report on his review, which will be tabled in the parliament.'

Under FOI legislation, the review is required to happen two years after the majority of the Government's Freedom of Information reforms commenced in November 2010.

Dr Hawke commenced his review in November 2012.

http://pandora.nla.gov.au/pan/132822/20130204-0704/www.attorneygeneral.gov.au/Media-releases/Pages/2012/Fourth%20Quarter/31October2012ReviewoftheFOIAct.html

Exposure Draft Human Rights and Anti-Discrimination Bill 2012

The Commonwealth Attorney-General and the Minister for Finance and Deregulation have released exposure draft legislation for the consolidated anti-discrimination law.

The Bill consolidates the five existing Commonwealth anti-discrimination acts into a single comprehensive law. The Bill was drafted following these key principles:

- lift differing levels of protections to the highest current standard, to resolve gaps and inconsistencies without diminishing protections;
- clearer and more efficient laws provide greater flexibility in their operation, with no substantial change in practical outcome;

- enhance protections where the benefits outweigh any regulatory impact;
- voluntary measures that businesses can take to assist their understanding of obligations and reduce occurrences of discrimination; and
- a streamlined complaints process, to allow more efficient resolution of disputes that arise.

On 21 November 2012 the Senate referred the exposure draft of the Bill to the Senate Legal and Constitutional Affairs Committee for inquiry and report. The reporting date was 18 February 2013.

More information on this public consultation process is available from the Senate Committees website.

http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=legcon_ctte/anti_discrimination_2012/info.htm

http://www.ag.gov.au/Consultations/Pages/ConsolidationofCommonwealthanti-discriminationlaws.aspx

Victorian Government to strengthen oversight of privacy and data protection

On 20 December 2012, Victorian Attorney General Robert Clark announced reforms to strengthen data security and the privacy and protection of personal information within the Victorian public sector.

The new Privacy and Data Protection Commissioner will be responsible for oversight of the current Victorian privacy and law enforcement data security regimes, as well as for the implementation of a new Victorian Protective Security Policy Framework (VPSPF).

The VPSPF will involve a new classification and information security framework for information held by government departments and agencies.

'The new office of the Privacy and Data Protection Commissioner will bring together the skills and resources of the Privacy Commissioner and the Commissioner for Law Enforcement Data Security,' Mr Clark said.

'Mr David Watts, who is currently the Commissioner for Law Enforcement Data Security, will lead the transition project to bring the two existing bodies into the one new entity.'

The new Office will have responsibility for oversight of the current privacy regime and Victoria Police law enforcement data security, and for implementing and monitoring compliance with the new VPSPF.

Mr Clark said an integrated, whole of government approach to data security, including protective security, was an essential part of strengthening the privacy and protection of personal information handled by and on behalf of the Victorian public sector.

'This new combined oversight role will be better able to respond to the new and emerging challenges affecting information privacy and data protection, including those identified by the Victorian Auditor-General in his 2009 Report on Maintaining the Integrity and Confidentiality of Personal Information,' Mr Clark said.

'The Government committed prior to the 2010 election to strengthening the protection of citizens' private information from inappropriate collection or use by government, and this reform is part of delivering on that commitment.

'The reform creates a more streamlined system that will have broader and more comprehensive oversight of the privacy and information security regime for the Victorian public sector.

'At the same time, the Victorian Government is responding to trends worldwide towards more open access to information, which the Government has endorsed through its DataVic Access Policy.'

Mr Clark said these changes would not alter any legal obligations under the Victorian privacy regime or under the law enforcement data security regime.

Legislation to establish the new Privacy and Data Security Commissioner will be introduced into Parliament in 2013.

http://www.premier.vic.gov.au/media-centre/media-releases/5729-government-to-strengthen-oversight-of-privacy-and-data-protection.html

Royal Commission into Institutional Responses to Child Sexual Abuse

On 13 February 2013, the Australian Government introduced legislation to amend the *Royal Commissions Act 1902* to assist the work of the Royal Commission into Institutional Responses to Child Sexual Abuse.

The amendments will allow one or more of the six Royal Commissioners to conduct hearings. The Royal Commissions Act currently only permits hearings to be conducted by all members of a multi-member Commission or by a quorum.

This amendment will assist the Commission to distribute its hearing work efficiently where this is appropriate.

The other purpose of the Bill is to allow the Commissioners to receive information from those affected by child abuse at less formal 'private sessions'.

For many, telling their stories of child sexual abuse will be very traumatic and these private sessions will mean that people affected by this crime can voluntarily participate in the Royal Commission in a less formal setting than a hearing.

People attending a private session would not be required to give evidence under oath, and their information would be used in a way that did not disclose their identity. The Commissioners could also authorise people to support a person attending a private session.

The Royal Commission is as much about assisting victims of past abuse to be heard, as it is about investigating systemic failures to prevent future abuse.

The proposed amendments will provide similar protection to participants who give information at a private session as would apply if they were giving evidence at a formal hearing.

http://www.pm.gov.au/press-office/royal-commission-institutional-responses-child-sexual-abuse

Coalition Government appoints IBAC Commissioner and Victorian Inspector

The Victorian Coalition Government has appointed Mr Stephen O'Bryan SC as the first permanent Commissioner of Victoria's Independent Broad-based Anti-corruption Commission (IBAC).

Premier Ted Baillieu and the Minister responsible for the establishment of an anti-corruption commission Andrew McIntosh also announced that Mr Robin Brett QC has been appointed as the inaugural head of the new Victorian Inspectorate, which will oversee IBAC and a number of other integrity bodies.

Mr Baillieu said he was confident both men would carry out their new duties with distinction.

'We have implemented the most significant integrity reforms in Victoria's history,' Mr Baillieu said.

'With these appointments, a new era begins for Victoria's integrity system.'

'Victorians elected us to carry out these reforms and create IBAC. With the appointment of Stephen O'Bryan and Robin Brett that mission is now in very good hands,' Mr McIntosh said.

Stephen O'Bryan was admitted to the Bar in 1983 and was appointed Senior Counsel in 2003. He has extensive experience in the field of administrative law, including in Royal Commissions, boards of inquiry and coronial inquests.

Mr O'Bryan will become IBAC's first permanent commissioner, taking over from acting Commissioner Ron Bonighton.

'IBAC gives Victorians the security of knowing that public money is not being misused and that public officials are carrying out their duties lawfully for all Victorians,' Mr O'Bryan said.

Robin Brett was admitted to the Bar in 1979 after five years as Victorian Parliamentary Counsel. He was appointed Queen's Counsel in 1996.

Mr Brett now assumes responsibility for the new Victorian Inspectorate, which has important powers to oversee IBAC's activities, including the assessment of material gained through covert and coercive methods.

Both appointments commenced on 1 January 2013.

The Coalition Government has also been advised that an IBAC CEO will commence work early next year. In the meantime, acting IBAC Commissioner Ron Bonighton has appointed an interim CEO.

Mr Baillieu also took the opportunity to thank Ron Bonighton for his important work with IBAC thus far.

'Ron Bonighton has spent his entire career giving outstanding public service to the people of Australia. As acting IBAC Commissioner he has undertaken the vital capacity-building work

necessary to allow IBAC to fulfil its functions. He is to be commended, and I thank him for his invaluable contribution,' Mr Baillieu said.

Early next year, legislation will be introduced to confer the pension entitlements of those who take up the positions of IBAC Commissioner and head of the Victorian Inspectorate, further entrenching the independence of these roles.

Legislation currently before Parliament will also give IBAC clearing house powers under the new simplified and streamlined protected disclosure regime.

The Coalition Government has also created the Public Interest Monitor to appear in the public interest at hearings where warrants for the use of covert and coercive powers are being sought. Mr Brendan Murphy QC has already been appointed as principal Public Interest Monitor.

http://www.premier.vic.gov.au/media-centre/media-releases/5643-coalition-government-appoints-ibac-commissioner-and-victorian-inspector.html

Sri Lankan refugees v Commonwealth of Australia (Department of Immigration & Citizenship)

Former President of the Australian Human Rights Commission, Ms Catherine Branson QC, has found that 10 Sri Lankan refugees with adverse security assessments from the Australian Security Intelligence Organisation (ASIO) were arbitrarily detained in closed immigration detention facilities.

The action has also affected three Sri Lankan children who have been granted protection visas but are residing in immigration detention with their parents.

'It appears that no comprehensive and individualised assessment has been undertaken in respect of each complainant to assess whether they pose any risk to the Australian community and whether any such risk could be addressed (for example by the imposition of particular conditions) without their being required to remain in an immigration detention facility' Ms Branson said. Ms Branson did not express any view as to what the outcome of any such consideration in each particular case would be.

Seven of the complainants arrived at Christmas Island between June and July 2009. Five other complainants initially sought to enter Australia on board the Oceanic Viking and were eventually brought to Australia from Indonesia in December 2009. One child was born in immigration detention after arriving in Australia.

All of the complainants were found to be refugees, either by Australia or by the UNHCR. All of the adult complainants eventually received an adverse security assessment from ASIO recommending that a protection visa not be granted.

Ms Branson found that the Department of Immigration and Citizenship failed to ask ASIO to assess whether six of the refugees were suitable for community based detention while they were waiting for their security clearance. Information provided by ASIO suggested that community detention assessments could be conducted within 24 hours. Instead, these six refugees were held in closed detention for between 5 months and 21 months while a security assessment in relation to the grant of a visa was carried out.

Ms Branson also found that after the complainants received their adverse security assessment from ASIO, the department failed to assess whether the circumstances of each individual complainant indicated that they could be placed in less restrictive forms of detention. Instead, the Minister determined not to allow anyone with an adverse security assessment in relation to a visa application to be placed in community detention.

However, it appears that this determination was based on an incorrect view that advice from ASIO about whether a visa should be granted also amounted to advice from ASIO about whether community detention was appropriate.

The failure of the department to take these steps raised the real possibility that each of the complainants was either detained unnecessarily or detained in a more restrictive way than their circumstances required. The detention of the complainants in these circumstances was arbitrary and in breach of article 9(1) of the ICCPR.

In the case of the Rahavan family of two parents and three children, Ms Branson found that the failure to consider fully alternatives to closed detention amounted to a breach of articles 3 and 37(b) of the Convention on the Rights of the Child.

Ms Branson recommended that the Minister indicate to his department that he will not refuse to consider a person in immigration detention for release from detention or placement in a less restrictive form of detention merely because the department has received advice from ASIO that the person not be granted a visa on security grounds.

Ms Branson also made a series of recommendations to the department. First, that the department refer each of the complainants to ASIO for advice as to whether less restrictive detention could be imposed, if necessary subject to special conditions to ameliorate any identified risk to security.

Secondly, that similar advice be sought in relation to other people in immigration detention with adverse security assessments.

Thirdly, that the department refer cases back to the Minister for consideration of alternatives such as community detention with details of how any potential risk identified by ASIO could be mitigated.

Fourthly, that Australia continue actively to pursue alternatives to detention, including the prospect of third country resettlement, for all people in immigration detention who are facing the prospect of indefinite detention.

The last recommendation was noted by the department. The other recommendations were not accepted by the Minister or the department.

The Commission's report was tabled in Parliament on 26 November 2012.

http://www.humanrights.gov.au/legal/humanrightsreports/AusHRC56.html.

http://www.humanrights.gov.au/about/media/media_releases/2012/110_12.htm

Recent Decisions

Are Commonwealth departments subject to NSW state privacy legislation?

AGU v Commonwealth of Australia (GD) [2013] NSWADTAP 3 (21 January 2013)

This decision of the Appeal Panel of the Administrative Decisions Tribunal (the ADT) concerned the application of the *Privacy and Personal Protection Act 1998* (NSW) and *Health Records and Information Privacy Act 2002* (Cth) to Commonwealth agencies.

When applying for a disability support pension AGU disclosed to Centrelink that he had a chronic medical condition. When AGU consulted Jobfind, a disability employment service provider, he discovered that his file included information about his medical condition. AGU assumed that Centrelink disclosed that information to Jobfind.

AGU contended that Centrelink, which is part of the Commonwealth Department of Human Services, was liable for contravening various Health Privacy Principles in the NSW *Health Records and Information Privacy Act 2002* (*HRIP Act*) and sought relief under the *Privacy and Personal Information Protection Act 1998* (*PPIP Act*). Both Acts 'bind the Crown in right of New South Wales and also, in so far as the legislative power of Parliament permits, the Crown in all its other capacities.' Its 'other capacities' include the Crown in right of the Commonwealth. This liability of the Crown provision overrides the common law presumption that the Crown is immune from civil suits.

AGU argued, among other things, that the liability of the Crown provision is a substantive provision and that regardless of the statutory scheme, that provision makes Commonwealth departments and agencies subject to the *PPIP Act* and the *HRIP Act* (*Re Residential Tenancies Tribunal of NSW v Henderson; Ex parte Defence Housing Authority* (1997) 190 CLR 410 at 448 (*Henderson*)).

The ADT found that while the High Court in *Henderson* was satisfied that the liability of the Crown provision meant that the Commonwealth was bound by the *Residential Tenancies Act 1987* (NSW), that finding was made in the context of the facts of that case. In *Henderson*, the High Court did not set down a general principle that a liability of the Crown provision in State or Territory legislation makes the Commonwealth liable. Whether or not the Crown is liable will depend on the particular statutory context. The ADT found that in the *PPIP Act* (and *HRIP Act*) there was no such intention.

The ADT held that the obligations under the *PPIP Act* apply to 'public sector agencies' including Government departments (section 3). 'Government' is defined in the *Interpretation Act 1987* (NSW) as the 'Government of New South Wales'.

The only textual support for AGU's view was that the *PPIP Act* exempts a 'law enforcement agency' from compliance with certain provisions. 'Law enforcement agency' is defined in section 3 of the *PPIP Act* and includes a number of Commonwealth law enforcement bodies, including the Australian Federal Police.

The ADT found that the need for the definition of 'law enforcement agency' to include the Commonwealth law enforcement bodies arises from the fact that a 'public sector agency' will be exempt from laws preventing disclosure of certain personal information if it discloses that information to a 'law enforcement agency' (section 23(5)(b)). 'Law enforcement agencies' are not themselves liable under the *PPIP Act* unless, like the NSW Police Force, they also fall within the definition of a 'public sector agency'.

Procedural fairness and the unrepresented litigant

Teuila v Minister for Immigration and Citizenship [2012] FCAFC 171 (28 November 2012)

The Appellant was born in New Zealand in January 1991. In October 2010 while living in Australia she gave birth to her son, Ezekiel. During her time in Australia, the Appellant accumulated a significant criminal record.

In March 2012, a delegate of the Immigration Minister cancelled her visa pursuant to section 501(2) of the *Migration Act 1958* (Cth). In June 2012 the Appellant sought a review of this decision by the Administrative Appeals Tribunal and in June 2012 that Tribunal affirmed the delegate's decision. That decision was appealed to a single judge of the Federal Court and in September 2012 that appeal was dismissed.

The Appellant then appealed to the Full Federal Court. She contended, among other things, that the Tribunal denied her procedural fairness by failing to advise her of a relevant consideration, namely the best interests of her child.

The Minister argued that the fact a copy of (1) the Notice of Intention to Consider Cancellation of a visa, (2) a copy of Direction No 41 (which expressly refers to the best interest of the child as a relevant consideration in these cases), (3) the Delegate's statement of reasons, (4) the Departmental issues paper; and (5) the Minister's Statement of Facts and Contentions, were all available to the Appellant and this was sufficient notice that the best interests of Ezekiel would be a relevant issue to be taken into account by the Tribunal.

The Court expressed considerable reservation about whether an unrepresented party is adequately put on notice of the potential importance of a primary consideration by simply being provided with such documents.

However, the Court held that notwithstanding the fact that the Appellant's attention was not expressly directed to the need to address the best interests of Ezekiel, it cannot be concluded in the present case that she has been denied a 'reasonable opportunity' to present her case. Whatever reservation may be expressed regarding the desirability or otherwise of leaving the task of distilling the issues that need to be addressed (especially the task of distilling those issues from a mass of other factual issues) to an unrepresented party, it cannot be concluded that the Appellant was not on notice of the need to give consideration to the best interests of Ezekiel from the materials available to her. The issue was raised, and she was given a 'reasonable opportunity' to respond.

Was the District Court exercising administrative or judicial powers?

Straits Exploration (Australia) Pty Ltd & Anor v Kokatha Uwankara Native Title Claimants & ors [2012] SASCFR 121 (5 November 2012)

This was an appeal from a determination made under Part 9B of the *Mining Act 1971* (SA) (the *Mining Act*) by a District Court Judge sitting as a Judge of the Environment, Resources and Development Court of South Australia (the ERD Court).

The Appellants, two joint venture partners, wished to conduct mining exploration at Lake Torrens in South Australia. The Appellants, within the *Mining Act* regime, sought to negotiate a native title mining agreement with the native title parties but were unsuccessful. In August 2010, the Appellants made an application to the ERD Court for a determination authorising mining operations at Lake Torrens. The District Court judge determined that the mining operations may not be conducted.

Before the Full Court, the Appellants contended, among other things, that the District Court Judge in making the determination had proceeded under a serious misconception of the role that he was to perform. The Appellants argued that the Judge had proceeded as though he was dealing with issues arising in a trial requiring resolution by way of judicial determination, whereas under the *Mining Act* he was engaged in the process of making an administrative decision. The Appellants also submitted that in the course of the hearing the Judge denied them procedural fairness by finding that the Appellants had breached their exploration licence without adequate notice. Such a finding could result in criminal sanctions.

The Full Court held that the Judge misunderstood his role causing him to embark on a judicial determination of fact, rather than making an administrative decision as was required under Part 9B of the *Mining Act*. The particular provisions of Part 9B of the *Mining Act* show that this is so:

- First an exploration authority granted under the *Mining Act* confers no right to carry out mining operations affecting native title on native title land, unless the holder of the authority 'acquires' the right to carry out mining operations on the land by an agreement, or by determination of the ERD Court authorising those operations. Claimants in judicial proceedings do not generally 'acquire' rights; their rights are determined or declared, and remedies are given for their denial by others;
- Secondly, a determination of the ERD Court can be overruled by the Minister. The conferral of that executive power on the Minister to override the ERD Court's determination is a strong indication that the ERD Court's functions is arbitral because it can be presumed that the legislature would not provide for administrative overruling of a judicial decision by the executive government; and
- Finally, a determination has no effect and is not binding until registered with the Mining Registrar; and once registered is, subject to its terms, binding on and enforceable by or against the original parties to the proceedings and against the holders from time to time of native title and the holders from time to time of any relevant exploration authority or production tenement.

The Full Court also found that the District Court Judge denied the Appellants procedural fairness. The Full Court held that the nature of the impugned findings, particularly findings of criminal conduct by the District Court Judge, were so serious, affecting the reputation of the Appellants and their officers and employees and their financial interests and future livelihoods, that the Judge's failure to accord procedural fairness constituted a jurisdictional error which, by itself, invalidated the determination. In the Full Court's view, the requirements of procedural fairness necessitated that the Judge should have given the Appellants fair notice that he had contemplated making findings in the impugned terms, and afforded the Appellants a reasonable opportunity to address them before the matter was decided. This did not occur.

A recent migration decision of the High Court

Tahiri v Minister for Immigration and Citizenship [2012] HCA 61 (13 December 2012)

The plaintiff, a citizen of Afghanistan, arrived in Australia unaccompanied when he was 17 years old. He was granted a protection visa. On the plaintiff's proposal, the plaintiff's mother (Mrs Tahiri) made an application for an offshore refugee and humanitarian visa. The application was combined with that of Mrs Tahiri's four other children who are under 18 years old and all citizens of Afghanistan. Mrs Tahiri claimed that she and children had been

residing in Pakistan for the past six years and that the children's father had left her seven years earlier to go to Kandahar to work and had disappeared.

A delegate of the Minister refused the applications because the delegate was not satisfied that Public Interest Criteria (PIC) 4015 was met in relation to the children. PIC 4015 relevantly requires a delegate to be satisfied either that the law of the children's home country permitted their removal, or that each person who could lawfully determine where the children were to live consented to the grant of the visa.

In a proceeding commenced in the original jurisdiction of the High Court, the plaintiff sought to have the delegate's decision quashed and the defendant compelled to determine the visa application according to law.

The plaintiff argued that it was not open to the delegate to find that the 'home country' of the children was Afghanistan, on the basis that the only finding the delegate could reasonably have made on a correct legal understanding of PIC 4015 was that each of the children was 'usually a resident' of Pakistan. The High Court found that this argument could not be sustained. Assuming the delegate accepted that the children had lived with Mrs Tahiri at an address in Pakistan for over six years before the making the visa application, that factor alone was not sufficient to compel the conclusion that they were each 'usually a resident' of Pakistan. The circumstances of their arrival, the fact that they were illegal residents in Pakistan and the fact that they had recently visited Afghanistan were capable of being considered countervailing factors.

The plaintiff also argued that the only finding the delegate could reasonably have made on a correct legal understanding of PIC 4015 was that Mrs Tahiri was the only person who could lawfully determine where the children were to live. The High Court held that the content of foreign law (in this case who could lawfully determine whether the children live under Afghani law) is a question of fact. In this case, the plaintiff did not establish that the delegate could not reasonably take the view that Afghan law applied to the relationships between the children and their father, if he were alive, and between the children and his relatives, if he were dead.

The High Court also held that there was no breach of procedural fairness. The High Court found that Mrs Tahiri was sufficiently alerted to the critical issues on which the application turned by the letter which set out the terms of PIC 4015 and invited her to provide evidence that PIC 4015 was satisfied in relation to the children. While the High Court acknowledged that the delegate may have referred to undisclosed material, the Court found that that material had not been shown to be adverse in any relevant sense. The delegate did not treat it as contradicting Mrs Tahiri's claim that the husband was missing and did not use it to make any finding as to the husband's current location assuming him to be alive.

RESTORING THE ADJR ACT IN FEDERAL JUDICIAL REVIEW

John McMillan*

The Administrative Review Council report on *Federal Judicial Review in Australia* was the Council's fiftieth report, and its seventh on judicial review.[1] The topic has self-evident importance. Judicial review, plainly stated, embodies a fundamental principle of the Australian legal system, that an independent court system must have the jurisdiction finally and conclusively to determine whether government action is undertaken according to law. That principle is enshrined in the *Constitution*, notably s 75(v), which confers upon the High Court an original jurisdiction to issue three remedies, now described as constitutional writs,[2] to restrain unlawful action and compel lawful action by officers of the Commonwealth.

If judicial review is to operate as a practical mechanism for resolving disputes between citizen and government, there must be a court option and a mechanism that is more accessible to the community than the High Court applying s 75(v). That explains why the *Administrative Decisions (Judicial Review) Act* (Cth) (*ADJR Act*) was enacted in 1977, and why the Federal Court and later the Federal Magistrates Court were given jurisdiction under that Act to entertain proceedings.

The *ADJR Act* has served the Australian community and Australian jurisprudence well. Legal proceedings touching a great many areas of government administration have been commenced under the Act, including taxation, broadcasting, migration, customs, health services, aboriginal heritage protection, pharmaceutical regulation, and personnel decision making.

ADJR actions have been commenced by individuals, corporations, other governments and public interest groups. Many leading cases in Australian administrative law were decided under the *ADJR Act* – including *Kioa*[3] on natural justice, *Sean Investments*[4] and *Peko-Wallsend*[5] on the obligation to consider relevant matters, *Schlieske*[6] on unauthorised purpose, *Tickner*[7] on Ministerial decision making, *Curragh Mining*[8] on the no evidence principle, *Mudginberri*[9] on the statutory duty to provide a service, *Wattmaster Alco*[10] on judicial review remedies and *North Coast Environment*[11] on standing.

The principles enunciated in those cases were tied to the provisions of the *ADJR Act*, and have shaped the development of administrative law and public administration in Australia.

The reason the *ADJR Act* has had a marked and positive influence on law and administration is that it provides a clear and coherent structure for judicial review:

- the Act specifies who can commence proceedings (s 3(4)), how the proceeding are to be commenced (s 11) and when a third party can join an ADJR proceeding (s 12);

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* *Prof John McMillan has been an ex officio member of the Administrative Review Council from 2003, as Commonwealth Ombudsman (2003-10) and Australian Information Commissioner (2010-12). This paper was presented at an Australian Institute of Administrative Law seminar, Canberra, 4 December 2012.*

- it defines the range of Commonwealth decisions and actions that are reviewable under the Act (s 3), and the decisions excluded from review (s 3(1), Schedule 1);
- it lists 18 grounds on which decisions and conduct can be set aside by a court (ss 5, 6);
- it sets out the relief that can be granted by a court when a breach of a ground of review is established (s 16); and
- it assists a person to obtain a written statement of reasons for a decision prior to commencing proceedings (s 13).

For many years the *ADJR Act* operated as the principal template for federal judicial review but there was always a latent weakness in the ADJR design. The Act placed limitations on the right to commence judicial review proceedings, both by excluding some Commonwealth decisions from review under the Act (Schedule 1) and by placing time limitations on when proceedings must be commenced (s 11). A person could circumvent those restrictions by instead commencing proceedings in the original jurisdiction of the High Court under s 75(v). That section provides more opaquely that the High Court can issue *mandamus*, prohibition or an injunction against an officer of the Commonwealth.

An early measure to plug that gap was the enactment in 1983 of s 39B of the *Judiciary Act 1903* (Cth). That section gave the Federal Court a supplementary jurisdiction expressed in similar terms to the High Court's s 75(v) jurisdiction. This lessened the risk that the High Court, which is primarily an appellate court, would receive an unworthy batch of judicial review cases in its original jurisdiction. Section 75(v), after all, is meant only as a constitutional safeguard of the rule of law lest no other court or mechanism has jurisdiction to restrain unlawful government action.

In its early years s 39B did not detract from the role of the *ADJR Act* as the principal template for federal judicial review. What changed – and, in truth, muddied – the picture was the removal, after 1992, of migration decision making from the *ADJR Act*. The Parliament took that step in reaction to a dual trend: what it saw to be a pattern of judicial overreach in review of migration decisions that was at odds with a newly-established system for merit review of adverse migration decisions; and a steady and dramatic increase in the migration caseload in the Federal Court under the *ADJR Act*.[12]

The removal of migration decisions occurred in two stages. In the first stage (in 1992) the Parliament enacted a new Part 8 in the Migration Act to replace both the *ADJR Act* and s 39B. Part 8 set out new and different rules for migration review. The grounds on which a migration decision could be challenged were narrower than those in the *ADJR Act*; and the Federal Court could not extend a tight 28 day time limit for commencing proceedings. Put simply, this measure did not stem either the increasing volume of migration review cases, nor judicial adventurism in extending the limited grounds further than the Parliament might have expected. A consequence, illustrated by *Aala*[13] in 2000 and *Miah*[14] in 2001, was that proceedings that would not succeed in the Federal Court were instead commenced in the High Court.

The second and more dramatic stage in curtailing migration review occurred in 2001 in the wake of the Tampa incident. A privative clause was enacted which declared expansively that a migration visa decision 'is final and conclusive' and 'must not be challenged, appealed against, reviewed, quashed or called into question in any court; and is not subject to prohibition, mandamus, injunction, declaration or certiorari in any court on any account'.[15]

There was no genuine expectation that the courts would entirely discontinue judicial review of migration decisions. Indeed, another section of the Migration Act acknowledged that an application could be made in the High Court under s 75(v), but that the application must be made within 35 days of the actual decision and the High Court could not extend that period.[16] It was not entirely clear how the courts would react to the privative clause, but a predictable outcome that has now become embedded in Australian jurisprudence is that the privative clause does not prevent a court from granting a constitutional remedy and setting aside a decision if there was a jurisdictional error.[17]

At the risk of oversimplification, the current position can be summarised in the following three points:

- Migration review constitutes the major portion of federal judicial review, as it has for nearly two decades. For example, in the period 2003-11, 1,744 migration applications were filed in the Federal Magistrates Court, compared to 56 administrative law applications under the *ADJR Act* and s 39B.
- In other areas of government administration, a growing trend is that actions are commenced under s 39B, either jointly with or instead of an ADJR application. For example, ten years ago the ratio of s 39B to ADJR matters was approximately 1 to 15, but is now roughly equal.
- The legal concepts of jurisdictional error and the constitutional writs, which have dominated migration review, now permeate other areas of federal judicial review, as well as State judicial review.[18] In practice, the concept of jurisdictional error is steadily replacing the ADJR grounds of review as the context for defining legality.

That is the major dilemma that faced the Administrative Review Council (ARC) in its examination of federal judicial review. We were concerned that the *ADJR Act* is being overtaken by s 39B and the constitutional review jurisdiction. The majority of the Council believed that the *ADJR Act* is the preferable template for federal judicial review, with simple procedures, defined remedies, and listed grounds.[19]

Beyond the courtroom, the ADJR principles and grounds have a wider value of elucidating the principle of legality and instilling administrative law values in government administration. There is wide recognition throughout the public service of core ADJR grounds, such as natural justice, relevant and irrelevant considerations, unauthorised purpose, inflexible application of policy, good faith, unreasonableness, evidence based decision making, and reasons for decision.

This growing divergence between constitutional judicial review and statutory judicial review is undesirable. There is a risk of confusion and incoherence in administrative law jurisprudence. At the beginning of any decisional task a public servant should be able to make the straightforward inquiry 'what is expected of me to act lawfully?' It has become far more difficult to answer that question applying concepts that stem from jurisdictional error and the prerogative and constitutional writs.

What can be done? The Council considered five options for a new framework for federal judicial review.[20]

1. Repeal both s 39B and the *ADJR Act* and develop a new judicial review framework, based perhaps on a new concept that the role of the courts is to control the exercise of public power or the discharge of public functions. This was an option

favoured in some of the submissions the Council received, from academics in particular. However, the Council did not believe that the Parliament would embrace this option. It would open the door to a new era of judicial innovation, perhaps judicial adventurism, and would remove that element of certainty and predictability that administrative decision makers crave in judicial guidance. Pragmatically, there is unlikely to be any appetite within government or parliament for an untested and uncertain model of judicial oversight. The direction of public policy for the last couple of decades has been in the opposite direction.

2. Repeal s 39B only. This is not feasible as s 39B enables the Federal Court to exercise the High Court's constitutional review jurisdiction. Repeal of s 39B could result in an undesirable upswing in federal judicial review proceedings being commenced in the High Court's original jurisdiction.

3. Repeal the ADJR Act only. This was the preferred option in a minority report written by the Secretary of the Attorney-General's Department. However, the remainder of the Council did not support this option, for a number of reasons. One concern is that repeal of the *ADJR Act* would deprive Commonwealth administrative law of a great many benefits that the ADJR brings to administrative decision making and judicial oversight. We risk abandoning a comprehensive body of jurisprudence that has been developed and settled over thirty years. Another risk is that repeal of the *ADJR Act* may be read (or misread) as a legislative invitation to courts to develop a new set of principles about the scope of judicial review and the principles for lawful decision making.

4. Extend the ADJR Act to include the s 39B and constitutional review jurisdiction. The simple way of doing this would be to remove all limitations from the *ADJR Act* and provide that proceedings can be commenced against any decision, action or conduct by a Commonwealth agency or officer. The ADJR procedures, remedies and grounds of review would apply to any such proceeding.

This approach, while attractive on the surface, would be unworkable. Many of the ADJR grounds of review presuppose a decision made under an enactment.[21] To revise the ADJR grounds to extend to all decisions made by an officer of the Commonwealth under statutory or executive power would rewrite the current principles for lawful decision making in a way that might open the door to uncertainty, creativity and adventurism in judicial review.

Equally, to provide explicitly that judicial review can apply to any action, decision or conduct of an officer of the Commonwealth might undermine decades of jurisprudence stemming from the *Bond*[22] decision. It confines judicial review to final and determinative administrative actions, and does not extend to all preparatory and interim administrative actions.

5. Amend the *ADJR Act* to host two, separate sources of jurisdiction. This was the preferred option of the majority of the Council. One source of jurisdiction would be the existing ADJR jurisdiction; the other would reflect the s 75(v)/s 39B jurisdiction. Both jurisdictions would be administered by the Federal Court and the Federal Magistrates Court.[23]

As to the ADJR jurisdiction, there would be little change. In scope the jurisdiction would embrace decisions of an administrative character made under an enactment, though some categories of decision would be excluded, as noted below. There would be little change to the *ADJR Act* grounds of review, the definition of standing, the way that proceedings are commenced and the remedial powers of the courts.

As to the s 75(v)/s 39B jurisdiction, the *ADJR Act* would provide that a person who could otherwise initiate a proceeding under Constitution s 75(v) could instead do so under the

ADJR Act, seeking relief on the ground of jurisdictional error. The action would be commenced using the simple procedure in s 11, and the courts could grant the remedies listed in s 16. That is, a party would not apply as at present for *mandamus*, prohibition or an injunction. The ADJR grounds would not apply, as some of those grounds presuppose a decision of an administrative character made under an enactment, rather than action taken by an officer of the Commonwealth. In addition, the concept of jurisdictional error is so immutably tied to the s 75(v)/s 39B jurisdiction that it cannot be removed by a simple stroke of the legislative pen.

The principal attraction for litigants to commence a s 39B-type action under the *ADJR Act* would be the simpler ADJR procedures and remedial options. A party could instead apply to the Federal Court under s 39B, but there would be no apparent advantage in doing so.

Procedural simplicity is not, however, the main objective in housing the statutory (ADJR) and constitutional review (s 75(v)/s 39B) jurisdictions under the one ADJR roof. The Council's objective is to draw attention back to the original ADJR framework, and to remind prospective litigants (or their counsel) that it provides a suitable framework for general judicial review. To the extent that actions are still commenced jointly under the statutory and constitutional review jurisdictions, there would hopefully be a closer integration and alignment over time of substantive jurisprudence on the ADJR grounds of review and the doctrine of jurisdictional error. The benefit from that trend would be a more coherent and integrated body of legal principle to guide decision makers on the requirements for lawful decision making. A greater alignment of statutory and constitutional judicial review would arrest the present trend that they are steadily growing apart.

Would this new scheme work? The Council acknowledges that it is an unconventional approach that is not free of doubt. Yet we saw it as the only viable option for retaining the primacy of the *ADJR Act* and accepting the reality that there must be a jurisdiction in the Federal Court and Federal Magistrates Court to match the High Court's s 75(v) jurisdiction. The Council's hope is that reliance on s 39B would become less common and the *ADJR Act*, hosting two sources of jurisdiction, could serve once again as the main template for federal judicial review.

One drawback of the Council's preferred approach is the need for special arrangements to maintain the exclusion of selected areas of decision making from ADJR review. Alongside the *ADJR Act* there are three other active statutory schemes for judicial review:[24]

- appeals from the Administrative Appeals Tribunal to the Federal Court on a question of law under the *Administrative Appeals Tribunal Act 1975* (Cth) s 44 (*AAT Act*);
- review of tax assessment and some other tax decisions by the AAT and the Federal Court under Part IVC of the *Taxation Administration Act 1953* (Cth); a party can apply directly to the Federal Court for review of a taxation decision, or apply to the AAT and possibly thereafter to the Federal Court under s 44 of the *AAT Act*; and
- review of migration decisions under Part 8 of the *Migration Act 1958* (Cth), essentially by applying to the Federal Magistrates Court for review under s 39B of the *Judiciary Act 1903* (Cth) on the ground of jurisdictional error.

The schemes for AAT appeals and taxation review have operated separately and successfully for decades and the Council saw little advantage in abolishing those arrangements and substituting ADJR review. As to migration review, the Council's preference is to repeal Part 8 and make migration decisions reviewable under the *ADJR Act*, as they were prior to 1992. However, migration review is a high profile, volatile and intensive

area of judicial review, and it is more pragmatic to deal separately with this issue following the more general reform of federal judicial review outlined earlier.

The Council took a similarly pragmatic approach in relation to other features of the *ADJR Act* by which decisions are excluded from ADJR review.

One feature is that the Act applies only to decisions made under an enactment. Two contentious areas of non-statutory decision making that are accordingly outside the ADJR scope are decisions made under the scheme for Compensation for Detriment Caused by Defective Administration (CDDA) and contracting and procurement decisions.[25]

Decisions in those areas can at present be challenged under s 39B, but this is uncommon and would come up against doctrinal uncertainty about the justiciability of decisions that involve the exercise of executive power. Those decisions are guided by executive guidelines rather than defined legal standards, which makes judicial scrutiny of a non-statutory decision a problematic venture. Flexibility is meant to be the hallmark of executive schemes, concerning their creation, funding, administration and revision in response to changing circumstances. In most areas of non-statutory decision making, separate effective arrangements have been developed for administrative oversight and review.[26]

The Council preferred to retain that ADJR limitation on decisions made under an enactment. Non-statutory decision making would, in theory at least, still be reviewable under s 39B, and under the parallel jurisdiction with simpler procedures that would be housed under the ADJR roof. There may over time be a gradual development in judicial review activity that would provide a pointer to the viability of establishing a new judicial review scheme that applied re-fashioned grounds of review to all administrative decision making both under legislation and the executive power.

Even here, however, the Council opted to place a brake on judicial review of CDDA decision making. In principle, a person who is denied administrative compensation should have the option of judicial review, but the Council's concern was that an outbreak of litigation in that area would threaten the continuation of this valuable compensation scheme. As an executive scheme it can be limited or dismantled as quickly as it was created. Consequently, CDDA decisions should be excluded altogether from the *ADJR Act* with its simpler procedures; the only option for judicial review should be under *Constitution* s 75(v) or the *Judiciary Act* s 39B.

Another limiting feature is that the *ADJR Act* applies only to decisions of an administrative character. It is not therefore possible under the *ADJR Act* directly to challenge the validity of subordinate legislation.[27] This can be done indirectly under the *ADJR Act*, by asserting that an administrative decision is invalid by reason that it was made under an invalid subordinate legislative instrument. A direct challenge could also be brought under s 39B of the Judiciary Act, though there is great uncertainty as to how the constitutional writs and the doctrine of jurisdictional error would apply to the making of subordinate legislation.

The Council chose not to disturb that arrangement, although a direct challenge could henceforth be brought under the simpler procedures applying to the s 75(v)/s 39B component of an enlarged *ADJR Act*. A strong reason for not removing the ADJR reference to decisions of an administrative character is that it is unclear how many of the current ADJR grounds of review could apply to decisions of a legislative character. Grounds that are difficult to apply include breach of natural justice, failure to consider relevant matters, not considering a relevant matter, and inflexibly applying a policy rule. Another consideration is that there is a robust accountability scheme for subordinate legislative activity based in the *Legislative Instruments Act 2003*, that includes parliamentary scrutiny and disallowance.

A few other important recommendations in the ARC report can be briefly noted. The Council recommended that decisions of the Governor-General should fall under the *ADJR Act*, except for decisions relating to the administration of the Department of Defence, the calling out of the military forces and statutory appointments and terminations.[28] Some of the excluded areas of decision making listed in Schedule 1 to the *ADJR Act* should be removed, whereas some others should be retained (for example, the exclusion for the commencement of criminal justice and civil penalty proceedings).[29] The Council proposed simpler principles for extending review to government reports and recommendations.[30] The rules on standing should be clarified to assist public interest organisations to bring actions under the *ADJR Act*.[31] The no evidence ground of review should be clarified, but other ADJR grounds of review should be unchanged.[32] The Act should provide that parties to an ADJR proceeding will bear their own costs, unless a court orders otherwise.[33] There is also a recommendation to encourage the recording of reasons at the time a decision is made, rather than upon request.[34] Failure by an agency to prepare adequate reasons should be a factor taken into account by a court in making a costs order.

The ARC report on federal judicial review provides a timely and comprehensive analysis of a large and important area of the legal system. The recommendation that is likely to attract the most attention and debate is the Council's majority recommendation on aligning statutory and constitutional review. In that and in other areas the guiding thread of the report is that the right to judicial review, enshrined in the Constitution, should be an accessible mechanism that enhances administrative justice and the rule of law, but must operate alongside other exigencies of government.

Endnotes

1 Administrative Review Council, *Federal Judicial Review in Australia*, Report No 50 (2012). Earlier ARC reports covered *The Scope of Judicial Review*, Report No 47 (2006); three reports on *Review of the Administrative Decisions (Judicial Review) Act*, Report No 33 (1991), Report No 32 (1989) and Report No 26 (1986); and two reports on *ADJR Act* amendments (Report No 9 (1980) and Report No 1 (1978). Many other reports have discussed judicial review in relation to matters such as migration decisions, customs decisions, appeals, notification of review rights, contracting out and business regulation.
2 *Re Refugee Review Tribunal; Ex parte Aala* (200) 204 CLR 82.
3 *Kioa v West* (1985) 159 CLR 550.
4 *Sean Investments Pty Ltd v Mackellar* (1981) 38 ALR 363.
5 *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24.
6 *Schlieske v Minister for Immigration and Ethnic Affairs* (1988) 84 ALR 719.
7 *Tickner v Chapman* (1995) 133 ALR 226.
8 *Curragh Queensland Mining Ltd v Daniel* (1992) 34 FCR.
9 *Mudginberri Station Pty Ltd v Langhorne* (1985) 68 ALR 613.
10 *Wattmaster Alco Pty Ltd v Button* (1986) 70 ALR 330.
11 *North Coast Environment Council Inc v Minister for Resources* (1994) 127 617.
12 See R Creyke & J McMillan, *Control of Government Action: Text, Cases and Commentary* (3rd ed, 2012) at 47-48; and J McMillan, 'Regulating Migration Litigation after Plaintiff M61', Report to the Minister for Immigration and Citizenship (Nov 2011).
13 *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 57.
14 *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57.
15 *Migration Act 1958* (Cth) s 474.
16 *Migration Act 1958* (Cth) s 486A. The removal of the Court's power to extend a time limit was declared invalid in *Bodruddaza v Minister for Immigration and Multicultural Affairs* (2007) 228 CLR 651.
17 Eg *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476.
18 *Kirk v Industrial Relations Commission of NSW* (2010) 239 CLR 531.
19 The view of the majority of Council is outlined in Chapter 4 of the Report. A dissenting approach, called a 'Jurisdictional Limits Model', supported by the Secretary of the Attorney-General's Department, Mr Roger Wilkins AO, is explained in Appendix A to the report.
20 See Chapters 4 and 7 of the Report.
21 Eg 'procedures that were required by law to be observed' (s 5(1)(b)), 'the decision was not authorised by the enactment in pursuance of which it was purported to be made' (s 5(1)(d)), 'an improper exercise of the power conferred by the enactment' (s 5(1)(e)) (which is then spelt out in nine other grounds in s 5(2)), and 'the person who made the decision was required by law to reach that decision only if a particular matter was established' (s 5(3)(a)).

22 *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321. See Creyke & McMillan, note 12 above at 77-93.
23 In May 2012 the Attorney-General announced that the name of the Court would be changed, following public consultation: Attorney-General N Roxon, Media Release, 'New Title to Reflect Importance of Federal Magistrates Court', 29 May 2013.
24 Report, Chapter 6.
25 Report at 78-91.
26 Eg as to CDDA decision making see Commonwealth Ombudsman, *Putting Things Right: Compensating for Defective Administration*, Report No 11 (2009), and *Executive Schemes*, Report No 12 (2009).
27 Report at 98-103.
28 Report at 108-11.
29 Report, Chapter 5 and Appendix B.
30 Report at 92-98.
31 Report, Chapter 8.
32 Report, Chapter 7.
33 Report at 190-191.
34 Report, Chapter 9.

JUDICIAL REVIEW: A JURISDICTIONAL LIMITS MODEL

Roger Wilkins AO
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In its recent report the Administrative Review Council concluded that 'the primary issue facing the federal judicial review system is that in practice there are two systems of review.'[1] These are 'constitutional review' (under section 75(v) of the *Constitution* or section 39B of the *Judiciary Act 1903* (Cth)), and 'statutory review' (under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (the *ADJR Act*). Unsurprisingly, the growing divergence between the two systems has caused confusion and overlap.

To address this divergence, there are two possible approaches. The first approach, preferred by the Council, is to amend the *ADJR Act* to align it more closely with the constitutional jurisdiction.

The second possible approach, which I personally support, is outlined in Appendix A to the *Report.* It would involve repealing the *ADJR Act* and instead relying solely on constitutional review, supplemented by statutory jurisdictional limits.

What is the jurisdictional limits model?

The jurisdictional limits model was originally suggested in a 2010 article[2] by Justice Stephen Gageler (then Commonwealth Solicitor-General).

Under this model, the *ADJR Act* would be repealed. Judicial review would only be available under section 75(v) of the *Constitution*, or under the mirror jurisdiction in section 39B of the *Judiciary Act*.

This would be supplemented by Parliament setting out in general terms the 'jurisdictional limits' on decision makers—that is, the limits on the power of executive officers to make decisions under statute. Like the grounds in the *ADJR Act*, these limits would reflect the common law expectations of decision makers. For example, the jurisdictional limits might require a decision maker to accord procedural fairness to those affected by the decision, or to follow any procedures required by law in making the decision.

The set of jurisdictional limits is a key feature of this model. Under the constitutional jurisdiction, judicial review is available for 'jurisdictional error' (where a decision maker exceeds his/her jurisdiction). The determination of jurisdictional limits is therefore central to the availability of review.

A clear legislative statement of jurisdictional limits would assist in determining whether a particular decision maker had exceeded his/her jurisdiction. It could be set out in an Act of

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general application, such as the *Acts Interpretation Act 1901* (Cth), and implied in every statute. Where appropriate, a particular statute could provide for more specific limits on decision makers' jurisdiction.

The jurisdictional limits would essentially play a role similar to the grounds of review in the *ADJR Act*, providing a clearly articulated and generally applicable threshold for judicial review.

What would the model look like?

The central features of the model would be:

- the repeal of the *ADJR Act* (although useful features, such as the right to reasons and the flexible remedies should be retained); and

- the development of a set of statutory jurisdictional limits.

There would be a number of ways of accomplishing this. For example, the Federal Court's jurisdiction in section 39B of the *Judiciary Act* could be moved to a new 'Judicial Review Act', which would also contain the right to reasons and remedies for review.

Alternatively, the remedies for review could be included alongside section 39B in the *Judiciary Act*, with the right to reasons also included here, or set out in other relevant legislation such as the *Freedom of Information Act*.

The jurisdictional limits could either be set out in the new 'Judicial Review Act' or included in the *Acts Interpretation Act 1901*, as originally suggested by Justice Gageler.

What are the advantages of a jurisdictional limits model?

The jurisdictional limits model offers a number of advantages.

A single system of judicial review

This model is the only one which would provide a single system of federal judicial review. Since constitutional review cannot be excluded, to truly achieve a fully unified system of review it would be necessary to repeal the *ADJR Act*.

In practical terms, this would not limit the availability of review; the constitutional review jurisdiction already encompasses and exceeds the scope of review under the *ADJR Act*. The only exceptions to this are review of decisions for non-jurisdictional errors of law and review of decisions made under enactment by persons who are not officers of the Commonwealth. However, both of these exceptions are limited, due to the common law development of these concepts.

A truly unified system of judicial review would arguably improve access to justice by removing the technicalities and confusion created by the availability of two slightly different systems of review.

In particular, this model would remove the need for a separate system for judicial review of migration decisions. This is important because review of migration decisions accounts for the vast majority of applications for judicial review. For example, in 2010–11, 1,213 judicial

review applications were made to the Federal Court and the Federal Magistrates Court in relation to migration decisions. During the same period only 44 applications were made under the *ADJR Act* and 32 under the *Judiciary Act*.[3]

Under the jurisdictional limits model, the scope and grounds of review would be the same for both judicial review and review of migration decisions. This would allow the coherent development of case law in relation to all Australian Government decision making.

Focus on decision makers, not review

Another advantage of the jurisdictional limits model is that it would shift the focus of judicial review from the review stage to the primary decision-making stage.

It has been suggested that the grounds for review in the *ADJR Act* play a significant role in communicating the standards for administrative decision making. In other words, the grounds are supposed to instruct decision makers on their role and powers, in addition to educating those affected by administrative decisions about their review rights.

Neither of these claims bears up well under close consideration. First, the *ADJR Act* grounds affect decision makers only indirectly, by setting out the circumstances in which their decisions may be reviewed. By contrast, a jurisdictional limits model would address decision makers directly by stating judicial review rules in terms of what the decision maker may and may not do.

Second, the *ADJR Act* grounds remain strongly reliant on the common law. As Mason J explained in *Kioa v West*,[4] it is a mistake to suppose that the grounds provide a right of review in relation to all administrative decisions. Rather, the applicability of a particular ground of review to a particular decision must be satisfied at common law before the *ADJR Act* may be engaged. For example, a decision may only be reviewed for compliance with the rules of natural justice where, at common law, the rules of natural justice apply to that decision.

Accordingly, the precise boundaries of the decision maker's power are determined not by the *ADJR Act*, but by limits implied (in the statute) by common law. The jurisdictional limits model would provide greater clarity to those seeking review, as the jurisdictional limits would apply to every administrative decision, unless the statute expressly excluded them.

By shifting the focus from the review process to the decision-making process, the jurisdictional limits model would provide better instruction to decision makers, encouraging better primary decision-making. It would also provide clearer signals to those considering a judicial review application, as to the availability of review.

Reduction of judicial review applications

A further (albeit somewhat speculative) benefit of the jurisdictional limits model would be a possible improvement in the number and quality of judicial review applications.

Such a result might flow from the greater clarity which this model provides. First by encouraging better primary decision making, the model would reduce overall demand for judicial review. Second, by providing clearer signals as to the availability of review, the model could reduce the number of misguided or speculative applications.

A reduction in the judicial review caseload would lessen public expenditure on these matters, as well as improving access to justice by freeing precious court resources for other matters.

Conclusion

The jurisdictional limits model would require a fundamental shift in thinking about judicial review. In essence, the model involves redesigning many of the innovations of the *ADJR Act*, but with a focus on incorporating these into the constitutional review jurisdiction.

- Like the *ADJR Act*, this model seeks to give clear guidance to decision makers about the exercise of statutory power, as well as clearer signals to applicants about the availability of review.

- Like the *ADJR Act*, this model includes a right to reasons, which underpins judicial review, and it offers flexible remedies.

- Like the *ADJR Act*, this model would provide flexibility to determine which limits should be applicable to which decisions. Unlike the *ADJR Act*, however, this would be achieved without sacrificing clarity.

The jurisdictional limits model would provide a complete solution to the problem of bifurcation in our current judicial review system. While the *ADJR Act* embodies a number of excellent developments in administrative law, the *Act* itself is increasingly irrelevant. By salvaging what is useful from the *ADJR Act* and building that into a model centred on the constitutional writs, the jurisdictional limits model would provide the best of both jurisdictions in a single accessible system.

Endnotes

1 Administrative Review Council, *Federal Judicial Review in Australia*, 2012, 72.
2 (2010) 17 *Australian Journal of Administrative Law* 92, 105.
3 Administrative Review Council, *Federal Judicial Review in Australia*, 2012, 66–68.
4 159 CLR 550, 576–77.

THE FOURTH BRANCH OF GOVERNMENT: THE EVOLUTION OF INTEGRITY AGENCIES AND ENHANCED GOVERNMENT ACCOUNTABILITY

Chris Field*

Introduction

Within the concept of an integrity branch of government reside a wide range of particularly interesting legal and policy issues, many of which challenge our traditional understanding of constitutional and administrative law and approaches to good public administration. In this paper I will explore these issues through a focus on the evolution of integrity agencies and their role in enhanced accountability of government.

I have drawn as my starting point the important speech on the integrity branch of government in the first lecture in the 2004 national lecture series for the Australian Institute of Administrative Law by His Honour, Justice Spigelman.[1] I have, however, also drawn on writing that influenced this speech and subsequent writing on the topic, with considerable reflection on the actual practice of integrity agencies.

The concept of integrity

An initial question that obviously arises is whether we are referring to personal integrity or institutional integrity (or, perhaps, both). It seems clear that when we consider branches of government, our focus is on institutional integrity rather than personal integrity, although the latter, as Justice Spigelman observes 'as a characteristic required of occupants of public office, has implications for the former'.[2]

There is clearly very strong interplay between institutional integrity and personal integrity. The former can be established in principle, legislative remit, structure and practice, but not be able to be realised successfully if it lacks occupants without the latter. What do we mean by the word integrity? There is some uncertainty evinced from the relevant literature as to the correct boundaries of integrity. There is reasonably clear agreement that if public administrators act in a way that is corrupt, for example, planning officials accepting bribes or other favours, to give planning permission inappropriately, we can say that they have acted without integrity. Similarly, the agencies tasked with the detection, investigation and reportage of corruption, most typically anti-corruption commissions, can be described as integrity agencies. Indeed, the identification, prosecution and limitation of corrupt activities has been the starting point of most thinking about an integrity branch of government. Professor Ackerman, in one of the first major articles to posit an integrity branch of government,[3] in his words a 'modest proposal'[4], said of it, 'a proposition so obvious that it almost rises to the dignity of a truism: Bureaucracy cannot work if bureaucratic decisions are up for sale to the highest bidder'.[5] Further to this, Justice Spigelman has suggested,

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correctly I think, that the 'clearest example of the distinctiveness of an integrity function over recent decades is the salience that has come to be given to the prevention of corruption'.[6]

The institutionalising of tackling corruption has been the most visible, and sometimes controversial, aspect of the move by the state to fortifying integrity in government.

What though of other conduct that can be seen as less than outright corruption? What of conflicts of interest, pecuniary or other benefits that do not appear on their face to be outright corruption or simply a broad category of public administration sins that can be considered improper conduct?

Professor Ackerman observes that 'once this branch is established, it may be plausible to define its concerns more broadly to include other pathologies beyond outright corruption'.[7] Following this observation, Justice Spigelman used the word integrity to mean 'its connotation of an unimpaired or uncorrupted state of affairs'[8] and flowing from this, that the:

> role of the integrity branch is to ensure that that concept is realised, so that the performance of government functions is not corrupt, not merely in the narrow sense that officials do not take bribes, but in the broader sense of observing proper practice.[9]

The conceptualisation of integrity as meaning the absence of corruption appears to be axiomatic. The call to a wider concept of integrity, one that includes pathologies not just of corruption but other forms of misconduct and improper action seems similarly to be entirely unremarkable – to act with either or both improper motive or conduct is surely to act without integrity. This is not to say that to act improperly is to act less egregiously than to act corruptly, but simply that integrity recognises a band of behaviour and, within that band, a range of acts might properly be characterised as actions lacking in integrity. Indeed, the Western Australian Integrity Coordinating Group, an informal collaboration of the Corruption and Crime Commission, Public Sector Commissioner, Auditor General, Ombudsman and Information Commissioner, defines integrity as: 'earning and sustaining public trust by serving the public interest; using powers responsibly; acting with honesty and transparency; and preventing and addressing improper conduct'.[10]

Beyond my membership of the Integrity Coordinating Group, I personally favour this wider definition of the word integrity – one that incorporates outright corruption, misconduct and a range of improper practices. I do so particularly when considering that the assessment we are making is of public officers acting in a public domain, not private citizens acting in a private domain. Public administrators are entrusted by the public to act solely in their interest, to be seen to be, and actually be, proper, honest and transparent in their dealings and, importantly, they are paid by those members of the public, through taxation, to so do.

Beyond this wider definition, there will be matters that might be considered not matters of integrity, but still matters of poor administration. As administrative lawyers, we would probably characterise this as a broad category of maladministration. The failure to give reasons, honest mistakes, otherwise honest but simply inadequate administrative practice or even well intentioned but ultimately misconceived practices of the executive, that all might be characterised as undesirable but are not matters that necessarily lack integrity. This is not to say that these matters are not ones that may require investigation and remedy, nor that there should not be institutionalised agencies dedicated to improving known errors of administration. Ombudsmen, Public Sector Commissioners and Auditors General are all agencies that might otherwise be conceptualised, quite properly, as being within an integrity branch of government, but will nonetheless sometimes deal with matters not properly cast as lacking in integrity.

The success of the integrity concept

It is important to consider the reason why we place an emphasis, indeed a significantly increasing emphasis over the last few decades, on the importance of integrity, including its recognition in our system of government and its importance to proper administration of the laws of Parliament.

There is no doubt that the idea of an integrity branch of government interests administrative and constitutional scholars, and might excite the interest of progressive and conservative commentators alike as to the relative merits and demerits of considering whether we ought to recognise a new branch of government, but why, in practice, does integrity matter in government? One explanation for the focus on the importance of integrity in government must lie with the expanding functions of government, including functions that involve covert or coercive powers or the deprivation of liberty. These sorts of powers will necessarily (and, I think, properly) attract interest in the assurance of integrity in the exercise of these powers. Alongside and, possibly, in part because of this expansion of the role of government, citizens have come to expect more of government, and perhaps place greater reliance on government, and in turn, integrity agencies.

Another explanation, is the appeal of the new domain of accountability agencies acting to ensure integrity, as opposed to the old domain acting to ensure procedural compliance. As Professor A J Brown has noted 'public accountability is all about compliance … the concept of integrity is all about substance, inextricably linked with ideas of truth, honesty and trustworthiness, whether applied to individuals or institutions'.[11]

Linked to this explanation, and one as familiar to Aristotle as to modern day writers, is the idea that integrity has a clear intrinsic value – it is inseparable from the idea that it is better in any walk of life, including life serving others, to act reliably and with virtue, with fidelity and honesty, responsibly and appropriately, with a clear sense of proper, legitimate purpose and unaffected by the corruptive and perverse.

Integrity in government also matters for its instrumental value – the practical consequences that can be observed from its protection and promotion in civil society. To adapt the words of the great Austrian economist Friedrich Hayek (Hayek was referring to the concept of liberty, rather than integrity), even if integrity is an 'indisputable ethical presupposition …if we want to convince those who do not already share our moral suppositions, we must not simply take them for granted'.[12] To paraphrase Hayek, we must demonstrate that integrity is a source value and that we cannot fully appreciate what government characterised by integrity means unless we know how that differs from one which is characterised by a lack of integrity.[13]

In its most recent 2011 Prosperity Index, the Legatum Institute assessed 110 countries, representing approximately 90% of the world's population, in terms of a series of measures, such as whether a country possesses 'an honest and effective government that preserves order and encourages productive citizenship' or whether it features 'transparent and accountable governing institutions'.[14] In the 2011 Prosperity Index, Australia finished third and only a marginal amount separated us from Finland and Denmark. What becomes quickly apparent about those countries at the top of the Prosperity Index is that they are countries that have fundamental adherence to the rule of law, a significant absence of institutionalised corruption and high levels of integrity in governance. The exact opposite correlation is observed at the bottom of the Prosperity Index.

I do not wish to be overly triumphalist about the success of modern democratic government characterised by a separation of powers, respect for the rule of law and hallmarked by integrity. This form of government has faults. Furthermore, even a passing acquaintance

with comparative constitutionalism suggests that there are variations on how to constitute the accretion and exercise of state powers in a way that is characterised as being done with integrity. In my view, however, and to paraphrase Winston Churchill, democratic governments that enshrine integrity within their framework are the worst form of government, apart from every other form of government that has ever been tried.

The integrity branch - its conception and agencies

In his AIAL national lecture, Justice Spigelman proposed:

> that the integrity branch or function of government is concerned to ensure that each governmental institution exercises the powers conferred on it in the manner in which it is expected and/or required to do so and for the purposes for which those powers were conferred, and for no other purpose.[15]

As His Honour notes, this is a definition with a strong resonance in administrative law. The scope of the integrity activities of government certainly has been seen in practice to include at least this definition, but as I indicated earlier, a wider scope has been established including 'earning and sustaining public trust by serving the public interest; acting with honesty and transparency; and preventing and addressing improper conduct'.[16] Putting the concept of integrity into the day-to-day practice of public administrators, the Western Australian Integrity Coordinating Group suggest that integrity is demonstrated by:

> public sector employees who serve the public interest with integrity by avoiding actual or perceived conflicts of interest and not allowing decisions or actions to be influenced by personal or private interests; use their powers for the purpose, and in the manner, for which they were intended; act without bias, make decisions by following fair and objective decision-making processes and give reasons for decisions where required; and behave honestly and transparently, disclosing facts, and not hiding or distorting them. This includes preventing, addressing and reporting corruption, fraud and other forms of misconduct.[17]

It is trite, but true, to observe that integrity agencies, such as the Auditor General and Ombudsman, exist within government, although their exact constitutional categorisation will vary – some may be recognised formally in their state's Constitution as they are in Victoria or be formally designated officers of the Parliament as they are, for example, in Western Australia. Equally, it is trite, but true, to observe that a range of integrity functions exist within the wider mandate of the Executive, alongside the integrity functions of the Legislature and the Judiciary. What is less immediately evident is the significant level of overlap of integrity functions among the existing branches of government. In Western Australia, my office, a Parliamentary Commissioner and an officer of the Parliament, reviews certain child deaths with a view to making recommendations to prevent or reduce child deaths. The Coroners Court also inquires into these deaths, for the purpose of determining cause of death, but quite properly may also recommend changes to public administration to prevent future deaths arising from similar circumstances. The work of parliamentary standing or select committees on public administration may necessarily traverse areas of administration examined by agencies of the Executive; internal review mechanisms within government departments will cover very similar ground, and often with similar investigatory methodologies, as external review by integrity agencies. Corruption identification and prevention is clearly a pursuit of the Legislative, Judicial and Executive branches, including integrity agencies specifically established as anti-corruption bodies.

The idea of the integrity branch is, in fact, a recognition that within the three traditional branches of government there are a range of integrity functions that are undertaken and, in part, the growth of these functions and integrity agencies, now warrants consideration of whether we ought to consider the formal recognition of a fourth branch of government, the integrity branch. As Justice Spigelman observes:

> [m]any of the existing institutions of the three recognised branches of government including the Parliament, the head of state, various executive agencies and the superior courts, collectively constitute the integrity branch of government.[18]

The recognition of a new branch of government is, as I alluded to earlier, a matter of considerable contest. The question becomes not that integrity institutions exist, as they plainly do, but whether the undertaking of integrity functions should be, in Professor Ackerman's words 'endowed with constitutional dignity'.[19] According to Professor Ackerman:

> endowing this effort with constitutional dignity is more than a symbolic gesture. If there is ever a moment when a country can get institutionally serious about corruption it is at a constitutional convention where long run structural conventions may win a rare moment of public attention.[20]

What is less contestable is that we can identify a very mature and continually expanding framework of agencies, functions and activities in our system of government that has at its heart the protection and promotion of institutional and personal integrity. While, Professor Ackerman has suggested that the 'credible construction of a separate "integrity branch" should be a top priority for drafters of modern constitutions'[21] and that this new branch 'should be armed with powers and incentives to engage in ongoing oversight',[22] there is no need for any constitutional contortions to identify, and critically analyse, an integrity framework of government.

Integrity agencies and functions of government have increased both in number and in scope. As an example, since the creation of the office of the Western Australia Ombudsman forty years ago, successive Western Australian governments have created a range of offices that include the Office of the Public Sector Standards Commissioner, now the Public Sector Commissioner, the Corruption and Crime Commission and an office of the Parliamentary Inspector of the Corruption and Crime Commission, an office of Inspector of Custodial Services and an office of Information Commissioner.

The development of the integrity branch of government is ultimately a reflection of the fact that as we take stock of these developments we can see a large growth over recent decades that has added significant institutional bulk to agencies that existed prior to our more recent interest. It also reflects, however, the change in the nature of individual institutions.

Issues for the integrity framework of government

I consider that there are three key challenges for the integrity framework.

1. Overreaching

Shortly after I commenced my role as Ombudsman, I was entering one of the main government buildings in Perth to attend a meeting of the Western Australian Integrity Coordinating Group. I happened to encounter a colleague and friend who asked where I was going and, following my response, quipped something along the lines of 'now that is a group setting itself up to fail'. This is less a case of, in the words of famous philosopher Groucho Marx, suggesting that he wouldn't want to join a club that would have him as a member and much more a case of the thoughts of the eminently less frivolous Adam Smith. Smith, the great Scottish moral philosopher and founder of modern economics, famously stated in his seminal work, *The Wealth of Nations*:

> The statesman who should attempt to direct private people in what manner they ought to employ their capitals would not only load himself with a most unnecessary attention, but assume an authority which could safely be trusted, not only to no single person, but to no council and senate whatever, and which

> would nowhere be so dangerous as in the hands of a man who had folly and presumption enough to fancy himself fit to exercise it.[23]

Many holders of senior statutory office, particularly in the anti-corruption sphere, could readily relate to being loaded with the unnecessary attention that undertaking their role invites. Similarly, most such officers will have at least paused to consider, if not dwelt for some extended period, on the almost sage like level of expertise required, combined with sustained humility, to ensure that one does not become that man or woman so dangerous in folly and presumption as Smith warned against.

Reflecting on the Chinese forebears of the fourth branch concept, Justice Spigelman observed that:

> [O]f course, like any other branch of government the censorate was liable to develop institutional interests of its own. There is a natural tendency in any surveillance mechanism to come to believe that the administration of government exists for the purposes of being investigated.[24]

Ultimately, public administration exists for the singular purpose of advancing the public good and integrity institutions only fulfil their mandate when, with great humility given their great powers, they ensure that administrators are not, in the widest sense of the word, corrupted in achieving that singular purpose.

Much consideration of our integrity framework focuses in on its accountability function. We must, however, also consider its regulatory function.[25] Integrity institutions, as Justice Spigelman correctly observes, do not just judge integrity, they seek to recommend, determine or implement new ways of undertaking administration that is seen as an improvement on that which they found.[26] My experience completely accords with that of Professor John McMillan and Ian Carnell when they observed that 'government agencies take the work of the review agencies seriously, in responding to their investigations and their reports and in implementing their recommendations'.[27] Indeed in each of the last five years, agencies have accepted 100% of my recommendations. Here, too then, we must guard against overreaching, including considering the regulatory burden of our recommendations for improvement.

It cannot be overstated that, insofar as any integrity institution was to ever believe that public administration could necessarily be improved in every instance, without regard to cost, opportunity cost or unintended consequence, would be to introduce a fatal level of hubris to the otherwise vital task of administrative oversight and improvement.

Simply put, designing the public good with perfectly good intentions is easier than implementing those intentions perfectly as a range of public policies from American prohibition of the past through to the pink batts scheme of today bear as a reminder. Integrity institutions must not just have good intentions when seeking to improve the work of public administrators, they must have a clear series of principles and mechanisms in place that seek to ensure that the investigations they choose, how the investigations are undertaken and the recommendations for improvements that the investigations make, are needed, evidence-based and ensure that the cost of implementing and undertaking the improvement is outweighed by its benefit.

Another form of overreaching is interference in matters that are properly matters of democratically elected assemblies. As Professor Ackerman has observed of the integrity branch, 'the broader its jurisdiction, the more it can disrupt the operations of the politically responsible authorities'.[28]

As an example, the Ombudsman is an officer of the Parliament and subordinate to the Parliament. The Ombudsman must show extreme care not to become a de-facto rule-maker, nor question the laws of the Parliament outside that which Parliament has empowered the Ombudsman to do in its enabling legislation. As an unelected official, the Ombudsman neither has the democratic mandate, nor can he/she be held to account in the same way as elected members of Parliament. For those aggrieved about the integrity of laws made, and those who make them, there is, of course, a highly cleansing level of integrity protection held approximately every three to four years in each Australian jurisdiction. The Ombudsman, however, generally does have the capacity to consider whether Parliament's laws are fair and reasonable in their application and can make recommendations to the Parliament accordingly.

2. Accountability

The accountability of integrity agencies might be described, in short, as 'who guards the guardians', or as Professor Ackerman, describes it 'once we have created our constitutional watchdogs, we must take steps to keep them under control'.[29]

Those operating within the integrity framework do so with very high levels of independence and very high levels of investigatory powers. Typically, the independence of these officers will be such that they can, within an overall legislative framework and convention, exercise significant discretion in how they undertake their role of integrity oversight.

It is critical that agencies of the state, particularly ones that keep to account the integrity of others, act themselves with unimpeachable integrity. A necessary corollary of keeping others to account is a preparedness for oneself to be kept to account. This is required for confidence in the system of integrity oversight, both public confidence and the confidence of those that are subject to oversight.

This is not to suggest that these integrity institutions operate without accountability. Plainly, there are a range of accountability mechanisms in place, including their need to seek appropriations, self regulatory codes and policies, a variety of codes that apply to institutions in receipt of consolidated revenues, parliamentary oversight and oversight of other oversight agencies such as the Ombudsmen, Auditors General or anti-corruption commissions. Certain institutions hold such significant powers that the state has seen fit to create oversight agencies dedicated to these institutions alone. The office of the Parliamentary Inspector of the Western Australian Corruption and Crime Commission, staffed as it has been by eminent members of the Western Australian bar, is one such example.

Simply put, that there is inevitably tension between the need for high levels of independence on one hand, and appropriate levels of accountability on the other, must be an ongoing consideration for the state and integrity institutions themselves.

3. Cost

The third issue I want to consider is the cost of the integrity framework. There seems little doubt that the price of integrity in government is one which the public values and for which it is worth paying, but not, of course, at any cost. Almost all institutions and functions within the integrity framework (perhaps with the exception of certain areas of regulation that might be considered integrity oversight) are paid for by taxpayers. It follows, of course, that the cost of this framework is one that increases the taxation burden on taxpayers, or alternatively, is an opportunity cost to other things that the community values and which require the expenditure of public monies.

It is for this reason it continues to be important that the integrity framework is delivered at least cost, and is prepared, in an ongoing way, to consider whether it can undertake what it does more efficiently, including considering whether the framework can realise economies of scale or scope. It seems to me that one obvious matter that needs to be kept under periodic review is whether the proliferation of multiple niche integrity agencies should be consolidated into overarching integrity bodies.

There are a number of other ways that the integrity agencies might ensure that they are operating at least cost. One obvious way is that agencies will generally be subject to regular audit, particularly by the Auditor General. Another is that agencies can seek to enhance efficiency through cooperation and comparative benchmarking, such as through models like the Western Australian Integrity Coordinating Group.[30] The Western Australian Integrity Coordinating Group was formed in January 2005 'to promote policy coherence and operational coordination in the ongoing work of Western Australia's core public sector integrity institutions'.[31] The cooperation and consistency:

> is to be achieved through public awareness, workplace education, prevention, advice and investigation activities with respect to integrity themes identified by ICG members as suitable for collaboration.[32]

The terms of reference of the Integrity Coordinating Group are:

1. Fostering collaboration between public sector integrity bodies.
2. Encouraging and supporting research, evaluation and policy discussion to monitor the implementation of integrity and accountability mechanisms in Western Australia, and other jurisdictions, nationally and internationally.
3. Inspiring operational cooperation and consistency in communication, education and support in public sector organisations.[33]

An interesting recommendation of the National Integrity System Assessment was the establishment of Governance Review Councils to promote policy and operational coordination between integrity institutions and integrity functions. As Professor A J Brown has observed 'we rely on many key integrity institutions to collaborate and cooperate, and we can expect them to act coherently in the overall task of helping ensure the appropriate exercise of power'.[34]

Another is through periodic government efficiency dividends. Organisations, including integrity agencies, are not perpetually and immutably optimally efficient and these efficiency mechanisms may, depending on the circumstances, have a role to play.

One final observation is really a question posed for further thought. As noted, Australia sits at, or very near, the top of most international transparency and anti-corruption indices. This raises an interesting question of how much more should be spent on integrity and accountability in government (beyond, of course, that which we currently spend). The cost of further improvement might be expensive for small gains, at least comparatively speaking. The trick, of course, is to spend such that we maintain our very high standards without incurring either inappropriate marginal cost, gold-plating our integrity framework such that it is inherently inefficient or increase the likelihood of downstream regulatory cost through excessive accountability mechanisms.

Rule of law[35]

A central component of the role of the integrity branch is to 'reduce the complexity, arbitrariness and uncertainty of the administrative application of law'.[36] The integrity branch does this in a variety of ways, including by investigating complaints from citizens, through

investigations of their own motion, through regular or special audit and, increasingly, through a range of monitoring, inspectorate and supervisory roles, often related to the exercise of coercive or covert powers or the deprivation of liberty. Through the performance of these functions the integrity agencies have become an important procedural safeguard against the abuse of integrity in the modern state.

The agencies within the integrity branch, however, have a role beyond, or perhaps more correctly, before, ensuring that the laws of Parliament are administered with integrity. This role is in relation to the rule of law. The rule of law is a complex notion but, in the words of Hayek:

> [s]tripped of all its technicalities [it] means that government in all its actions is bound by fixed rules and announced beforehand – rules which make it possible to forsee with fair certainty how the authority will use its coercive powers in given circumstances, and to plan one's individual affairs on the basis of this knowledge.[37]

The rule of law is also about control, or more precisely, in the words of Professor John McMillan, about 'controlling the exercise of official power by the executive government'.[38] The rule of law, as Hayek describes it, is not a 'rule of the law, but a rule concerning what the law ought to be, a meta-legal doctrine or political ideal'.[39] It is a legal doctrine that, in my view, integrity agencies should unashamedly identify, promote and protect. This is so because, again quoting Hayek:

> while [the importance of procedural safeguards] is generally recognized, it is not understood that they presuppose for their effectiveness the acceptance of the rule of law … and without it, all procedural safeguards would be valueless.[40]

This does not diminish in any way the importance of a procedural role in ensuring administrative compliance of integrity agencies, a role whose 'value for the preservation of liberty can hardly be overstated',[41] but simply that the rule of law prefigures this role.

Conclusion

In conclusion, we have undoubtedly become familiar with the idea of integrity oversight. But, as Professor John McMillan and Ian Carnell have observed 'the familiarity of this model of independent review should not detract from the profound nature of this change in government'.[42] Indeed, so profound has this change been, to access to administrative justice and procedural remedy on one hand, to the creation of a range of accountability agencies dedicated to integrity protection and promotion on the other, that it has come to suggest a new branch of government. According to Professor Ackerman, 'the mere fact that the integrity branch is not one of the traditional holy trinity should not be enough to deprive it of its place in the modern separation of powers'.[43]

Whether we recognise the integrity branch of government as a separate branch or not will be a matter of ongoing debate. But even if we do not, the fact that we are debating and discussing this issue allows us to ensure that there is ongoing attention given to the purpose and work of integrity agencies and the proper construction, boundaries and operation of the integrity framework. That is a level of attention that will benefit us all.

Endnotes

1 A revised version subsequently published as J J *Spigelman*, '*The Integrity Branch of Government*' (2004) 78 ALJ 724.
2 Ibid 725.
3 Professor Bruce Ackerman, 'The New Separation of Powers', 113 *Harvard Law Review* 3, 642.
4 Ibid 691.

5 Ibid.
6 Spigelman, n 1 above, 728.
7 Ackerman, n 3 above, 693.
8 Spigelman, n 1 above, 725.
9 Ibid.
10 Integrity Coordinating Group at http://www.opssc.wa.gov.au/ICG/Integrity_in_the_WA_public_sector/ Integrity_and_conduct.php (viewed 2 August 2012).
11 Dr A J Brown, 'Putting Administrative Law Back into Integrity and Putting the Integrity Back into Administrative Law' (2007) 53 *AIAL Forum* 51.
12 Friedrich Hayek, *The Constitution of Liberty* (Routledge Classics, 1960) 5-6.
13 Ibid.
14 The 2011 Legatum Prosperity Index at http://www.prosperity.com/ (viewed 2 August 2012).
15 Spigelman, n 1 above, 726.
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18 Spigelman, n 1 above, 726.
19 Ackerman, n 3 above, at 691.
20 Ibid 692-3.
21 Ibid 691.
22 Ibid.
23 Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations*, (Edwin Cannan, ed. 1904), Library of Economics and Liberty. Retrieved 3 August 2012 from http://www.econlib.org/library/ Smith /smWN.html.
24 Spigelman, n 1 above, at 725.
25 Professor Ackerman introduces the idea of a fifth branch of government to sit alongside the integrity branch and the three traditional branches: Ackerman, n 3 above, 693. This idea is interesting and worthy of further exploration, particularly in light of the development of financial, consumer, economic and other regulators operating in all Australian jurisdictions.
26 Spigelman, n 1 above, 726.
27 Professor John McMillan and Ian Carnell, 'Administrative Law Evolution: Independent Complaint and Review Agencies' (2010) 59 *Admin Review* 35.
28 Ackerman, n 3 above, 693.
29 Ibid 692.
30 Similar mechanisms exist in other Australian jurisdictions.
31 Integrity Coordinating Group at http://www.opssc.wa.gov.au/ICG/About_Us/ (viewed 2 August 2012).
32 Ibid
33 Ibid.
34 Brown, n 11 above, 35.
35 This section of the paper expands upon material set out in Chris Field, 'The Ombudsman and the Constitution of Liberty', Address to the 26th Australasian and Pacific Ombudsman Regional Conference, 25 March 2011, Taipei, Taiwan.
36 See the Rule of Law Institute of Australia, Objectives at http://www.ruleoflawaustralia.com.au/ objectives.aspx (viewed 2 August 2012).
37 Friedrich Hayek, *The Road to Serfdom* (Routledge Classics, 1944) 75-76.
38 Professor John McMillan, 'The Ombudsman and the Rule of Law, Address to the Public Law Weekend', Canberra, 5-6 November 2004 at http://www.ombudsman.gov.au/files/5-6_November_2004_ The_ Ombudsman_and_the_rule_of_law.pdf (viewed 2 August 2012).
39 Friedrich Hayek, n 12 above, 191.
40 Ibid.
41 Ibid.
42 McMillan and Carnell, n 27 above, 2.
43 Ackerman, n 3 above, 691.

THE PUBLIC INTEREST REVISITED – WE KNOW IT'S IMPORTANT BUT DO WE KNOW WHAT IT MEANS?

Chris Wheeler*

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Acting in the public interest is a concept that is fundamental to a representative democratic system of government and to good public administration. However, this commonly used concept is also, in practice, particularly complex.

There are at least three major obstacles to public officials acting in the public interest:

- firstly, while it is one of the most used terms in the lexicon of public administration, it is arguably the least defined and least understood – few public officials would have any clear idea what the term actually means and what its ramifications are in practice;
- secondly, identifying or determining the appropriate public interest in any particular case is often no easy task; and
- thirdly, while some have argued that it is relatively easy to do the right thing once you have identified what the right thing is,[1] in practice people often do not have the will or courage to do the right thing, for example to argue with their political masters or senior managers, or to apologise when at fault.

The concept – acting in the public interest

Public officials have an overarching obligation to act in the public interest. They must perform their official functions and duties, and exercise any discretionary powers, in a way that promotes the public interest that is applicable to their official functions.

The primary purpose of (non-elected) public officials is to serve. This primary purpose can be seen as having four dimensions:

- to serve the public interest;
- to serve the Parliament and the government of the day (not applicable to all public officials);
- to serve their employing agency (where applicable); and
- to serve the public as customers or clients.

Associated with each of these four dimensions of service are various standards of conduct with which public officials in democratic countries are commonly expected to comply, each

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with its own objective(s). Experience has shown that there will be times when a public official will need to balance conflicting or incompatible conduct standards or objectives – where the public official has to make a decision that will serve one objective, but not another, or one more than another. While there is some flexibility inherent in the various conduct standards with which public officials are commonly expected to comply, the fundamental principle must be that public officials must resolve any such conflicts or incompatibilities in ways that do not breach their obligation to act in the public interest – the overarching obligation.

The importance of acting in the public interest was emphasised by the Royal Commission into the commercial activities of the government sector in Western Australia (the WA Inc. Royal Commission). In its report the WA Inc. Royal Commission said that one of the two fundamental principles[2] and assumptions upon which representative and responsible government is based is that '[t]he institutions of government and the officials and agencies of government exist for the public, to serve the interests of the public'.[3]

The Royal Commission noted that this principle (the 'trust principle') '…expresses the condition upon which power is given to the institutions of government, and to officials, elected and appointed alike'. Later in its report, it noted that '[g]overnment is constitutionally obliged to act in the public interest'.[4] This mirrored a statement made in a 1987 judgment of the NSW Supreme Court, Court of Appeal that '…governments act, or at all events are constitutionally required to act, in the public interest',[5] and a statement made in a 1981 judgment of the High Court of Australia that '…executive Government…acts, or is supposed to act, … in the public interest'.[6]

This does not mean, of course, that what is in the interest of executive government should automatically be considered to be in the public interest.[7]

The meaning – trying to define the 'public interest'

Can the 'public interest' be defined?

Equivalent concepts to the public interest have been discussed since at least the time of Aristotle (*common interest*), including by Aquinas and Rousseau (*common good*) and Locke (*public good*).

Although the term is a central concept to a democratic system of government, it has never been definitively defined either in legislation[8] or by the courts. Academics have also been unable to give the term a clear and precise definition. While there has been no clear interpretation, there has been general agreement in most societies that the concept is valid and embodies a fundamental principle that should guide and inform the actions of public officials.

The public interest has been described as referring to considerations affecting the good order and functioning of the community and government affairs for the wellbeing of citizens. It has also been described as being for the benefit of society, the public or the community as a whole.

In its 1979 report on the then draft Commonwealth Freedom of Information Bill, the Australian Senate Committee on Constitutional and Legal Affairs described the public interest as, '…a convenient and useful concept for aggregating any number of interests that may bear upon a disputed question that is of general – as opposed to merely private – concern'.[9]

The Committee also said that the:

> … 'public interest' is a phase that does not need to be, indeed could not usefully, be defined... . Yet it is a useful concept because it provides a balancing test by which any number of relevant interests may be weighed one against another. …the relevant public interest factors may vary from case to case – or in the oft quoted dictum of Lord Hailsham of Marylebone 'the categories of the public interest are not closed'.[10]

The meaning of the term has been looked at by the Australian courts in various contexts. In one case the Supreme Court of Victoria said:

> [t]he public interest is a term embracing matters, among others, of standards of human conduct and of the functioning of government and government instrumentalities tacitly accepted and acknowledged to be for the good order of society and for the well being of its members. The interest is therefore the interest of the public as distinct from the interest of an individual or individuals…[11]

In another case the Federal Court of Australia said:

> The expression 'in the public interest' directs attention to that conclusion or determination which best serves the advancement of the interest or welfare of the public, society or the nation and its content will depend on each particular set of circumstances…
>
> The expression 'the public interest' is often used in the sense of a consideration to be balanced against private interests or in contradistinction to the notion of individual interest. It is sometimes used as a sole criterion that is required to be taken into account as the basis for making a determination. In other instances, it appears in the form of a list of considerations to be taken into account as factors for evaluation when making a determination...
>
> The indeterminate nature of the concept of 'the public interest' means that the relevant aspects or facets of the public interest must be sought by reference to the instrument that prescribes the public interest as a criterion for making a determination…[12]

In the context of a statutory public interest test, the High Court described the term as:

> …classically import[ing] a discretionary value judgement to be made by reference to undefined factual matters, confined only 'insofar as the subject matter and the scope and purpose of the statutory enactments may enable…given reasons (to be pronounced) definitely extraneous to any objects the legislature could have had in view'…[13]

The dilemma faced by those trying to define the public interest was summed up in another case as follows:

> The public interest is a concept of wide meaning and not readily limited by precise boundaries. Opinions have differed, do differ and doubtless always will differ as to what is or is not in the public interest.[14]

The term was referred to in the following more colourful, but pragmatic, terms by an American commentator:

> Plainly the 'public interest' phrase is one of those atmospheric commands whose content is as rich and variable as the legal imagination can make it according to the circumstances that present themselves to the policy maker (under the supervision of the courts of course).[15]

What is not in the public interest?

In some ways it is easier to distinguish what is in the public interest from what is not. For example the public interest can be distinguished from:

- the *private interests* of particular individuals – public interest is distinguishable from private interest because it extends beyond the interests of an individual (or possibly even a group of individuals) to the interests of the community as whole, or at least to a particular group, sector or geographical division of the community. However, even such a statement must be qualified because there are some circumstances where an individual's private interests – in privacy and procedural fairness for example – are regarded as being in the public interest;
- the *personal interests* of the decision-maker (including the interests of members of their families, relatives, business associates, etc) – public officials must always act in the public interest ahead of their personal interests and must avoid situations where their private interests conflict, might potentially conflict, or might reasonably be seen to conflict with the impartial fulfilment of their official duties;
- *personal curiosity* – ie what is of interest to know, that which gratifies curiosity or merely provides information or amusement[16] (to be distinguished from something that is of interest to the public in general);[17]
- *personal preferences* - for example, the political or philosophical views of the decision-maker, or considerations of friendship or enmity;
- *parochial interests* – ie the interests of a small or narrowly defined group of people with whom the decision-maker shares an interest or concern; and
- *partisan political interests* - for example the avoidance of political/government or agency embarrassment.[18]

These can be categorised as 'motivation' type issues that focus on the private, personal or partisan interests of the decision-maker (and possibly also those of third parties).

What does the 'public' mean?

Most attempts to describe what is meant by the 'public interest' refer to the 'community', 'common' good or welfare, 'general' welfare, 'society', 'public', or the 'nation'. However, the issue of what constitutes the 'public' in 'public interest' has largely been unexplored.

When addressing this issue, academic commentators and judicial officers have taken it as a given that the 'public interest' relates to the interests of members of the community as a whole, or at least to a substantial segment of them - that it should be distinguished from individual, sectional or regional interests.[19] At the other end of the spectrum it is also widely accepted that the 'public interest' can extend to certain private rights of individuals – rights that in many societies are regarded as being so important or fundamental that their protection is seen as being in the public interest, for example privacy, procedural fairness[20] and the right to silence.

However this conceptualisation of the public interest fails to identify and address an important implication. In my view the public interest must also be able to apply to the interests of groups, classes or sections of a population between those two ends of the spectrum. The 'public' whose interests are to be considered can in practice validly consist of a relatively small group, class or section of a total population.

The size and composition of the 'public' whose interests should in practice be considered in relation to any particular decision or outcome will be dependent on, or at least be strongly influenced by, such factors as the:

- *legal context* – the jurisdiction and role of the decision-maker;

- *operational context* – the particular issues to be addressed and the decision to be made;
- *political context* – whether the decision-maker is a representative of a group, class or section of the public that has, or is perceived by the decision-maker to have, a particular interest in and views about the decision to be made, eg the decision-maker's political party and/or electorate (maybe better described as the political 'reality'); and
- *personal context* – whether the decision-maker has strong personal, philosophical or political preferences on the issue, or is subject to the direction of, or whose continued employment or career prospects are dependent on, the support of a person with such views on the issue.

Sub-groups of a total population that could be considered to be the relevant 'public' whose best interests need to be considered by a decision-maker might be geographically based, ie the residents of a particular area. This can be seen most clearly in a federal system of government such as Australia. For example:

- in relation to the exercise of a discretionary power at the national level, the 'public' could refer to all residents of Australia (or a particular part of Australia or segment of the Australian population);
- for a state public official, the 'public' whose interests are relevant will primarily be the residents of that state (or some particular part of the State or segment of the State's population); and
- for a local public official, the 'public' would primarily be the residents of the local area (or some particular locality or neighbourhood).

Decision-makers at different levels of government, or in equivalent but separate levels of government (eg separate states or local councils), will therefore have different views as to the 'public' that is relevant to their decision. One consequence of this is that they can have very different, but possibly equally valid, views as to what constitutes the 'public interest' in relation to the same issue.

In the local government context another consequence is that decisions made by elected local councils relating to the development of their area can be expected to be largely based on a perception of the public interest, which is focussed primarily on the interests of the people who own land, live and/or work in that area. While legislation could require local elected decision-makers to consider a broader public interest extending beyond their council boundaries, given that their electorate is the local residents, it is arguable that such a requirement may have little effect in practice. In recognition of this parochial approach by local councils, over recent years a system has been introduced to ensure that state and regionally significant planning and development proposals are considered and/or determined by bodies that include both local government and the state government representatives (eg the Planning Assessment Commission, Joint Regional Planning Panels, the Local Planning Panel and the Central Sydney Planning Committee).

Sub-groups of a total population that could be considered to be the relevant 'public' whose best interests need to be considered by a decision-maker might also include groups or classes of the general population. For example, indigenous people, farmers, school students, first home buyers, residents of an area (particularly objectors) close to a proposed development, etc: certain decisions made for the benefit of such groups could be seen as being in the 'public interest'. As another example, while anti-discrimination legislation would be in the general public interest, the inclusion of each category of discrimination or each requirement to prevent a particular type of discrimination, that affects a specific group of the population, could be argued to be primarily in the interests of that group.

The possibility of an interest of a section of the public being 'in the public interest' was acknowledged in at least one court case, where the High Court of Australia said that:

> [t]he interest of a section of the public is a public interest but the smallness of the section may affect the quantity or weight of the public interest so that it is outweighed by [another public interest]. It does not, however, affect the quality of that interest.[21]

Apart from this weight issue, in practice, the interests of a small section or sector of the public may not be considered to be in the public interest if they are seen as being contrary to the interests of the broader public. Conversely, certain basic rights or interests of minorities are seen in many societies as sufficiently important for their protection to be seen as in the public interest, even if the protection of those interests does not directly advance the interests of the majority.

While decision-makers can be expected to be significantly influenced by their perception of the group, class, or section of the population that constitutes the 'public' whose interests they must consider, this does not mean that broader or higher public interests will be ignored. In practice it can be seen that there is in effect a hierarchy of interests, for example the high level shared *values* of a society[22] would, where relevant, be the foundation for decision-making by public officials at all levels of that society. These shared values would include respect for significant private rights.

The next level down of the hierarchy would be general public interest (for example the protection of the urban environment, the interests of the residents of a local government area, or the provision of social welfare for persons in need). At the base of the hierarchy would be private interests (for example the interests of an objector to a local development proposal or issues about a person's entitlement to social welfare benefits).[23] It could be argued that the decision-making process in the public interest would involve decisions made at each level of the hierarchy not being contrary to an interest ranked at any higher level.

So what does the term mean?

In my view, in relation to the decision-making in particular, the meaning of the term, or the objective of or approach indicated by the use of the term, is to direct consideration towards matters of broad public concern and away from private, personal, parochial or partisan interests.

In trying to find a meaning for the term, it is important to draw a distinction between the question and its application – between what '*is*' the public interest as a concept, and what is '*in*' the public interest in any particular circumstance.

While the meaning of the 'public interest' stays the same, the answer to the question what is 'in' the public interest will depend almost entirely on the circumstances in which the question arises. In fact it is this 'rich and variable'[24] content which is what makes the term so useful as a guide for decision-makers.

It is actually possible to determine what is meant by the '*public interest*' if a distinction is drawn between the concept and its application. The public interest might best be seen as the approach to be adopted in decision-making rather than a specific and immutable outcome to be achieved.

The application – identifying and assessing relevant public interests

What are the dimensions of the public interest?

In relation to the application of the 'public interest' concept to public administration, in my view it is helpful to look at the requirement on public officials to act in the public interest as comprising four separate dimensions. These dimensions are:

- *outcomes* – ie the objectives and the substance of the decisions made by the decision-makers, as well as the advice given to decision-makers, are in the public interest;
- *inputs* – ie the matters considered by the decision-maker in making decisions are in the public interest;
- *process* – ie the processes, procedures and practices followed by the decision-maker are in the public interest; and
- *conduct* – ie the conduct or approach of the decision-maker is in the public interest.

Most discussion and debate about public interest issues focuses on the outcome dimension – about whether the outcome of decisions and the decision–making procedure, including the advice given to decision-makers, was in the public interest. In relation to outcomes, the meaning of the term, or the approach indicated by the use of the term, is to direct consideration away from private, personal or partisan interests towards matters of broader concern.

It is equally important that the inputs – the matters considered by the decision-maker – also reflect the public interest. Relevant inputs would include:

- considering relevant matters and not considering irrelevant matters;
- exercising powers for the proper purpose;
- giving appropriate weight to matters based on their relative importance/significance;
- complying with government and agency policy; and
- avoiding bias.

In relation to the process or procedure dimension, there is also a public interest that those involved:

- comply with legal requirements;
- act impartially, including the absence of discrimination, or acting apolitically in the performance of official functions (of course this is not applicable to elected public officials);
- demonstrate fairness in the exercise of discretionary powers, including procedural fairness, the giving of reasons, etc;
- act reasonably, including with proportionality;
- ensure confidentiality, where this is appropriate; and
- demonstrate proper accountability and transparency, including making appropriate records, accepting proper scrutiny, facilitating public access to information, etc.

In relation to the conduct or approach of public officials, there is a public interest in those involved being perceived to be:

- acting in good faith (ie honestly, within power and for the proper purpose);
- avoiding or properly managing situations where private interests conflict or might reasonably be perceived to conflict with the impartial fulfilment of official duties; and
- showing respect for individuals (eg courtesy, consideration, respect for rights such as civil liberties, privacy, etc).

How can the public interest be identified?

Assessment of the public interest – inputs, process, and conduct

Identifying how the public interest applies to inputs, procedures and conduct is a relatively clear cut process. The rules that guide such assessments are set out in detail in such things as statutory statements of values,[25] standards of conduct and/or criteria, in the principles of administrative law, codes of conduct, and expositions of the requirements of good administrative practice set out in integrity agency guidelines.

Assessment of the public interest – outcomes

a) A three stage process

Identifying how the public interest applies to outcomes, ie objectives and decision-making, can be a much more complicated and uncertain process than in relation to inputs, process and conduct. While it is generally accepted that the term cannot be given a fixed and precise content, this does not mean that public officials have an unfettered discretion in their assessment of what is in the public interest in any given circumstance. In nearly all cases they must be guided by factors such as applicable legal obligations, government and organisational policies, and lawful directions from Ministers or management.

The assessment as to how the public interest applies in any particular circumstance can be thought of as a three stage process (although depending on the circumstances the first and second stages might overlap):

- firstly, identification of the relevant population – the 'public' whose interests are to be considered in making the decision;
- secondly, identification of the relevant public interests applicable to an issue or decision; and
- thirdly, an assessment and weighing of each relevant public interest, including the balancing of conflicting or competing public interests.

b) Identifying the relevant public

The **first step** for the decision-maker is to be clear about which people, or which group, class or section of the general population is the relevant 'public' (or 'publics' if several different groups, classes or sections are involved) whose best interests must be considered in making the decision.

c) Identifying the relevant public interests

The **second step** for the decision-maker is to identify the public interests that should guide the exercise of his/her discretionary powers. In other words, (non-elected) public officials exercising discretionary powers must determine the specific public interest objective(s), criteria and/or other obligations that apply. This can be done by reference to three sources of information:

- *Primary sources:*
  - *the objects clauses in legislation or, in the absence of such provisions the spirit (intention) of legislation identified from the terms or provisions that establish either the agency or its functions, from explanatory memoranda or from relevant second reading speeches;*
  - *the terms of legislation that establish the agency and/or give it functions and powers; or*
  - *any regulations that set out the functions and powers of an agency.*

- *Secondary sources:*
  - *government policy (including council policy where relevant);*[26]
  - *plans or policies made by or under statutory authority, approved by the Governor and/or published in the Government Gazette, approved by Cabinet or a Minister;*
  - *Ministerial directions; or*
  - *plans or policies approved by the agency or a particular authorised public official.*

- *Tertiary sources:*
  - *agency strategic/corporate/management plans; or*
  - *agency procedure manuals and delegations of authority.*

If all else fails (ie there are no primary, secondary or tertiary sources), perhaps as a last resort consideration could be given to the statements of duties of the decision-maker's position.

d) Assessing and weighing public interest objectives

The **third step** for a decision-maker is to assess and apply weightings/levels of importance to the identified public interest objectives (over and above the three sources of information referred to earlier). Options available for making assessments as to what is in the public interest and the relative weightings to be given to competing or conflicting public interests would include: the revealed majority views or opinions of the public; the views of the elected representatives of the people (eg the Parliament or a local council); the views of the responsible Minister; or an objective assessment by an impartial person of the public interests likely to apply.

In practice, basing assessments and decisions as to what is in the 'public interest' on the revealed majority opinion of the 'public' is not a workable option as:

- often the public does not have the full picture or may be misinformed; a matter could be in the public interest even if it is not reflected by the revealed preferences or opinions of the majority, eg an issue about which the public is unaware or unconcerned, a matter could

be in the public interest even if it is contrary to the revealed preferences or opinions of the majority, eg tax increases for public purposes; and

- there are matters where the 'ends' are clearly supported by the majority (eg improved defence), but the means are not (eg increased taxation), particularly where both may validly be considered to be in the public interest.

Basing assessments on the views of the elected representatives of the people is a far more appropriate and workable option. One way of looking at a democratic system of government is that it provides a process through which conflicting points of view of what constitutes the 'public interest' can be identified and considered in the development of policy and the making of decisions. A fundamental rationale for the Parliamentary process of debate, for example, is to allow the community's elected representatives to assess competing interests and make informed decisions that are in the public interest.

At the risk of oversimplification, a complicating factor is that while the starting point for public officials to assess the public interest would usually be to identify what the public 'needs' (ie what is in the general interest of the public), the starting point for many politicians would usually be to identify what the public 'wants' (ie what are the likely views of the electorate). However, in a world of increasingly professionalised party-politics, parties and governments place increasing resources and effort behind attempting to shape and influence what the public might appear to want, in ways that are conducive to their own electoral prospects. The theory of democratic responsiveness has to be reconciled with the reality of the ways in which legislators generally, and Ministers in particular, can shape conceptions of the public interest to suit what might also be their own short term or more private interests.

Unfortunately, in practice open public debate is often hampered by a number of factors, including excessive (if not obsessive) government secrecy; news media not always acting responsibly; contract employment of senior public officials and the ease with which some can be removed, which does not foster the giving of frank and candid advice to Ministers; and the fact that the growth over time in influence (and numbers) of the personal staff of Ministers has not been balanced by increased levels of accountability.

In an ideal world, decisions as to what is in the public interest might be made by a decision-maker who is rational, dispassionate/disinterested and altruistic[27] (although in the real world we can only hope to approximate this ideal). This may be achieved through such means as healthy, open public debate on issues of genuine 'public interest' contention; effective use of academic and non-government expertise in transparent processes that throw light on issues of contention; and the contributions of an independent but responsible news media. Most important, however, is an apolitical and professional public service prepared to formulate reasoned interpretations of the public interest and present these back to government and then see its role as acting in accordance with the lawful instructions issued by (and being guided by the views of) the relevant Minister and/or Cabinet.

In practice the views of public officials about what is in the public interest can be influenced (either consciously or subconsciously) by factors such as:

- self-interest – for example, continued employment by keeping the Minister happy;
- organisational interest – for example, viewing the public interest through the narrow lens of their organisation's interests rather than a whole-of-government perspective; and
- political interest – for example, a blanket acceptance that whatever their Minister wants must be in the public interest.

There can also be a temporal dimension to many assessments of what is in the public interest:

- the present – considerations including current environmental, organisational, political, economic and/or social priorities; and
- the future – considerations relating to long term viability, environmental sustainability, flexibility (eg keeping options open), including protecting historical works, artefacts and records of official business.

Clearly there is no simple answer. As Professor Geoff Gallop said in a 13 July 2010 article in *WA Today*:

> …the public interest can't be found by way of mathematical or political calculation. It is an aspiration to find the mix of policy that best represents the interests of the whole community.

e) Balancing conflicting or competing public interests

In practice, a decision-maker will often be confronted by a range of conflicting or competing public interest objectives or considerations. As part of the third step, decision-makers need to balance any such conflicting or competing public interests. Such a weighing up and balancing exercise is usually based on questions of fact and degree.[28]

As was noted in the *McKinnon* case:

> The public interest is not one homogenous undivided concept. It will often be multi-faceted and the decision-maker will have to consider and evaluate the relative weight of these facets before reaching a final conclusion as to where **the** public interest resides. This ultimate evaluation of the public interest will involve a determination of what are the relevant facets of the public interest that are competing and the comparative importance that ought to be given to them so that 'the public interest' can be ascertained and served. In some circumstances, one or more considerations will be of such overriding significance that they will prevail over all others. In other circumstances, the competing considerations will be more finely balanced so that the outcome is not so clearly predictable. For example, in some contexts, interests such as public health, national security, anti-terrorism, defence or international obligations may be of overriding significance when compared with other considerations.[29]

Where there are conflicting or competing public interests, it may be possible to address them through compromise or prioritisation. Sometimes it may be more appropriate to choose the 'least worst' option – the decision that causes the least harm rather than the most good. While there may be circumstances where public interest objectives are entirely incompatible, where one must be chosen at the expense of the other, in practice it is more likely that there will be degrees of incompatibility between various objectives.

Every policy decision, such as a decision to build a road or to approve a development application, requires a weighing up and balancing of interests, at least to some extent. Most cases will not have a win/win outcome – there will be winners and losers. The decision-maker needs to consider all of those who may be affected as individuals, but more importantly how the community at large may be affected.

The kinds of conflicts or incompatibilities that often arise include:

- where a decision would advance the interests of one group, sector or geographical division of the community at the expense of the interests of another – such a decision can be in the public interest in certain circumstances, for example, granting resident parking permits near popular destinations may be in the public interest even though it

inconveniences non-residents, because it helps to ensure residents are not overly inconvenienced by people visiting nearby areas;

- where a decision may affect people beneficially and detrimentally at the same time – for example a decision to improve public safety by operating CCTVs on every street corner may improve security but also may restrict the privacy of individuals. Where two government organisations are responsible for advancing different causes which both provide some benefit to the public – for example, it is likely that in many respects a body responsible for protecting the natural environment and a body responsible for harvesting forestry products have equally valid but conflicting views about the public interest; and
- where a decision requires a balancing of one public interest consideration over another – for example in the NSW *Government Information (Public Access) Act 2009* (*GIPA Act*) there are balancing tests that the Parliament has seen fit to impose in relation to certain exemption clauses, ie that public interest considerations against disclosure, on balance, outweigh the public interest considerations in favour of disclosure (s 13).

Who is obliged to act in the public interest?

A wide range of people and organisations have public official functions or are obliged to act in a public official capacity.

No longer can it be said that it is only public officials who are obliged to act in the public interest. More and more public functions have been contracted out to outside of government, for example:

- professionals (eg lawyers, private certifiers, etc);
- contractors (eg to operate correctional centres or immigration detention centres, etc); or
- NGOs (eg for the provision of a range of 'community services', etc).

Any person or organisation exercising public official functions or obliged to act in a public official capacity is, for the purpose of and while doing so, obliged to act in the public interest. Which dimensions of the public interest apply to such persons or organisations, and to what extent, will depend on the precise nature of the public official roles performed and particularly whether any statutory powers are being exercised.

One example that illustrates this point relates to private sector lawyers retained to advise or represent public sector agencies or officials. Just like their public sector counterparts, in performing such roles private sector lawyers are obliged to consider the broader public interest (not just any narrow or personal interests of their client) and to give advice that promotes or preserves the public interest. Lawyers acting for the public sector must act and advise their client/employer to act ethically, and within both the letter and the spirit of the law. In this regard, the obligation to act in the public interest may at times require the lawyers acting for the public sector to give advice that is unpalatable or disadvantageous to their client/employer agency.

Another example is private sector contractors, including NGOs, who perform public official functions or who act in a public official capacity. The public interest outcomes they are to achieve and other public interest considerations, should largely be addressed (either explicitly or implicitly) in the terms of the contract, MOU, licence, or relevant statutory provisions, that govern the performance of their role. They are also expected to comply with relevant process and perform their public interest obligations (for example, complying with legal requirements, acting impartially, demonstrating fairness, ensuring confidentiality, acting in good faith, avoiding conflicts of interests and showing respect for individuals).

Complying with statutory public interest tests

The situations addressed through legislation are often so complex that it is not possible for the legislature to comprehensively cover all matters that should be taken into account by decision-makers. In such circumstances it is not uncommon for legislation to identify a number of public interest type issues or matters to be considered by decision-makers in exercising their discretionary powers, and then to add a general 'catch-all' public interest test. As the majority in the High Court of Australia said:

> …the expression 'in the public interest', when used in a statute, classically imports a discretionary value judgment to be made by reference to undefined factual matters, confined only 'in so far as the subject matter and the scope and purpose of the statutory enactments may enable…'.[30]

In NSW, nearly 190 Acts require that the public interest be considered when implementing the Act or in making particular administrative decisions under the Act.[31] The form of words used in Acts includes the '*the public interest'*, '*in the public interest'*, '*contrary to the public interest'*, '*inconsistent with the public interest'*, and '*necessary in the public interest'*.

Statutory public interest tests usually fall into one of the following four categories:

1. whether something should be done (ie whether something is 'in' the public interest);
2. whether something should be permitted to be done (ie is permissible in the public interest);
3. whether something should not be done or is not permitted to be done (ie whether something is 'contrary' to the public interest); or
4. a catch-all consideration over and above various specific considerations set out in the statute (ie decision-makers must 'consider the public interest').

As noted earlier, in practice the nature and scope of the public interest considered relevant by a decision-maker in complying with such a statutory test will be significantly influenced by the nature and scope of the decision-maker's powers, jurisdiction, etc.

Section 15 of the NSW *GIPA Act* is designed to assist decision-makers in determining whether certain actions would be contrary to the public interest. Given the impossibility of properly defining the public interest, this Act does so by specifying matters that are considered to be irrelevant to such an assessment, for example, that disclosure of documents:

- could cause embarrassment to or a loss of confidence in the government;[32] or
- could be misinterpreted or misunderstood by any person.

While most statutory public interest tests relate to regulatory or approval provisions or schemes, another type relates to the availability of rights or protections. For example, most of the whistleblower legislation in Australasia contains public interest type tests for determining whether a disclosure is protected. These Acts either refer specifically to 'public interest disclosures'[33] or state that disclosures that comply with the Act are made in the 'public interest'.[34] In relation to each of these Acts, the agency or person who receives a disclosure must make a decision as to whether or not it is protected by the Act (ie a disclosure made in the public interest). Whether or not such protection is available can have serious implications for the person making the disclosure. One difficulty associated with the public interest tests in whistleblower legislation is that, given the different contexts in which they are operating, whistleblowers and the recipients of their disclosures can and often do

have very different conceptions of how important or significant a matter must be to be in the public interest.

Distinguishing between the public interest and the merits of the case

A clear distinction must be drawn between whether on the one hand a decision was made in the public interest and on the other the merits of the decision. Alternatives open to a decision-maker could all be in the public interest, but one might have greater merit. This assessment of merit could be validly based on a range of criteria including any set out in statutes, the policies or priorities of the government of the day or the agency concerned, the availability of resources, public pressure, etc.

In practice, in a number of circumstances the issue will not be whether a decision-maker has correctly identified the public interest, or has made an error in balancing competing public interests, as there will not be any clearly 'right' or 'wrong' answer. The relevant questions will actually be whether a decision was the 'best' decision in terms of the merits, ie the correct (when there is only one decision) or preferable (when a range of decisions is available) decision based on the information available to the decision-maker. For example, in deciding how to allocate government funds between two or more options, each of which is in the public interest (eg between health, education or law and order), whatever decision is made will be 'in' the public interest. In this context, the primary questions that could arise might relate to things such as the merits of the decision to put extra funding into one area and not another (or more funding into one area than another), and/or the appropriateness of the decision-making process.

The proof – demonstrating that the correct decision has been made

In many circumstances public discourse will focus on whether the appropriate public interest has been correctly identified or whether there has been an appropriate balancing of conflicting public interests. At one end of the spectrum will be circumstances where the appropriate public interest considerations are clear from the terms of the relevant legislation. At the other end of the spectrum will be circumstances where there are conflicting public interests that are either very finely balanced or where the appropriate weighting to be applied to each is unclear.

As a generalisation it can be said that decisions made at either end of the spectrum are more easily supportable or defensible than decisions made in the grey area in between – at one end because the 'right' answer is clear and at the other end because there is clearly no 'right' answer and therefore the decision-maker has far more room to move.

Where a decision is contentious or otherwise significant, it should be expected that it is likely to lead to the expression of contrary views and active debate as to the merits. Such an outcome does not mean that the decision was wrong, only that the merits of the decision are being tested in ways that are entirely appropriate in our society. In such circumstances it is important to ensure that any such debate focuses on the merits of the decision and not the conduct or propriety of the decision-maker or the decision-making process. Where decisions are being made in this grey area, it is particularly important for public officials to be able to demonstrate that their decision was made on reasonable grounds, including which public interest issues were considered and the reasons why a particular interest was given precedence.

The more significant or contentious an issue the greater the importance of ensuring that the basis for the decision is properly documented. For example, where a decision or a course of action is being considered by some third party, be it an interest group, opposition MPs,

journalists, regulators, watchdog bodies, tribunals or courts, if the basis for a decision is properly documented this supports the credibility of the decision-maker and the decision-making process in the eyes of that third party, even if there is disagreement with the merits of the decision made. This generally increases the chances that any debate will focus on the merits of the decision and not the conduct of the decision-maker.

Proper documentation also helps to achieve a second important goal in this context. Properly documenting a decision helps ensure that there is adequate rigour in the assessment process, for example, helping to ensure that all relevant factors are taken into consideration and helping to highlight circumstances where decision-makers find themselves wanting to skate over certain difficult or inconvenient issues, or where they are experiencing some difficulty in explaining (or rationalising) the basis on which a decision was made.

Conclusion

Most commentators appear to have taken the view that it is not possible to effectively define the concept of the public interest. In my view, it is possible to determine what is meant by the public interest if a distinction is drawn between the concept and its application.

The public interest is best seen as the objective of, or the approach to be adopted in, decision-making rather than a specific and immutable outcome to be achieved. The meaning of the term, or the approach indicated by the use of the term, is to direct consideration and action away from private, personal, parochial or partisan interests towards matters of broader (ie more 'public') concern. The application of the concept is a separate issue and the answer to the question 'what is in the public interest?' will vary depending on the particular circumstances in which the question arises.

There are two separate components of the public interest – the process/ procedure component and the objectives/ outcomes component. In relation to the objectives/ outcome component, identifying what is in the public interest in any given situation is a primary obligation on public officials who are exercising discretionary powers. This is not a simple task and in practice involves an assessment as to:

- who should be considered to be the relevant public?
- what are the relevant public interest issues that apply?
- what relative weightings should be given to various identified public interests and how should conflicting or competing public interests be addressed?

While in many cases there will be no clear answer to these questions, it is important that a conscientious attempt is made to find appropriate answers, and that the decision-maker is able to demonstrate that the appropriate approach was followed and all relevant matters were considered.

Endnotes

1 For example, Lyndon B Johnson is often quoted as saying: 'Doing what's right isn't the problem. It's knowing what's right'.
2 The other fundamental principle was: 'It is for the people of the State to determine by whom they are to be represented and governed'.
3 In Volume 1, Chapter 1, at 1.2.5.
4 In Volume 1, Chapter 1, at 3.1.5.
5 Per McHugh JA in *Attorney General (NT) v Heinemann Publishers Pty Limited* (1987) 10 SLWLR 86 (at p 191) – the Spycatcher Case.
6 Mason J in *Commonwealth of Australia v John Fairfax and Sons Ltd & Ors* (1981) ALJR 45 (at p 49).

7 See Note 5.
8 Attempts have been made in some Acts to define public interest, eg s 24 *Surveillance Devices Act 1998* (WA) states that the public interest 'includes the interests of national security, public safety, the economic wellbeing of Australia, the protection of public health and morals and the protection of the rights and freedoms of citizens'. In some Acts there are also definitions of public interest information, eg SA *Whistleblowers Protection Act 1993.*
9 At 5.25.
10 At 5.28.
11 Appeal Division of the Supreme Court of Victoria in *Director of Public Prosecutions v Smith* [1991] 1 VR 63 (at 75), per Kaye, Fullagar and Ormiston JJ.
12 Full Court of the Federal Court of Australia in *McKinnon v Secretary, Department of Treasury* [2005] FCA FC 142 per Tamberlin J (at 245).
13 *O'Sullivan v Farrer* [1989] HCA 61; (1989) 168 CLR 210 (at para 13), quoting *Water Conservation and Irrigation Commission (NSW) v Browning (1947)* 74 CLR 492 (at 505); most recently quoted by the High Court in *Plaintiff S1O/2011 & others v Minister for Immigration and Citizenship & Anor* [2012] HCA 31.
14 *Right to Life Association (NSW) Inc v Secretary, Department of Human Services and Health* (1995) 128 ALR 238 per Lockhart J.
15 Glen O Robinson, 'The Federal Communications Act: an Essay on Origins and Regulatory Purpose', in M Paglan (ed) *A Legislative History of the Communications Act of 1934*, (Oxford University Press, 1989) (at 16).
16 *Director of Public Prosecutions v Smith* [1991] a VR 63 (at pp 73-75), *R v Inhabitants of the County of Bedfordshire* (1855) 24 LJQB 81 at (p 84) and *Lion Laboratories Limited v Evans* [1985] QB 526 (at p 537).
17 Re *Angel and Department of Arts, Heritage & Environment* (1985) 9 ALD 113 (at 114).
18 A specific factor referred to in some NSW legislation, for example, the *Government Information (Public Access) Act 2009*, s 15, and the *Local Government Act*, s 12(8) and a matter referred to by Mason J in *Commonwealth of Australia v John Fairfax & Sons ltd and Ors* (1981) 55 ALJR 45 at (p 49).
19 *Assessing the Public Interest in the 21st Century: a Framework*, Leslie A Pal and Judith Maxwell, December 2005, External Advisory Committee on Smart Regulation.
20 Per Mason CJ in *Attorney General (NSW) v Quin* (1990) 64 ALJR 627 and Lord Keith in *Glasgow Corporation v Central Land Board* [2956] SC(HL) 1 at p 25.
21 In *Sinclair v Maryborough Mining Warden* (1975) 132 CLR 473 (at p 487) per Jacobs J.
22 For example, those relating to freedom, fairness, justice, health, safety, security, etc.
23 From a societal perspective, such a hierarchy could be seen in some ways as almost the reverse of Maslow's Hierarchy of Needs pyramid.
24 See note 11.
25 See for example s 3B, *Public Sector Employment and Management Act 2002* (NSW).
26 Or, in the Australian Federal context, Statements of Expectation and Intent approved by the relevant Minister (in the Commonwealth context per Uhrig, *Review of the Corporate Governance of Statutory Authorities and Office Holders*.
27 'The public interest may be presumed to be what men would choose if they saw clearly, thought rationally, acted disinterestedly and benevolently', per Lippman, Walter, *Essays in the Public Philosophy* (Little Brown, 1955).
28 Per Mason CJ, Wilson and Dawson JJ said in the *Queensland Electricity Commission; Ex parte Electrical Trades Union of Australia* (1987) 61 ALJR 393.
29 Per Tamberlin J in *McKinnon v Secretary, Department of Treasury* [2005] FCA FC142.
30 *O'Sullivan v Farrer* (1989) 168 CLR 210, per Mason CJ, Brennan, Dawson & Gaudron JJ (at 217).
31 Such Acts include the *Defamation Act 2005*, *Evidence Act 1995*, *Environmental Planning and Assessment Act 1979*, *Government Information (Public Access) Act 2009*, *Local Government Act 1993*, *Ombudsman Act 1974*, *Police Act 1990*, *Privacy and Personal Information Protection Act 1998*, *Public Interest Disclosures Act 1994*, *Public Sector Employment and Management Act 2002*, and *Teaching Service Act 1980*.
32 Reflecting the view expressed by the majority of the High Court in *Osland v Secretary of the Department of Justice* [2008] HCA 37 that '…the risk of political criticism is not of itself a public interest argument against disclosure […of a document] (at para 56).
33 *Public Interest Disclosure Act 2012* (ACT), *Public Interest Disclosure Act 2008* (NT), *Public Interest Disclosure Act 2010* (Qld), *Whistleblowers Protection Act 1993* (SA), *Public Interest Disclosures Act 2002* (Tas), *Public Interest Disclosure Act 2003* (WA), and *Public Interest Disclosures Act 1994* (NSW).
34 *Protected Disclosures Act 2000* (NZ).

SHOULD 'INCONSISTENCY' OF ADMINISTRATIVE DECISIONS GIVE RISE TO JUDICIAL REVIEW?

Emily Johnson*

In a recent Federal Court case,[1] an asylum seeker and her two daughters sought judicial review of a decision by the Refugee Review Tribunal (RRT) that upheld a decision not to grant them protection visas. The applicant's younger sister had been granted a protection visa by the (differently constituted) RRT. Review was sought on the grounds that an unfair and inconsistent decision had been made. The Court, after considering the relevant authorities, concluded that there was no ground of review and indeed no inconsistency that would indicate arbitrariness in the RRT's decision. This follows many decisions by Australian courts and tribunals recognising that consistent administrative decision-making is desirable and that inconsistent decision-making can be indicative of arbitrariness but denying that this gives rise to a duty of consistent decision-making, or a ground of judicial review for inconsistency.

This article considers whether inconsistency of administrative decisions, by primary decision-makers and merit review tribunals, *should* give rise to a ground of judicial review in Australian administrative law. Recently, comments were made by Lord Dyson in the UK Supreme Court[2] about a duty of consistency. In addition, the Australian Administrative Review Council's recent consultation paper sought views on the ambit of a statutory judicial review scheme in this country.[3] This article considers that there could be significant benefits to a ground of review for inconsistency both in terms of good administration and individual justice outcomes. However, for a number of reasons that centre on the conflicts between good administration and individual justice, it does not recommend that inconsistency should be recognised as a ground of review in its own right. The conflicts include the potential impacts on flexibility and responsiveness of the policy process, on other grounds of review, particularly for exercising 'fettered' discretion, and on the implications of the fundamental shift it would reflect in judicial review in Australia.

Underpinning and informing this argument is consideration of the use of 'soft law' by executive governments, including its prevalence, its status and the accountability issues to which it gives rise. In this context, the impact that a judicial review ground for inconsistency would have on soft law is focused on improving bureaucratic decision-making and policy processes by the executive, arising from increased scrutiny of soft law by the judiciary.

Consistency as a principle of administrative law and how to achieve it

Principles of consistency, equality and predictability are fundamental to the rule of law, requiring that laws must be applied equally, and precedent must be followed, absent a justifiable reason.[4] Similarly, consistency is central to the idea of administrative justice, at

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least to the extent that it is widely recognised as an administrative law 'value'. It allows people to order their affairs and is a defence against claims of abuse of power by government decision-makers. The perception of inconsistent decision-making is 'not merely inelegant; it brings the process of deciding into disrepute, suggesting an arbitrariness which is incompatible with commonly accepted notions of justice'.[5]

However, the widely held view in Australian case law is that, while 'consistency may be an important element of good administrative decision-making, each case must be considered in the context of its individual circumstances'.[6] Australian courts and tribunals have recognised 'the need for compromise, in the interests of good government, between, on the one hand, the desirability of consistency in the treatment of citizens under the law and, on the other hand, the ideal of justice in the individual case'.[7]

Accepting that consistency is desirable and inconsistency is generally to be avoided in administrative decision-making, some discussion is required of how consistency may be achieved in the exercise of discretionary decision-making.

Administrative decision-making is increasingly complex, with competing factors such as budgetary limitations and notions such as the 'public interest' to be taken into consideration. The migration regime, for example, is 'fraught with factual uncertainty and legal difficulty' and decision-makers must deal with high-volume case loads.[8] To deal with this complexity, the legislature often provides for the exercise of discretion by ministers, their delegates and tribunals. Legislation governing migration, taxation, environmental planning, social security and many other fields of government activity authorises discretionary powers that can impact greatly on individuals' rights and interests, such as granting or denying visas, licences and payments. Australian taxation law, for example, included almost 500 administrative discretions when analysed in 2007.[9]

No longer thought of in Diceyan terms as necessarily leading to the exercise of 'arbitrary power', discretion is now recognised as necessary although it is still treated with some caution in administrative law.[10] Thus, the executive is entitled to develop and implement policies which guide the exercise of a discretion conferred by statute. Policy guidelines, or 'soft law', promote fairness through predictability, consistency and often distribution of limited resources.[11] Indeed, by adopting policies and making them available, decision-makers may improve the transparency and accountability of the exercise of discretion.[12]

The principles relating to the lawfulness of soft law were summarised by Gleeson CJ in *Neat Domestic Trading Pty Ltd v AWB Ltd*: [13]

> There is nothing inherently wrong in an administrative decision-maker pursuing a policy, provided the policy is consistent with the statute under which the relevant power is conferred, and provided also that the policy is not, either in its nature or in its application, such as to preclude the decision-maker from taking into account relevant considerations, or such as to involve the decision-maker in taking into account irrelevant consideration.

However, it does not necessarily follow that there is a duty to apply soft law. The seminal judgment on the role of policies in guiding statutory discretion, *Drake (No 2),*[14] is a well-known case involving an ultimately unsuccessful challenge to the Minister's decision to order the deportation of Drake, who had been convicted of drug offences. The Minister, and the Administrative Appeals Tribunal (AAT), had applied the relevant ministerial policy in the exercise of a discretion under the *Migration Act 1958* (Cth) and found that, within the parameters of the policy, it was in the best interests of Australia to uphold the deportation order.[15]

The relevant principle enunciated by Justice Brennan is that the duty of the AAT is to make the 'correct or preferable' decision on review of a decision by the Minister. While the AAT could apply or decline to apply any policy in reviewing the merits of the decision, '[o]ne of the factors to be considered in arriving at the preferable decision in a particular case is its consistency with other decisions in comparable cases, and one of the most useful aids in achieving consistency is a guiding policy'.[16]

Given that there is no duty to apply soft law, Australian courts would be unlikely to find that a duty of consistency is owed by administrative decision-makers. Nevertheless, obiter comments of Tobias JA in the NSW Court of Appeal have indicated that encouraging consistency is 'properly related to the context of administrators called upon to make what are truly administrative decisions'.[17]

This position may be seen as a step towards the UK position in the recent decision by the Supreme Court in *R (Lumba) v Secretary of State for the Home Department,*[18] in which a majority of the court found a duty to apply policies consistently, arising from the principles of equality, non-discrimination and lack of arbitrariness. In that case, the decision related to the detention of two foreign nationals prior to their deportation. At issue was whether an unpublished policy, imposing a 'near blanket' ban on the release of foreign nationals who had been sentenced for any of a wide range of offences, could be applied when it was in direct contrast with published policies stating that there was a presumption in favour of release prior to deportation in such cases. The court found that it could not. Furthermore, the 'near blanket' policy was unlawful for the fetter on discretion that it imposed. Although this case concerns a policy applied consistently (indeed, almost uniformly), the court's remarks on the duty, not only to comply with a published policy, but to apply it consistently,[19] are germane to this discussion. The decision also raises a conflict between a potential duty of consistent decision-making and the duty to exercise unfettered discretion.

Since the decision in *Drake (No 2)*, soft law has proliferated and, while it may be a useful means of achieving consistency, soft law decisions may be seen to lack the accountability of those made under delegated legislation or regulations adopted or prescribed by statute.

Soft law and accountability

Soft law, also known as 'fuzzy law' and 'grey-letter law', refers to a range of instruments including guidelines, policies, standards, codes and directives used by governments to implement statutory discretion.[20] For the purposes of this discussion, soft law does not include subordinate legislation, by-laws, or codes or standards that are adopted by legislation and have legislative force as a result. The development of soft law has been prolific; an empirical study in 1997 found that 30,000 codes were in existence in the business and regulatory environment alone.[21]

Given its prevalence and consequently its influence as 'the principal administrative mechanism used to elaborate the legal standards and political and other values underlying bureaucratic decision-making',[22] soft law is rightly raising eyebrows amongst administrative law academics for the 'accountability deficit' that it has created.[23] There is a scale of accountability in terms of 'policy processes' used to develop soft law from development by departmental officials, to ministerial policies tabled in parliament, from no consultation to full consultation processes, and from internal to publicly available policy documents. What is important, in terms of the principles espoused in *Drake (No 2)* regarding a duty on tribunals to apply it, is not how or by whom soft law is made but the intended behaviour-changing effect and weight given to policies.[24] Generally, however, the weight given to ministerial policies is considered to be significant.[25]

Soft law is outside the ambit of the *Legislative Instruments Act 2003* (Cth) and as a result is not subject to any of the accountability mechanisms applying to delegated legislation, including the requirements for consultation,[26] public accessibility, parliamentary scrutiny and 'sunsetting' (automatic repeal after ten years).[27] Decisions are only reviewable under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (*ADJR Act*) if the policy is directly authorised by statute, which is generally not the case for soft law. Such decisions have been considered in Australian judicial practice not to constitute decisions 'made under an enactment' as required to bring them within the reach of the *ADJR Act*.[28]

Failure of soft law to achieve consistency

A discretionary power conferred on a minister may in practice be exercised by a 'small army' of decision-makers, depending on the caseload. Where a discretionary power is wide, it is natural that different decision-makers, even when presented with the same or similar facts, may arrive at different conclusions.[29] However, courts have been reluctant to interfere with the exercise of discretionary power conferred by the legislature on the executive, as expressed by Mason J in *Minister for Aboriginal Affairs v Peko-Wallsend*: [30]

> It is not the function of the court to substitute its own decision for that of the administrator by exercising a discretion which the legislature has vested in the administrator. Its role is to set the limits on the exercise of that discretion, and a decision made within those boundaries cannot be impugned.

In *Segal v Waverley Council*[31] the NSW Court of Appeal held that consistency in administrative decision-making, which was pursued through the application of planning principles by decision-makers, would not necessarily result in different decision-makers reaching the same outcome, particularly where the decision involved a 'value judgment of a particularly subjective kind'.[32]

In that case, two neighbouring families, the Darlings and the Segals, each proposed to build a garage that would affect a sandstone retaining wall, deemed by the local environment plan to be a landscape heritage item. Both applications to Waverley Council were refused and both neighbours appealed for merits review to the Land and Environment Court. The Darlings' appeal was rejected by Commissioner Moore. However Commissioner Watts subsequently granted consent for the Segals' development proposal. No reasons were given by Commissioner Watts for his departure from the decision of Commissioner Moore. Waverley Council's subsequent appeal to the Land and Environment Court was upheld by Lloyd J,[33] against which the Segals appealed to the NSW Court of Appeal on the ground that, inter alia, his Honour erred in finding that Commissioner Watts was bound to consider the earlier decision of Commissioner Moore in light of the principle of consistency in administrative decision-making.[34]

The Court of Appeal stopped short of upholding a duty of consistency, but Tobias JA added:[35]

> [t]hat is not to say that it was not desirable for Commissioner Watts to have referred to [Commissioner Moore's] decision given the somewhat unique circumstances under which the two decisions were made: on the contrary, his doing so may well have avoided the present appeal.

The outcome of the decision in *Segal* was to uphold the exercise of independent discretion rather than importing the doctrine of 'precedent' into administrative or tribunal decision-making, particularly by a 'quasi-judicial tribunal' such as a Commissioner of the Land and Environment Court.[36] The results for the Segals and the Darlings were substantively inconsistent but equally valid. This is not to say that the result was not 'inelegant'.[37]

It should be acknowledged that there are other methods for achieving consistency in decision-making, such as the use of information technology, agency training and oversight. In addition, a duty to give reasons[38] helps to guard against arbitrary decisions and reliance on erroneous notions, and ensures that decision-makers 'pay close attention to the individual circumstances of each case'.[39] While it is not the focus of this article, tribunals may also develop their own strategies for avoiding the sort of inconsistency evident in *Segal.* The decision in *Drake (No 2)* and subsequent practice indicates that tribunals will seldom depart from the requirements of executive soft law absent compelling reasons.

In summary, consistency in administrative decision-making is desirable but not currently mandated in Australian administrative law. It is largely pursued through soft law, which is an effective mechanism insofar as it is flexible and need not go through parliamentary processes but as a result lacks accountability safeguards. Furthermore, while it may improve consistency, the application of soft law by different decision-makers to different cases does not ensure consistency.

Inconsistency – a ground of judicial review?

The purpose of a system of judicial review of administrative decisions in the Australian system of government is twofold. First, it is to ensure accountability of the executive branch of government by allowing the judicial branch to scrutinise decisions in order to safeguard individual rights (or interests) against adverse government action.[40] In this regard it is closely connected with the doctrine of the 'rule of law' and other public law principles leading to an expectation that, secondly, judicial review will result in 'broader systemic improvements in the quality and consistency of government actions'.[41] The standard indicator that the rule of law is absent is that decision-making is (or looks to be)[42] arbitrary.[43]

Given the views expressed by the judiciary and academics referred to in this article, that inconsistency in decision-making may be indicative of arbitrariness at worst and poor administration at best, it is arguable that it should give rise to a ground for judicial review as 'equality of treatment under the law is an ingredient of modern concepts of justice and the rule of law' particularly where it intersects with individual rights, interests and obligations.[44] In considering whether inconsistency should be an independent ground of review, three key impacts of such a ground are considered: first, the impact on the duty of administrative decision-makers to exercise unfettered discretion; secondly, the impact on individual justice; and thirdly the (indirect) impact on 'good administration', namely the policy process and the practice of decision-making.

Existing grounds of judicial review for inconsistency

The notion of 'inconsistency' already has a limited role in judicial review. Grounds arising from application of a policy, where the policy is inconsistent with statute or precludes a decision-maker from taking into account a relevant consideration may all accommodate elements of inconsistent decisions. In particular, however, inconsistency which can be characterised as *Wednesbury* unreasonableness, for unjustified, unequal treatment and inconsistency resulting in disappointment of a legitimate expectation, holds some potential, albeit limited, for inconsistency to expand into a free-standing ground of judicial review.[45]

Few cases have successfully met the high threshold test developed at common law requiring 'a similarity, if not a virtual duplication of circumstances and conditions to establish the basis for a complaint of inconsistency'.[46] The ground was successfully argued in the Full Court of the Western Australian Supreme Court in *Dilatte v MacTiernan*,[47] where the relevant Minister had refused an appeal against a decision not to grant permission to the applicants for an extension to their house. The decision was not only contrary to a decision of the previous

Minister, it was also contrary to the recommendations of the Town Planning Appeal Committee.

In reaching his conclusion, Malcolm CJ commented that the doctrine of *ultra vires* can be invoked in circumstances of unreasonableness where the cases indicate 'inconsistent and capricious' decisions which bring decision-making into disrepute for arbitrariness.[48] His Honour indicated that some sort of duty of consistency can arise where a planning authority is dealing with successive or concurrent applications relating to the same parcel of land. However, the failure to establish the ground in numerous taxation cases involving discrimination between taxpayers indicates it does not apply to all inconsistencies and courts will determine when there are sound administrative or policy reasons to allow or disallow a successful argument on these grounds.[49]

In contrast, a duty of consistency was not contemplated in terms of 'unreasonableness' in *Segal*, but rather in terms of the 'public interest'[50] of consistent decision-making and the requirements of judicial comity in following earlier decisions absent sound reasons. Although Tobias JA rejected the notion of a ground of review for inconsistency, in *obiter* he remarked that seeking consistency was the proper domain of administrative decision-makers and is at the very least desirable. These different results indicate that the law is far from settled on when inconsistency may deliver the type of 'inelegant' results referred to by Brennan J in *Drake (No 2)*. Despite Tobias JA's comments about the 'unique circumstances' of the case and the desirability of consistent decision-making, it is unlikely that, had *Wednesbury* unreasonableness been argued as a ground for judicial review, it would have been accepted. The difficulty of establishing invalidity based upon *Wednesbury* is well understood and it would by no means be certain that such a claim would succeed, especially where the inconsistency was not internal but with the decision of another decision maker and was otherwise free from jurisdictional error.

Review for the substantive disappointment of a legitimate expectation has been described in England as 'the most fertile ground for the development of protection from inconsistent decisions'.[51] In that jurisdiction, the doctrine of legitimate expectation has extended from a procedural to a substantive ground of review.[52] However there is little judicial support for such an extension at Australian common law.[53] The dogmatic, albeit 'porous and ill-defined',[54] distinction between merits and judicial review perpetuates the reluctance of courts to see substantive fairness as being relevant to anything but the merits of a decision, and thus unsuitable for judicial review. As Gleeson CJ remarked in *Lam*, the nature and scope of judicial review is informed by the separation of powers doctrine enshrined in the Australian Constitution. This prevents the courts from intruding on the executive function of administration,[55] particularly where to do so would achieve no more than impose legally irrelevant judicial notions of what comprises good administration on the executive.

While *Wednesbury* unreasonableness and the disappointment of legitimate expectations therefore offer limited support for the development of inconsistency as a ground of review, limitations on the exercise of 'fettered' discretion appear to stand in direct contrast to the proposal.

If judicial review remedies were available for demonstrable inconsistency in administrative decision-making other than on the basis of *Wednesbury* unreasonableness, it is probable that a court would be required to enquire into the consequences of that inconsistency. There is a very great risk that this would become a de facto inquiry into the substance of the applicant's complaint and, as such, an impermissible excursion into the merits of both the decision subject of the application and potentially prior decisions with which it was inconsistent. The likelihood of inconsistency being approved as a ground of review in Australia at present on that basis is minimal.[56]

Duty to exercise unfettered discretion

The current position in Australia is that inconsistent treatment of people in similar positions does not constitute legal error or jurisdictional error but, rather, that 'decision-making should focus on individual merits of the case and not be fettered by general policies or the pursuit of consistency for its own sake'.[57] To this end, the *ADJR Act* prohibits the exercise of discretion 'at the behest of another person' or without regard to the individual merits of the case.[58] These grounds are technically separate but are often argued together, along with 'failure to consider relevant matters', where it appears that a policy has been applied inflexibly. The *ADJR Act* provisions reflect the common law principle, informed by the separation of powers doctrine, that the executive cannot fetter discretion through non-statutory rules conferred by the legislature.[59] However, it has also been recognised that in some discretionary exercises, such as calculation of profits for nursing homes,[60] uniformity is paramount to fairness between the subjects of decisions, justifying fettering discretion with soft law.[61]

The Administrative Review Council (ARC) recently invited submissions in response to a consultation paper on judicial review. A number of submissions recommended a reformulation of section 5(2)(f) of the *ADJR Act* which currently provides for a ground of judicial review in relation to 'an exercise of a discretionary power in accordance with a rule or policy without regard to the merits of the particular case'. Aronson[62] and Weeks[63] both recommended a reformulation of that ground to something like 'applying a rule or policy that unlawfully (or invalidly)[64] purports to narrow the breadth or content of an applicable discretionary power'. This recommendation was not accepted by the ARC, which concluded that the courts are currently dealing satisfactorily with issues associated with the use of discretion and soft law by decision-makers. It was however noted in the final ARC report on the consultation that an amendment of section 5(2)(f) may be warranted in the future.[65] If the proposal by Aronson and Weeks were accepted, this may have the effect of decreasing the strict application of the rule against fettering discretion and forging the path for the development of inconsistency as a ground of judicial review.

It is argued by Aronson, Dyer and Groves that a blanket rule against fettering discretion is 'increasingly out of step with a perfectly respectable and alternative vision of good government', which is to develop quasi-legislative policy, or soft law, in a manner which takes into account the process of making policies on the basis of 'comprehensive rationality' whereby a range of factors are considered by policy makers underpinned by policy goals and ways of achieving them.[66] They suggest that if courts could modify the rule against fettering, in light of the high volume of cases administrative departments are required to handle, that may open the way for courts to give more force to soft law.[67]

Aronson et al refer to a 'trickle of cases', which can be expected to increase in recognition of the demands of complex and high-volume government decision-making, where the court has apparently accepted modification to the 'non-fettering' rule, including *Minister for Immigration and Multicultural Affairs v Jia*.[68] While the question in that case was on actual or perceived bias in light of comments the Minister had publicly made on radio in relation to the AAT's decision not to cancel Jia's visa on character grounds and the Minister's anticipated response to that decision, the court considered in obiter that the Minister could develop a policy and apply it in relation to the 'character test' without necessarily considering each case afresh.[69]

However the 'perfectly respectable and alternative vision of good government' proposed may be seen by others as having the effect of subordinating individual justice to a principle of 'horizontal equity' with accountable decision-making or 'good administration'.[70] Any proposal for reform that may shift the balance of administrative justice away from individual rights towards the interests of good government must be approached with caution, if not suspicion,

given the potential that would follow for soft law to have normative force despite the absence of accountability in its formation.

Individual rights and interests of good administration

One of the potential advantages of a ground of review for inconsistency must be to uphold individual rights and interests where there is some contention that discretion has been exercised in an arbitrary or discriminatory way. In many cases, it has been claimed that inconsistent decision-making has led to an unfair result for the applicant.[71] However a ground of review for inconsistency would represent a shift away from the 'classic model' of judicial review, concerned primarily with the procedural protection of rights and legal interests[72] towards a model of judicial review concerned primarily with good administration.

The tension was expressed extra-judicially by Justice Brennan in 1986: [73]

> The primary purpose of judicial review may be stated under Lord Diplock's broad headings: it is the safeguarding of individual interests against affection by illegal or irrational administrative action or by administrative action taken without proper procedures. The tension between the purpose of safeguarding individual interests and the purpose of defining principles to govern administration produces some uncertainty in the scope of judicial review. There has to be a composition between flexibility and certainty in the law, and the law is not settled.

The interests of good government and individual justice are sometimes at odds. Thus, while Deane J expressed the view in *Nevistic v Minister for Immigration and Ethnic Affairs* that although consistency 'may properly be seen as an ingredient of justice, it does not constitute a hallmark of it',[74] Flick J further stated in *SZMIP* that 'a like result reached upon the basis of factually diverse materials may be the hallmark of *injustice* and not justice'.[75] Decisions can be 'consistently wrong and consistently unjust'.[76] This has been said of the extensive use of 'character tests' in the immigration context, for example.[77]

However, there may be a role for judicial review in rectifying 'systemic failures' of bureaucracy.[78] It appears that the case for developing a ground of judicial review for inconsistency is equally, if not more, concerned with good administration as it is with individual justice. For example, Aronson suggests that the ground would allow courts to 'explore the possibilities of giving more force to non-statutory guidelines' indicating an underlying need to address systemic issues through judicial review.[79]

Based on the assumption that a ground of review for inconsistency must necessarily impose a duty of consistency on decision-makers (at least to the terms of any operative soft law), two key impacts that such a ground of review may have on good administration are, first, a more formalised and accountable policy process, arising from increased judicial scrutiny of soft law; and secondly, changes to bureaucratic decision-making that result in a higher level of consistency in administrative decisions. For each of these, however, there are potentially both positive and negative impacts on individual justice as well as the imperatives of the executive government to deliver responsive and flexible policy outcomes.

Accountability in the policy process and bureaucratic decision-making

Judicial scrutiny of decisions made under soft law, resulting from a ground of judicial review for inconsistency, would arguably go towards addressing the 'accountability deficit' of soft law by giving courts access to the 'lush field of policy'.[80] However, this benefit must be weighed against the desirability of policy that is flexible and responsive to individual circumstances, from which exceptions can be made in the interests of individual justice and which allow decision-makers to balance a range of factors. There may indeed be an

expectation that policy shifts will follow from changes at the political level, such as a change of government.

It has been argued by Sossin and Smith that soft law should be treated as 'law' and thus amenable to judicial review, if it has the effect of exerting 'significant influence' in the exercise of discretion by administrative decision-makers. By emphasising the treatment of soft law as a species of law, they suggest that change would be required to the way soft law rules are formulated including, for example, minimum standards to be established for the development of soft law guidelines and policies across the executive arm of government.[81] Accountability of policy processes could be improved by introducing a positive mandate to develop guidelines where discretion is to be exercised; publication of guidelines unless contrary to the public interest; procedures to ensure that guidelines comply with statutory standards and purposes as well as (in the Canadian context) the *Canadian Charter of Rights and Freedoms*; and a mandate for written reasons for departure from the guidelines.[82] These safeguards are necessary, since:[83]

> Difficulties arise when manuals which are treated as 'law' remain 'soft', in the sense that they cannot be enforced against the will of the party to whom discretionary decision-making power has been granted. In other words, the central problem with soft law is its asymmetrical operation.

A preference for this approach is also reflected in the obiter comments of Lord Walker's judgment in *Lumba*: [84]

> Decisions are taken by a small army of officials at different levels, and they need guidance in order to achieve consistency in decision-making. Members of the public, or those of the public liable to be affected, should know where they stand, and so they are entitled to know, at least in general terms, the content of the official policies.

In addition to increased accountability of the policy process, Sossin has suggested that judicial scrutiny of soft law decisions may also improve bureaucratic decision-making by 'shining a spotlight on a corner of bureaucratic processes which too often is left in the shadows'.[85] One wonders, however, whether this will be a practical outcome if the court lacks the power to invalidate soft law, as it would have in regard to 'hard law'.

There is scant information on the impact that judicial decisions have on agency decision-making in Australia. One empirical study, by Creyke and McMillan,[86] sought to address the lack of knowledge of the impacts of judicial review decisions at an individual and systemic level by tracking the outcomes of all Federal Court of Australia decisions in favour of applicants (individuals seeking review of decisions made against them) over a ten-year period. The findings were mixed. In more instances than they had expected, the authors reported finding that agencies had responded to the court's criticisms by changing their policies and procedures and remaking the particular decision in favour of the applicant. However there were also many instances of agencies making no change, either to the individual decision or to their policies, following an adverse finding through judicial review. [87]

Although policies and rules may be implemented to guide discretion to benefit government 'managerialism', one of the key principles underpinning this approach is the 'justice advantage which flows from the administration exercising its powers in a consistent way', particularly where a high volume of cases must be considered by a number of (or many) different decision-makers.[88]

While enhanced accountability of decision-making under soft law and improved systems of consistent bureaucratic decision-making are potential benefits of the development of a judicial review ground for inconsistency, other perceived benefits of policy, as opposed to

law, as a framework for administrative decision-making, such as flexibility and responsiveness, may be compromised.

As Cane said: [89]

> fair administrative decision-making requires a balance to be struck between generality and consistency on the one hand, and specificity and individualisation on the other. Rules, principles and guidelines facilitate consistency; and the power to depart from such rules, principles and guidelines, and to apply them flexibly, facilitates individualised justice.

In a sense, one may conclude on the basis of that passage that little has changed since *Drake (No 2)*: for justice to be done relies on a balance being struck between consistency and flexibility.

Furthermore, as seen in the US context, an approach to policy development that mandates involvement of interest groups, giving rise to an entitlement to participate in 'rule-making', or policy processes, can lead to increased litigation by interest groups, with the effect of reducing flexibility and responsiveness of policy.[90] If consistency as an element of good administration is the objective, there are other, more direct and effective ways of achieving this than through judicial review.

Alternatives to judicial review

One of the hurdles to proposing a ground of review for inconsistency is defining the scope of such a ground. Decisions made by governments are often polycentric in nature, involving sensitive decisions about the distribution of scarce resources and competing interests and they may not be suitable for judicial review. Another consideration is that ensuring the exercise of unfettered discretion may be more important where an individual's rights and interests are at stake. Although, again, defining exactly when that may be is also a difficult task, particularly in the absence of constitutionally enshrined or legislated human rights in the Australian legal system at the Commonwealth level.

As a final consideration in the development of a ground of review for inconsistent decision-making, brief note should be made of the effectiveness and appropriateness of alternative mechanisms to judicial review in light of the above difficulties. An inconsistent decision may indicate discrimination, for example, whereby a complaint to the Australian Human Rights Commission may produce a positive substantive outcome for individuals subject to discriminatory decisions. More widely available is the possibility of complaining to various Ombudsman's offices, which have, in many jurisdictions, had a strong focus on good administration[91] and have a record of obtaining positive outcomes or systemic change in Australia despite having no power to make binding declarations of right.

Of particular importance is the ability of Ombudsmen to provide recommendations to an agency before a final 'decision' has been made, for example, where complainants may have concerns about their treatment or access to natural justice. The NSW Ombudsman, Bruce Barbour, has commented that Ombudsmen have a far greater impact than courts on administrative decision-making and individual outcomes because of their mandate to deal with systemic issues, initiate investigations, review the effectiveness and implementation of legislation and find conduct to be 'wrong', even if it is in accordance with the law.[92]

Conclusion

This article has argued that, in considering a proposal that inconsistency of administrative decision-making *should* give rise to judicial review, it is important to take into account the

ongoing (and overlapping) tensions in Australian administrative law between a duty to exercise unfettered discretion and the desirable goal of consistent decision-making; the purpose of judicial review in safeguarding individual rights and interests versus defining principles of good administration; and the accountability deficit of soft law versus the ability of the executive to develop and apply policy flexibly and responsively.

The strongest arguments in favour of judicial review remedies being available where there has been demonstrable inconsistency in administrative decision-making are that it would bring soft law instruments under judicial scrutiny, increasing the accountability of government for its decisions; and that it could produce more favourable and seemingly just outcomes for applicants, such as those in *SZMIP* and *Segal*. However, it has been argued that such a ground of review would represent a fundamental shift of the balance in administrative law from safeguarding individual rights to the development of principles of 'good administration'. The benefit of such a shift may be to improve policy processes and bureaucratic decision-making (although not necessarily). The dangers of this approach include removing flexibility from the policy process and mandating consistency even where it may be 'wrong or unjust'.

It is concluded that if one of the primary purposes (if not outcomes) of a ground of review for inconsistency would be to create a duty of consistency and reduce flexible and responsive policy processes, any proposal for the development of a judicial ground of review for inconsistency should be approached cautiously. While there may be merit in reducing the high threshold test of unreasonableness for unjustified unequal treatment that already exists, or extending legitimate expectation to substantive fairness to make these grounds of review more readily available to people who have had an inconsistent decision made against them, those proposals are quite distinct from the development of an independent ground of review which would have the potential effect of the judiciary usurping the power of the executive to make decisions that often require a complex balance of interests, policy goals and resources.

Endnotes

1 *SZMIP v Minister for Immigration and Citizenship* [2009] FCA 217.
2 *R (Lumba) v Secretary of State for the Home Department* [2012] 1 AC 245, 265 [26] per Lord Dyson.
3 Administrative Review Council, *Judicial Review in Australia* (Consultation Paper, April 2011).
4 Karen Steyn, 'Consistency – A Principle of Public Law?' (1997) 2 *Judicial Review* 22, 22.
5 *Re Drake and Minister for Immigration and Ethnic Affairs* (No 2) (1979) 2 ALD 634, 639 (*Drake (No 2)*).
6 *Ibrahim v Minister for Immigration and Multicultural Affairs* (2000) 63 ALD 37, 41 [15].
7 *Drake v Minister for Immigration and Ethnic Affairs* (1979) 2 ALD 60, 70, per Bowen CJ and Deane J.
8 John McMillan, *Lessons for Public Administration: Ombudsman Investigation of Referred Immigration Cases* (Report No 11, 2007, Commonwealth Ombudsman) 2.
9 Robin Creyke and John McMillan, *Control of Government Action: Text, Cases and Commentary* (LexisNexis Butterworths, 3rd ed, 2012) 368.
10 Ibid, 368-9.
11 Peter Bayne, 'Administrative Law' (1993) 67, *Australian Law Journal* 214, 216.
12 The decision in *R (Lumba) v Secretary of State for the Home Department* [2012] 1 AC 245, for example.
13 [2003] 216 CLR 277, 289 per Gleeson CJ.
14 *Re Drake and Minister for Immigration and Ethnic Affairs (No 2)* (1979) 2 ALD 634.
15 *Re Drake and Minister for Immigration and Ethnic Affairs (No 2)* (1979) 2 ALD 634, 637-8.
16 *Re Drake and Minister for Immigration and Ethnic Affairs (No 2)* (1979) 2 ALD 634, 643.
17 *Segal v Waverley Council* (2005) 64 NSWLR 177, 191 [51].
18 [2012] 1 AC 245, 265 [26] (*Lumba*).
19 *R (Lumba) v Secretary of State for the Home Department* [2011] 1 AC 245, 265 [26] per Lord Dyson.
20 Creyke and McMillan, 2012, above n 9, 671-2.
21 Australian Government, *Grey-Letter Law* (Report of the Commonwealth Interdepartmental Committee on Quasi-regulation, December 2007) 32. It should be noted, however, that this figure includes legislative and quasi-legislative codes which would not be considered soft law.
22 Lorne Sossin and Charles Smith, 'Hard Choices and Soft Law: Ethical Codes, Policy Guidelines and the Role of the Courts in Regulating Government' (2003) 40 *Alberta Law Review* 867, 871.

23 For example, Robin Creyke, "'Soft Law' and Administrative Law: a New Challenge" (2010) 61 *AIAL Forum* 15; Robin Creyke and John McMillan, 'Soft Law versus Hard Law' in Linda Pearson, Carol Harlow and Michael Taggart (eds), *Administrative Law in a Changing State: Essays in Honour of Mark Aronson* (2008) 377. Some of the practical consequences of the 'accountability deficit' are explored in Mark Aronson, 'Private Bodies, Public Power and Soft Law in the High Court' (2007) 35 *Federal Law Review* 1.
24 Although following *Drake (No 2)* there was some debate about whether the duty of tribunals to follow policy only applied to ministerial policy: Andrew Edgar, 'Tribunals and Administrative Policies: Does High or Low Policy Distinction Help?' (2009) 16 *Australian Journal of Administrative Law* 143, 143.
25 *Hneidi v Minister for Immigration and Citizenship* (2010) 182 FCR 115, 121 [49] (*Hneidi*).
26 Although this may make little or no practical difference; see *Legislative Instruments Act 2003* (Cth) s 19.
27 *Legislative Instruments Act 2003* (Cth), Parts 3-6.
28 Creyke, 2010, above n 23, 19. Creyke notes that in some instances the *Judiciary Act 1903* (Cth) may provide an avenue for judicial review.
29 *Re Drake and Minister for Immigration and Ethnic Affairs (No 2)* (1979) 2 ALD 634, 639, Brennan J.
30 *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24, 40-41.
31 (2005) 64 NSWLR 177 (*Segal*).
32 *Segal v Waverley Council* (2005) 64 NSWLR 177, 201 [96].
33 'Class 1' merits reviews such as those heard by Commissioner Watts and Commissioner Moore can be challenged on an error of law before a Judge in the Land and Environment Court.
34 *Segal v Waverley Council* (2005) 64 NSWLR 177, 184, [29].
35 *Segal v Waverley Council* (2005) 64 NSWLR 177, 192, [56].
36 Clifford Ireland, 'Planning Merits Review and the Doctrine of Precedent' (2007) 27 *Australian Bar Review* 231.
37 *Re Drake and Minister for Immigration and Ethnic Affairs (No 2)* (1979) 2 ALD 634, (*Drake (No 2)*).
38 Section 13 of the *ADJR Act* allows any person entitled to make an application to the Federal Court or the Federal Magistrates Court for review of a decision to request a written statement about the reason for the decision, with some exceptions. Section 28 of the *Administrative Appeals Tribunal Act 1975* (Cth) entitles a person affected by a decision to obtain reasons for that decision, with some exceptions.
39 McMillan, 2007, above n 8, 10-13.
40 Peter Cane, 'Understanding Judicial Review and its Impacts', in Marc Hertogh and Simon Halliday *Judicial Review and Bureaucratic Impact: International and Interdisciplinary Perspectives* (Cambridge University Press, 2004) Chapter 1, 15, 16.
41 Administrative Review Council, *Judicial Review in Australia* (Consultation Paper, 2011) 7.
42 'Inconsistency is not merely inelegant: it brings the process of deciding into disrepute, **suggesting** an arbitrariness which is incompatible with commonly accepted notions of justice.': *Drake (No 2)* (1979) 2 ALD 634, 639 (Brennan J) (empasis added).
43 See eg Trevor Allan's entry on the rule of law in Peter Cane and Joanne Conaghan (eds), *The New Oxford Companion to Law* (2008) 1038.
44 *Nevistic v Minister for Immigration and Ethnic Affairs* (1981) 51 FLR 325, 334 (Deane J).
45 It is beyond the scope of this article to give thorough consideration to all grounds of review. These two are thought to give rise to review for inconsistent decisions and so are considered here.
46 *Dilatte & Anor v MacTiernan* [2002] WASCA 100, [66] (*Dilatte*).
47 [2002] WASCA 100.
48 *Dilatte* [2002] WASCA 100, [58]-[61]. Malcolm CJ's use of the concept of disrepute is similar to the reasoning of Brennan J in *Drake (No 2)* at 639.
49 For example, *Federal Commissioner of Taxation v Swift* (1989) 18 ALD 679.
50 The Commissioner was required to consider the 'public interest' by section 39(4) of the *Land and Environment Court Act* 1979 (NSW).
51 Steyn, 1997, above n 4, 26.
52 *R v North and East Devon Health Authority; Ex parte Coughlan* [2001] QB 213.
53 *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* (2003) 214 CLR 1, 21 [65]-[67].
54 Chief Justice Spigelman, 'The Integrity Branch of Government' (2004) 78 *Australian Law Journal 724*, 733.
55 *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* (2003) 214 CLR 1, 24 [76].
56 *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* (2003) 214 CLR 1.
57 Creyke and McMillan, 2012, above n 9, 827.
58 *Administrative Decisions (Judicial Review) Act 1977* (Cth), ss 5(2)(e) and 5(2)(f).
59 Creyke and McMillan, 2012, above n 9, 677-8.
60 *Alexandria Private Geriatric Hospital Pty Ltd v Blewett* (1984) 56 ALR 265, 291.
61 Bayne, 1993, above n 11, 218.
62 Mark Aronson, Submission No 1 to Administrative Review Council Consultation Paper, *Judicial Review in Australia* (2011) 4.
63 Greg Weeks, Submission No 8 to Administrative Review Council Consultation Paper, *Judicial Review in Australia* (2011) 6.
64 Weeks recommended the wording 'unlawfully' whereas Aronson recommended the wording 'invalidly'.
65 Administrative Review Council, *Federal Judicial Review in Australia* (Report 50, September 2012) 139.

66 Mark Aronson, Bruce Dyer and Matthew Groves, *Judicial Review of Administrative Action* (Thomson Reuters, 4th ed, 2009) 306.
67 Ibid, 162.
68 (2001) 205 CLR 507.
69 Aronson, Dyer and Groves, 2009, above n 65, 309.
70 Creyke and McMillan, 2012, above n 9, 680.
71 For example, *SZMIP v Minister for Immigration and Citizenship* [2009] FCA 217; *Segal v Waverley Council* [2005] NSWCA 310; *Hneidi v Minister for Immigration and Citizenship* (2010) 182 FCR 115, 117.
72 Mark Aronson, 'Is the ADJR Act Hampering the Development of Australian Administrative Law?', (2005) 12 *Australian Journal of Administrative Law* 79, 96-97.
73 Justice Brennan, 'The Purpose and Scope of Judicial Review', (1986) 2 (2) *Australian Bar Review*, 93.
74 (1981) 34 ALR 639, 647.
75 *SZMIP v Minister for Immigration and Citizenship* [2009] FCA 217 [30] (emphasis added).
76 *Nevistic v Minister for Immigration and Ethnic Affairs* (1981) 51 FLR 325, 335 (Deane J).
77 Susan Harris Rimmer, 'Dangers of Character Tests Under Australian Migration Laws' (2010) 17 *Australian Journal of Administrative Law* 229.
78 Cane, 2004, above n 40, 32.
79 Aronson, Dyer and Groves, 2009, above n 65, 162.
80 Justice Brennan, 'The Purpose and Scope of Judicial Review', (1986) 2 (2) *Australian Bar Review*, 93, 110.
81 Sossin and Smith, 2003, above n 22, 891-893.
82 Ibid, 893.
83 Greg Weeks, 'The Use of Soft Law by Australian Public Authorities: Issues and Remedies' (Paper presented at the Practice and Theory of Soft Law Academic Symposium, Peking University Soft Law Centre, 9 July 2011).
http://www.gtcentre.unsw.edu.au/sites/gtcentre.unsw.edu.au/files/Weeks_SoftLaw_%20Australia.pdf, 3.
84 *R (Lumba) v Secretary of State for the Home Department* [2012] 1 AC 245, 307 [190].
85 Lorne Sossin, 'The Politics of Soft Law: How Judicial Decisions Influence Bureaucratic Discretion in Canada', in Marc Hertogh and Simon Halliday (eds), *Judicial Review and Bureaucratic Impact: International and Interdisciplinary Dimensions* (Cambridge University Press, 2004) Chapter 5, 129, 157.
86 Robin Creyke and John McMillan, 'Judicial Review Outcomes – an Empirical Study' (2004) 11(2) *Australian Journal of Administrative* Law 82.
87 Robin Creyke and John McMillan, 'The Operation of Judicial Review in Australia' in Marc Hertogh and Simon Halliday (eds), *Judicial Review and Bureaucratic Impact: International and Interdisciplinary Dimensions* (Cambridge University Press, 2004) Chapter 6, 161, 176.
88 Aronson, Dyer and Groves, 2009, above n 65, 162.
89 Peter Cane, 'Merits Review and Judicial Review – The AAT as Trojan Horse' (2000) 28 *Federal Law Review*, 213, 236.
90 Martin Shapiro, 'Judicial Review and Bureaucratic Impact: The Future of European Union Administrative Law, in Marc Hertogh and Simon Halliday (eds), *Judicial Review and Bureaucratic Impact: International and Interdisciplinary Perspectives* (Cambridge University Press, 2004) Chapter 9, 251, 252-3.
91 European Ombudsman, *The European Code of Good Administrative Behaviour* (2005, Office for Official Publications of the European Communities); McMillan, 2007, above n 8; UK Parliamentary and Health Services Ombudsman, *Principles of Good Administration* (2009).
92 Bruce Barbour, 'The Impact of External Administrative Law Review: Courts, Tribunals and Ombudsman', (2008) 57 *AIAL Forum*, 50. 59.

YES MINISTER? THE 2012 MIGRATION AMENDMENTS: WHENCE HAVE WE COME AND WHITHER ARE WE GOING?

Robert Lindsay*

The zigzag approach to finding a response to the influx of asylum seekers has recently taken a further turn. This is the most recent attempt of the executive to avoid judicial scrutiny of political treatment of asylum seekers.

I will endeavour to explain why this latest asylum legislation, which echoes past Government endeavours, is likely to be just another temporary milestone in grappling with ever increasing migration waves.

Mandatory detention

The introduction of mandatory detention in 1992 was the first step by Australia to deter those arriving by boat seeking asylum. An applicant had first to be viewed as engaging Australia's protection obligations under the *Refugee Convention*. Initially adverse decisions about asylum seekers were challenged by prerogative writ and sometimes even at common law. People smugglers were few. Very often the boats were bought by the fleeing occupants themselves. Such was the case in *Wu Yu Fang and 117 Others v MIEA and Commonwealth of Australia*[1] in which Sino Vietnamese fled China and were boarded by Australian officers off Ashmore Reef. A formal review process developed in the 1990s and a Refugee Review Tribunal (RRT) examined the correctness of the initial departmental decision maker on refugee status. However, if an asylum seeker wanted to go further than the RRT, no assistance was given to the applicant in framing appropriate grounds for a hearing by the Federal Court, although the law did allow a limited right of appeal on legal issues.

Offshore processing

It was this absence of a structured and orderly review process beyond the RRT which resulted in the Coalition Government introducing, in 2001, six Acts amending the *Migration Act 1958* (Cth). The Federal Court had been swamped with ill framed and futile applications for review, and well over 40 per cent of the appeals in the Federal Court were from asylum seekers who had failed before the RRT.

The Coalition Government commenced offshore processing by excising certain territories, such as Christmas Island and Ashmore Reef, as designated areas. Asylum seekers might now be precluded from making valid applications and were now called 'offshore entry persons'. They no longer had access to law courts as a right; such access was one of the articles contained in the *Refugee Convention*, of which Australia was a signatory.[2] The Government also introduced section 198A of the *Migration Act 1958* (Cth), which allowed for declaration of a country as a receiving country. At that time, the primary purpose of offshore processing was to prevent judicial review. Nauru, an island mostly known for its phosphate

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extraction with a minimal population of around 9,000, housed many of the asylum seekers who had been sent there pursuant to a declaration under section 198A by the Minister. Manus Island, a protectorate of Papua New Guinea, housed others. The Coalition Government under John Howard maintained that the so called Pacific Strategy did have the effect of stopping people arriving by boat.

In taking these steps, Australia was not alone in departing from the terms of the *Refugee Convention.* Professor Godwin Gill, an eminent Canadian international jurist, had said as long ago as 1996 that 'the developed world has expended considerable energy in trying to find ways to prevent claims for protection being made at their borders, or to allow for them to be summarily passed on or back to others.....[T]he intention may be either to forestall arrivals or to allow those arriving to be dealt with at discretion, but the clear intention is that, for states at large, refugees are protected by international law and, as a matter of law, entitled to a better and higher standard of treatment'.

The new construction of a privative clause

In 2001 the Coalition Government also moved to abolish judicial review for onshore applicants. Section 474 of the Act forbade appeal against 'privative clause' decisions. The Australian courts had, up to 2003, been prepared to countenance privative clauses protecting decision makers against appeal, provided the decision was made in good faith, related to the subject matter of the legislation and was reasonably capable of reference to the power.[3] In *Plaintiff S157/2002 v the Minister,*[4] the High Court explained that such a 'privative clause' may not protect against a jurisdictional error the nature of which could take various forms. Furthermore, where an Act imposed 'inviolable limitations' or 'imperative duties' it was not to be presumed that a general privative clause purporting to protect a decision against any form of appeal would necessarily prevail. In short, the courts now displayed a marked reluctance to allow their jurisdiction to be ousted by clauses seeking to prevent review of decisions by administrators.

The consequence of the High Court decision in *Plaintiff S157* was that onshore asylum seekers who had failed before the RRT now had the legal capacity to appeal to the Federal Court and the High Court. An appeal could now succeed where it could be shown that there had been jurisdictional error. This might take varied forms, such as the Tribunal asking itself the wrong question, having ignored relevant considerations or taken into account irrelevant considerations, where those considerations amounted to jurisdictional error including jurisdictional facts.[5] Indeed the grounds for jurisdictional error cast a wider net than the statutory rights of appeal which the Government had intended, by use of the privative clause, to prevent.

The Malaysian deal

The subsequent Labor Government, under Kevin Rudd, briefly flirted with onshore processing before reverting to offshore processing when there was an increase in the number of boats sailing towards Australia. On 25 July 2011, a swap deal was done with Malaysia whereby 800 asylum seekers were to be transferred to Malaysia in exchange for 4,000 established refugees whose cases had been verified by the United Nations Refugee Agency. These refugees would be sent to Australia. In announcing the deal, the Gillard Government said the agreement reaffirmed Malaysia's commitment that asylum seekers would be treated with dignity and respect in accordance with human rights standards.

Subsequently, six members of the High Court concluded that the ministerial declaration was invalid.[6] In so finding it said 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 those intended to be sent to Malaysia, under section 6 of the *Malaysian Immigration Act 1959*, which provided for such persons, 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] Malaysia did not sign the *Refugee Convention* and had not bound itself to observe those rights contained in the *Refugee Convention*, such as giving the same treatment to asylum seekers and nationals in relation to freedom of religion, access to education, access to courts of law and freedom of movement.[8] Most importantly, there was no commitment by Malaysia to observe the core obligation of *non-refoulement*, whereby there is a prohibition under the *Refugee Convention* against expulsion to any territory where a refugee's life or freedom would be threatened.[9]

Looking back it is hard to understand quite what the Government hoped to achieve by the Malaysian swap. On the one hand, the *Migration Act 1958* (Cth), reflecting duties under the *Refugee Convention*, required countries to ensure that refugees were not returned to their countries of origin directly or through a third country. Section 198A(3) required the Minister to be satisfied that the receiving country met human rights standards in providing protection. On the other hand, the Government wished to signal to people smugglers and others who might be tempted to travel to Australia by boat, that if they arrived here they were likely to be sent to declared countries which provided few of these human rights standards, and this would thereby deter them from coming. To put it another way, the minister was required only to declare a receiving country suitable for asylum seekers if it met relevant human rights standards mandated by section 198A(3), whilst at the same time, the Government wanted to signal that the designated countries to which the asylum seekers are sent are ones well known for their inhospitality and draconian regimes when it comes to treatment of asylum seekers.

Government policy and its implications

The recent *Houston Report*, from which the present amendments to the *Migration Act 1958* (Cth) stem, recommended enough which was palatable to both the major parties to enable acceptance of most of its major recommendations.

What is now intended is, presumably, to deter boat arrivals by the prospect that they will spend a long period of time in Nauru, Manus Island or Christmas Island or any other declared centre. One must ask what the long term prospects of offshore processing will be if the boats keep coming? Should the boats continue to arrive at the rate experienced in 2011, the Manus Island and Nauru accommodation is predicted to be full by the end of 2012 or in early 2013. Neither Malaysia nor Indonesia are signatories of the *Refugee Convention* and it is unclear whether they, or other countries in the Asian region, are likely to enter into arrangements with Australia to receive asylum seekers. The statistical evidence shows that around 70 per cent of those who arrived by boat and were put on Nauru or Manus Island, eventually qualified as refugees.[10] One therefore has to ask whether the purpose intended justifies the expense to be incurred. If some 70 per cent of those who arrive are refugees, what is the purpose of prioritising others in refugee camps simply because they have already been found to be refugees? It is the Government which opts to set a self imposed quota (now to be 20,000) for humanitarian overseas applicants. There is no priority to the order and mode in which people flee persecution. Australia has chosen to subscribe to and not resile from a *Refugee Convention* which sets no quota upon the number of refugees that may be accepted.

The 2012 Migration Amendments[11]

The latest legislation is the *Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012* (Cth) (the *2012 Amendments*). Under the *2012 Amendments*,

amending schedule 1 subdivision B of the *Migration Act 1958* (Cth), a Minister may, by legislative instrument, designate a country as a 'regional processing country'. The only condition for the exercise of the power is that the Minister thinks that it is in the national interest to designate a country as a 'regional processing country'.[12] In considering the national interest the Minister 'must have regard to' whether or not the country has given Australia assurances to the effect that:

(i) it will not expel or return a person to another country where his/her life would be threatened on account of his/her race, religion, nationality, membership of a particular social group or political opinion (ie *non-refoulement* under Article 33 of the R*efugee Convention*); and

(ii) the country will make an assessment, or permit an assessment to be made, of whether that person is covered by the definition of 'refugee' in Article 1A of the *Refugee Convention*.

The Minister may also have regard to any other matter which, in the opinion of the Minister, relates to the national interest.[13]

The assurances given by the receiving country need not be legally binding and the rules of natural justice do not apply to the exercise of the Minister's power (section 198AB (4) and (7)).

The Minister must cause to be laid before Parliament a statement of the Minister's reasons for thinking that it is in the national interest to designate a country to be a regional processing country, together with a copy of the written agreement with that country; a statement about the Minister's consultations with the UNHCR in relation to the designation; and a statement about any arrangements that are, or will be, put in place in that country for the treatment of persons taken to that country (section 198AC(2)). The intended purpose of laying these documents before the Parliament is to inform the Parliament about these things; nothing in the documents affects the validity of the designation. That some of those documents do not exist will not affect the validity of the designation, and a failure to comply with the section at all does not affect the validity of the designation.[14]

There are procedures for the removal of 'offshore entry persons' to a regional processing country, including force where necessary and reasonable.[15]

It was a feature of the *Malaysian case*, that the second plaintiff, who was a minor, was not removable to Malaysia because the Minister had not signed the consent as the guardian for the minor which was a requirement of the *Immigration (Guardianship of Children) Act 1946* (Cth). There is now no obligation upon the Minister to authorise or sign a consent form before the removal of an unaccompanied child.[16]

The *2012 Amendments* prohibit the institution in any court of proceedings to challenge the exercise of a function, duty or power; this prohibition includes Ministerial acts as well as those performed by immigration officers in carrying out their powers. This last provision may be regarded as a 'privative clause' which purports to prevent access to judicial review, although there is a formal acknowledgment in the *2012 Amendments* of the High Court's grant of jurisdiction under section 75(v) of the *Constitution* in respect of constitutional writs being brought against a Commonwealth officer.

The purpose of the 2012 Amendments

The centrepiece of this new legislation is the designation power of the Minister. A principal purpose of the current legislation is to enable the Minister to designate a country as a regional processing country without that decision being impugned by the courts. In the *Malaysian case* the Minister's declaration was successfully challenged on the basis that the four statutory criteria which he was required to consider under section 198A(3) constituted jurisdictional facts. Accordingly, where a Minister made a declaration on the basis of a misconstrued criterion, it was said that the declaration made was not authorised by Parliament and that such misconstruction would be a jurisdictional error[17]. In the joint judgment it was pointed out that the power of the minister was 'not a power to declare that the minister thinks or believes or is satisfied' that the country has the characteristics set out in the criteria, but that the Minister is 'satisfied of the existence of those criteria'.[18] In that case it was said that the access and protections to which the sub-paragraphs of section 198A referred must be provided as a matter of legal obligation and that Malaysia did not, either by its domestic law or by international convention, demonstrate a legal commitment to the values required.

The new legislation seeks to avoid any judicial scrutiny of the Minister's powers to designate a regional processing country. This is done, firstly, by stating that the 'Minister thinks that it is in the national interest to designate the country' and that the Minister 'must have regard to whether the country has given Australia any assurances' in regard to *non-refoulement* and, further, that the assessment will be done according to the definition of a 'refugee' under the *Convention*; these assurances do not have to be legally binding. The only condition for the exercise of the power is that the Minister thinks that it is in the national interest to designate the country to be a regional processing country. In considering this, the Minister only has to consider *non-refoulement* and whether the country will make an assessment, or permit an assessment to be made (in the case of Nauru, on previous occasions, the applications were processed by Australians). Otherwise it is up to the Minister to decide if there are any other matters relevant to the national interest which should be considered. The rules of natural justice are excluded in respect of the exercise of this power.

Will the 2012 legislation survive challenge?

Some provisions, such as the prohibition on proceedings, may be open to challenge. Indeed, the legislation is bound to and does recognise the High Court's powers under section 75(v) of the *Constitution*, which grants jurisdiction for constitutional writs against a Commonwealth officer. But, in light of the recent decisions striking down privative clauses, it may be going too far to say that proceedings may not be brought challenging the decision of the Minister or Commonwealth officer where jurisdictional error is shown.[19] In *Lim v MILGEA*, the provision in the *Migration Act 1958* (Cth) prohibiting a court from ordering release of a detainee from custody was held to be unconstitutional.[20] Furthermore, there are dicta of the High Court which suggest that judicial power under Chapter III of the *Constitution* may embrace legislation which breaches the rules of natural justice.[21] Natural justice has frequently been equated with procedural fairness, though it is a concept which may in time have a broader reach. It is often said that the rules of natural justice are applicable unless expressly excluded or excluded by necessary intendment.[22] However, even where there is an express statutory exclusion there may be scope to challenge conduct that offends the principles of natural justice.[23]

Nonetheless, given the restricted criteria to which the Minister now has to have regard, and the subjective nature of the discretion to be exercised, it may be overly optimistic to believe that the legislation can successfully be challenged in its essentials. The judicial system depends upon the good will and respect of the public, and where the two major political

parties have joined in asserting executive discretion based upon minimal objective criteria, it will be a formidable task to disturb a discretionary political judgment about designation of a regional processing centre. To use the words of French J (as he then was) in *Patto v Minister for Immigration*[24] about Ministerial power, 'Their very character is evaluative and polycentric and not readily amenable to judicial review'.[25] However, if bad faith or jurisdictional error is made out as his Honour recognised, this will not prevent a judicial challenge. The difficulty in challenging a subjective Ministerial discretion is reinforced by the recent High Court decision about the Minister's discretionary powers.

Limits upon procedural fairness: *Plaintiff S10–2011 and others v Minister for Immigration and Citizenship*[26]

On 7 September 2012, the High Court unanimously dismissed an application by four plaintiffs for constitutional writs to quash rejections made of their earlier applications for protection visas.

These plaintiffs were not 'offshore entry' persons unable thereby to engage the visa provisions of the *Migration Act 1958* (Cth). All had their applications considered and ultimately rejected by either the Refugee Review Tribunal or the Migration Review Tribunal. Under the four dispensing provisions of the Act[27] the Minister was authorised, in given circumstances, to make rulings favourable to a visa applicant and these dispensing provisions stood apart from the scheme of tightly controlled powers and dispositions under the Act conferring upon the Minister flexibility in allowing the grant of visas, which otherwise could not be granted.[28] Ministerial instructions stated when such powers would or would not be exercised by the Minister. The various plaintiffs had applied for protection visas and their applications had been rejected by the Minister under these guidelines.

The plaintiffs contended that the obligation to afford procedural fairness includes an opportunity to be heard in relation to adverse materials or any proposed deviation from published guidelines.

The joint judgment concluded that the extraordinary nature of the dispensing provisions and their exceptional place within the scheme of the Act, provided a basis to exclude what otherwise might be an implication of procedural fairness.[29] The Minister's powers were personal, non-compellable, public interest powers.[30] In a separate judgment, French CJ and Kiefel J said that there is no statutory duty upon the Minister to consider the exercise of the Minister's powers, and so no question of procedural fairness arises when the Minister declines to embark upon such a consideration.[31]

Relevant factors for the exclusion of procedural fairness, according to the joint judgment, included the absence of obligation upon the Minister to consider exercise of the power; a tabling requirement before Parliament showing an accountability to Parliament; and consideration of the 'public interest' involving a Ministerial value judgment.[32]

These are cognate statutory powers to those now contained in the new schedule 1 subdivision B of the Act.

How long will the legislative strategy adopted be likely to last if the boats keep coming?

The cost of offshore processing may become prohibitive, and receiving countries will no doubt expect reasonable remuneration for the services which they will be providing. Indeed Nauru is cash strapped after its phosphate mining was exhausted and it received very

favourable treatment from Australia for its participation in the Coalition Government's Pacific strategy.[33]

There may be a growing realisation that such a prohibitively expensive processing system is unsustainable, aside from the obvious difficulty that it pays lip service to civil liberties and is premised upon a doctrine of deterrence which contradicts Australia's international obligations. If it is shown that offshore processing is likely to serve no other purpose than to deter asylum seekers who arrive by boat, most of whom in the past have been proved to have valid claims, and are now put to the back of the processing 'queue', a new approach may be forced upon a reluctant government unless a greater degree of co-operation in sharing the burden can be achieved from regional countries.

Where applications are finally successful the years of trauma, aggravated by prolonged detention, are likely to leave a residue of bitter memories. Each step of government policy commencing with mandatory detention in 1993 has taken Australia deeper into a quagmire. Release from detention after an initial period of health, security and identification checks would mean some integration for asylum seekers into an Australian community and must surely be more productive and less expensive than ongoing detention. Offshore regional processing is open to much criticism for its prohibitive cost, lack of accountability for the assessment process, and the dire living standards to which asylum seekers are exposed. If mandatory detention had not been pursued by both major parties it is doubtful that today there would be the present acrimony. Secondly, if some reasonable review procedures for applicants whose RRT applications had failed, had been adopted so as to filter out unsuitable cases while enabling proper formulation of grounds for others (which could have been done with a very modest financial investment), offshore processing, with its inherent flaws, would not have been adopted. Until there is some realisation that these basic pillars of the political approach have to be reassessed, the anguish and political controversy is likely to continue unabated. Emotional nationalism, which has cradled itself to sleep oblivious to a tidal wave of suffering humanity beyond its shores, will continue in thrall to a recurring nightmare.

Endnotes

1 *Wu Fang and 17 others v The Minister of Immigration & Ethnic Affairs & Cwth of Australia* (1996) FCA 1272.
2 Article 16 of the *Convention on the Status of Refugees 1951* amended by the 1969 protocol: for summary of the 2001 Act; see *Plaintiff M11/2010E v Commonwealth of Australia* [2010] HCA 41 at [49] to [31].
3 *R v Hickman* (1945) 70 CLR 598 per Dixon J.
4 *Plaintiff S157/2002 v Commonwealth* ()11 CLR 476 which qualifies *R v Hickman* (1945) 70 CLR 598.
5 *Craig v South Australia* (1995) 184 CLR 163; *MIMA v Yusuf & Others* (2001) 181 ALR 1.
6 *Plaintiff M70/2011 v Minister for Immigration and Citizenship; Plaintiff M166 of 2011 v Minister for Immigration and Citizenship* [2011] HCA 32 Heydon J dissented.
7 *Plaintiff M70* French CJ at [30] – [33]; joint judgment at [126].
8 *Plaintiff M70* joint judgment at [117].
9 *Refugee Convention* article 33 per French CJ at [66].
10 1,637 people were processed on Nauru and Manus Island between 2001 and 2008; 1,153 (70.5%) were resettled - the others voluntarily returned to their country of origin (Report, *West Australian,* Tuesday 21 August 2012).
11 Emily Price, ALA Legal Officer. I am indebted to her paper on the new legislation.
12 *Migration Act 1958* (Cth) (Act) Schedule 1 Subdivision B section 198AB(2).
13 Act Schedule 1 Subdivision B section 198AB(3).
14 Act Schedule 1 Subdivision B section 198AC(4) and (5).
15 Act Schedule 1 Subdivision B section 198AD.
16 Act Schedule 1 Subdivision B schedule 2 paragraph 8.
17 *Plaintiff M70* French CJ at [59].
18 *Plaintiff M70* at [106].
19 *Kirk v Industrial Relations Commission* (2010) HCA 1 at [100].
20 *Lim v MILEA* (1992) 176 CLR 1.
21 *International Finance Trust Co Ltd v NSW Crime Commission* [2009] HCA 49 French CJ at [54] & [55].

22 *Annetts v McCann* (1990) 170 CLR 596 at 598: *Re Minister: Ex parte Miah* (2001) 206 CLR 57 at 93 McHugh CJ at [126].
23 *Leeth v The Commonwealth* (1992) 174 CLR 455 per Mason CJ, Dawson and McHugh JJ at [30] and French CJ in *International Finance Trust Co v NSW Commission* 2009 240 CLR 345 [28].
24 [2000] FCA 1554.
25 *Patto* supra at French J [36].
26 2012 HCA 31.
27 *Plaintiff S10-2011 and others*: 'dispensing provisions' refers to s 48B which authorises the Minister to determine the bar imposed by s 48A be lifted upon a further application; s 195A allowing a detained unlawful non-citizen under s 189 be granted a visa whether or not applied for; s 351 allows the Minister to substitute a decision of the MRT which is more favourable to the applicant; and under s 417 the Minister may do so in the case of a decision of the RRT.
28 *Plaintiff S10-2011* French CJ and Kiefel J at [30].
29 *Plaintiff S10-2011* Gummow J, Hayne J, Crennan J, Bell J (joint judgment) at [96].
30 *Plaintiff S10-2011* joint judgment at [100].
31 *Plaintiff S10-2011* French CJ and Kiefel J at [50].
32 *Plaintiff S10-2011* joint judgment at [99].
33 See P Mares, *Borderline: Australia's Response to Refugees and Asylum Seekers in the Wake of the Tampa* (UNSW Press, 2nd ed, 2002) pp 128-130.

WILLIAMS V COMMONWEALTH AND THE SHIFT FROM RESPONSIBLE TO REPRESENTATIVE GOVERNMENT

Daniel Stewart*

The decision in *Williams v Commonwealth*[1] has significantly restricted Commonwealth executive power. The High Court held that the Commonwealth funding agreement in question must be authorised by valid legislation. In response, the *Financial Framework Legislation Amendment Act (No.3) 2012* (Cth) was passed in an attempt to provide legislative authority for a wide range of government programs placed in doubt by the decision. This comment briefly sets out the basis of the decision in *Williams* and explores the implications that a shift from executive to legislative power (and from responsible to representative government) will have for the role of the court in reviewing government expenditure.

Background

Under the Commonwealth Government's National School Chaplaincy Programme (the NSCP), the Scripture Union Queensland (SUQ), a public company incorporated under the *Corporations Act 2001* (Cth), was contracted to provide chaplaincy services to, among other schools, Darling Heights State Primary School in Queensland (the Agreement). SUQ also had a contract with the Queensland State government to provide similar services to Queensland state schools. Ronald Williams, the Plaintiff, whose children were enrolled at the School, brought proceedings against the Commonwealth, relevant Ministers and the SUQ challenging the authority of the Commonwealth to provide funding under the Agreement. Declaratory and injunctive relief was sought in the High Court's original jurisdiction under s 75(iii) and (v) of the *Constitution* and s 30 of the *Judiciary Act 1903* (Cth). An agreed amended special case was removed to the Full Court.[2] Each of the States intervened on the Constitutional questions raised, and the Churches Commission on Education appeared as *amicus curiae*.

The amended special case raised three key issues: (1) whether there had been a valid appropriation for the Agreement; (2) whether the expenditure of funds under the agreement was authorised by the executive power of the Commonwealth under s 61 of the Constitution; and (3) whether the Agreement infringed s 116 of the Constitution by establishing a religious test as a qualification for an office under the Commonwealth. The Plaintiff's standing to raise these issues was also questioned. The majority of the Court[3] concluded that the Agreement was beyond the executive power of the Commonwealth, and that as such it was unnecessary to answer the questions relating to the appropriation of funds, but that it was not prohibited by s 116. The Plaintiff was held to have standing to raise those questions answered by the Court.

Government is different

The Commonwealth's ultimate submission claimed that the Executive enjoyed the capacity to contract and spend money lawfully available, in common with other legal persons,

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because this did not 'involve interference with what would otherwise be the legal rights and duties of others'.[4] This was unanimously rejected. Some judges drew a distinction between the *capacity* to enter into contracts on behalf of the Commonwealth,[5] and the *power or authority* to do so. Others suggested that the expenditure of public moneys requires questions of contractual capacity 'to be regarded "through different spectacles"'.[6]

The judges therefore accepted that the role of the government in the expenditure of public funds was substantively different from consensual arrangements entered into by non-government persons. The government contract was recognised as a powerful regulatory tool[7] which gave rise to a 'need to protect the community from arbitrary government action'[8]. '[B]y contract the Commonwealth may fetter future executive action in a matter of public interest.'[9] Financial dealings with the Commonwealth also give rise to criminal sanctions.[10] For these reasons some limits had to be placed on the Commonwealth's capacity to contract and spend money.

Exploding common assumptions

Many of the written submissions prior to oral argument made what was termed a 'common assumption'[11] that the executive power of the Commonwealth included a power to do what the Commonwealth legislature *could* authorise the executive to do. Thus one of the main issues raised in the submissions was the extent to which the NSCP fell within the legislative heads of power under s 51 of the *Constitution*, and in particular s 51(xx) given SUQ's status as a trading corporation or s 51(xxiiiA) as a form of benefit to students. Only Heydon J[12] was prepared to accept this argument and to find that the funding would be supported s 51(xxiiiA). Hayne J[13] and Kiefel J[14] each rejected the potential for valid legislative backing of the program. Thus even if the potential to legislate was sufficient to authorise executive action, the NSCP could not be authorised on that basis.

The judgments of French CJ, Gummow and Bell JJ, and Crennan J, however, were prepared to assume that the Commonwealth could have legislated to give effect to the Programme. This was not sufficient. Actual legislative authority was required to enter into the Agreement and for the valid expenditure of the funds. Much of the discussion in the various judgments involved demonstrating that this conclusion was not excluded by previous judicial statements which arguably suggested otherwise. However, the principal justifications for restricting executive power involved two related elements: the Constitutional relationship between legislative and executive power, and the requirements of federalism.

Gummow and Bell JJ pointed to the unsuitability of many of the Constitutional heads of legislative power to frame executive power. The heads of power include provision for taxation and offences, complement the jurisdiction of federal courts over matters arising, and are not suitable to executive decree. French CJ goes further in rejecting 'the location of the contractual capacity of the Commonwealth in a universe of hypothetical laws which would, if enacted, support its exercise' as the means by which to determine the scope of executive power.

Gummow and Bell JJ also stated that reliance on the possibility of statutory support would 'undermine the basal assumption of legislative predominance inherited from the United Kingdom'.[15] The responsibility of Ministers to parliament is not sufficient to satisfy the needs of representative government, at least 'where an executive spending scheme has no legislative engagement for its creation or operation beyond the appropriation process' and where that appropriation process involves limited involvement of the Senate.[16]

Other judges also referred to the distinction between responsible and representative government, but only to counter the argument that government executive power was

potentially unbounded. Crennan J recognised the rise of 'responsible government' in the sense of a government which is responsive to public opinion and the electorate as much as to Parliament. She referred to the various forms of accountability beyond direct legislative implementation as permitting 'the ventilation, accommodation and *effective* authorisation of political decisions':[17]

> The principles of accountability of the Executive to Parliament and the Parliament's control over supply and expenditure operate inevitably to constrain the Commonwealth's capacities to contract and to spend.[18]

Kiefel J referred to responsible government as establishing the relationship between parliament and the executive and requiring only that the scope of Commonwealth executive power be susceptible of control by statute. Parliament can therefore oversee executive action through the possibility of disapproval as well as positive authorisation. On this view the potential influence or impact of the executive action in question is not alone sufficient to invoke representative concerns.

The most strongly supported arguments for requiring statutory authority relied on concerns that the expansion of Commonwealth executive power impacted on State interests. As French CJ put it:

> Expenditure by the Executive government of the Commonwealth, administered and controlled by the Commonwealth, in fields within the competence of the executive governments of the States has, and always has had, the potential, in a practical way of which the Court can take notice, to diminish the authority of the States in their field of operation.[19]

Allowing the Commonwealth government to enter, without statutory authority, into a field where the Commonwealth and State governments have concurrent competencies might give rise to questions of inconsistency without the reconciliation effected by s 109[20] and would undermine the availability of the grants power under s 96.[21] It would ignore the distinctions drawn in identifying those aspects of non-statutory power which derive from the peculiar capacities of the Commonwealth government to Act in a way the States cannot.[22] And the role of the Senate, even if it be 'vestigial'[23] in representing State interests, is impeded through the limited ability of the Senate to scrutinise appropriation Bills under s 53 of the Constitution.

It thus appears that the requirement for statutory authorisation is primarily derived from the need to limit the potential interference with State interests, through more direct reliance on various heads of legislative power and the capacity for legislative predominance over mere executive action or s 109 to resolve any inconsistencies.

Where to now for executive power

The judgments suggest that the scope for executive action is limited to that which is:

- an exercise of the prerogative power unique to the Crown as attributable to the Commonwealth;
- incidental to giving effect to the execution and maintenance of a valid law of the Commonwealth;
- carried out in the administration of a department of State in the sense used in s 64 of the Constitution; or
- an exercise of inherent authority derived from the character and status of the Commonwealth as a national government.[24]

In *NSW v Bardolph*[25] it was suggested that no statutory power is required to make a contract in the ordinary course of administering a recognised part of the government.[26] Several comments in Williams indicate that this proposition may not be generally applicable to the Commonwealth,[27] at least as it purports to extend beyond the administration of a department of state under s 64 of the Constitution[28] or the entering into agreements with the States.[29]

Office … under the Commonwealth

The majority made short work of the argument that the Program requires a religious test as a qualification for an office under the Commonwealth contrary to s 116 of the Constitution. The chaplain in question is 'under the control and direction of the school principal' and is not under any 'contractual or other arrangement with the Commonwealth'.[30] The provision of Commonwealth funding is not enough. It was argued that even if the meaning of 'office' is not restricted in s 116, unlike other provisions like s 75(v) perhaps, the term 'under' requires 'a closer connection to the Commonwealth than that presented by the facts in this case.'[31]

Heydon J, however, dismissed the importance of 'under' suggesting rather that an 'office' is a position under constituted authority to which duties are attached.[32] This requires a direct, legal relationship with the Commonwealth. Contractual obligations enumerating standards and monitoring compliance by parties not directly subject to the contract are not sufficient. Otherwise the original jurisdiction of the High Court under s 75(v) would be widened even beyond its beneficial limits.

All judges therefore accepted that a more direct relationship is required before the parameters of an 'office' under or of 'the Commonwealth' are breached. Whether a more direct contractual relationship might suffice was not considered by the majority, but there is little to indicate that statutory authorisation of the contracts in question would affect this question.

Standing

The question of standing is no clearer. All judges except Heydon J agreed with the conclusion of Gummow and Bell JJ that standing was established to challenge the validity of the Agreement and the making of payments under it.[33] However, Gummow and Bell JJ avoided detailed consideration of the question given that Victoria and Western Australia also sought to challenge the scope of executive power. Even in the absence of any power to intervene any State would have standing to challenge 'the observance by the Commonwealth of the bounds of the executive power assigned to it by the Constitution'.[34]

The 'real issue' as to the Plaintiff's standing to challenge the sufficiency of the appropriation by Parliament was recognised, but not pursued given it did not affect the validity of the funding agreement which was the focus of the case. It appears that the grant of standing was therefore based on the acceptance by the Commonwealth of the Plaintiff's standing to challenge funding arrangements which affected the Plaintiff's children while they attended the school and which continued in operation at the time proceedings were commenced. Only Heydon J examined this point at any length, concluding that, on the Plaintiff's submission, chaplains funded by the Agreement were directly involved in the education of his daughters, which was sufficient to give rise to a sufficient special, if non-material, interest in having a judicial determination of the validity of at least one payment under the Agreement.[35]

So the funding agreement is therefore subject to challenge only due to the direct involvement of the Plaintiff in the activities funded by the agreement. The nature of that involvement and the extent to which it extends to other ways third parties may be affected through the awarding of contracts or spending was not considered.

The legislative response

A week after the *Williams* decision, Parliament passed the *Financial Framework Legislation Amendment Act (No.3) 2012* (Cth) (the *Amendment Act*).[36] The *Amendment Act* purports to provide legislative authority to a wide variety of government programs whose validity was thrown into doubt by the decision in *Williams*. It inserts s 32B into the *Financial Management and Accountability Act 1997* (Cth) (the *FMA Act*). Section 32B provides that, where it did not otherwise have power, the Commonwealth has the power to make, vary or administer agreements[37] or grants included in the Regulations. The Act also amends the *Financial Management and Accountability Regulations 1997* (Cth) to insert Schedule 1AA, which includes a list of 'Grants of financial assistance to persons other than a State or Territory', and a list of 'Programs', collected under the respective Department or administering body and providing only the title and brief objective.

Section 44 of the *FMA Act* is also amended by taking the Chief Executive's responsibilities to manage the affairs of the Commonwealth in s 44(1) to include, and have included, the power to make, vary and administer agreements on behalf of the Commonwealth, though not in relation to a power conferred by the new s 32B. This is intended to provide the power to spend money where that is related to the affairs of the agency in question. The majority in *Williams* had characterised s 44 of the *FMA Act* as only being directed to the prudent conduct of financial administration.[38]

Transitional provisions provide that arrangements and purported arrangements that would have been authorised by the new s 32B(1) but which were made prior to the amendments and in force immediately before the commencement of these provisions are taken to have effect as if they had been made under the new s 32B(1).

The amendments also exclude decisions made under the new s 32B[39] from review under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (the *ADJR Act*).

Questions arising

The legislative response suggests that the decision in Williams will not significantly expand the role of the Senate in supervising government expenditure. Whether arrangements for new spending programs will be subject to greater scrutiny prior to enactment remains to be seen. The threat of Constitutional challenges based on exceeding a Commonwealth head of power remains. However, it is unclear whether the shift to statutory authority for the broad range of programmes listed in the amendments will have significant implications for government contracting more generally.

Excluding decisions made under the new s 32B from review under the *ADJR Act* may be considered unnecessary given the test in *Griffith University v Tang.*[40] It remains to be seen whether the principles set out in that test, and in particular the requirement that the decision under review have the capacity to affect rights and obligations derived from a public source of authority, are applicable to other avenues for review, and particularly if they apply differently depending on whether executive or legislative power is exercised.[41] The Explanatory Memorandum for the amendments states that review under s 75 of the *Constitution* and s 39B of the *Judiciary Act 1903* would still be available,[42] but where the only rights and obligations that arise under the newly statute-based spending agreements derive from contract, the extent of any review beyond constitutional conformity will be very limited.

While it is accepted that the power to enter into contracts *can* be subject to statutory constraint, the nature of those constraints and the extent to which they affect the validity of any contract is a question of statutory construction.[43] The new s 32B provides authority to

enter into the particular arrangement or grant directly or 'for the purpose of a program specified in the regulations'. Given the programs are defined by no more than a title and broadly stated objective it is difficult to derive limits on the nature of the arrangements which might meet that purpose. It may be that there are some express or implied limits that would be required to meet constitutional requirements for a valid law.[44] However, the terms of s 32B do not appear to impose more restrictions than would apply if the legal authority for the arrangements were sourced in executive power.

The authority provided by the new s 32B conditions the grant of power as subject to compliance with the *FMA Act* and regulations, Finance Minister's Orders, special instructions and any other law.[45] Given the varied and indistinct nature of many of these requirements it is unlikely that they condition the validity of any contracts or grants made. The nature of decisions made relating to the exercise of rights and obligations arising under the contracts, such as the application of criteria for entering into or enforcing performance of contracts is thus not likely to be conditioned through additional criteria imposed through the statutory authorisation contained in the *Amendment Act*.

Other elements of *Williams* may also have a limited effect on the capacity to challenge the range of contracts or grants in question. The States will continue to have standing to challenge the constitutional basis of any arrangements; individuals may have standing to challenge only when directly affected by the contract or grant in question. The s 32B grant of authority to the Minister or Chief Executive will not of itself bring other parties to the contract or third parties involved in fulfilling any grant conditions, within the definition of an 'office' either under or of the Commonwealth.

The extent to which the *Williams* decision applies to other forms of executive power, including the power to make inquiries, remains uncertain.[46] An inquiries power may not have the same regulatory effect as funding agreements, may be more readily classified as within the administration of a department of state and arguably has less impact on State interests. However, the same question arises as to whether the shift to statutory authority will substantially change the available grounds of judicial review.

The judgments in *Williams* do recognise the expanded role of government contracting in achieving regulatory objectives in modern government, but the shift to representative accountability is required principally for compatibility with State, rather than individual, interests. But the States gain little in the way of protection of those interests if the degree of parliamentary scrutiny required is as limited as the amendments to the *FMA Act* would suggest, and may now be concerned with the consistency of their own programs with those of the Commonwealth.[47]

Gummow and Bell JJ refer to the need for parliamentary engagement with the 'formulation, amendment or termination' of expenditure programs. Crennan J similarly refers to a parliamentary process of 'scrutiny and debate',[48] and the need for 'some details about the policy being authorised'.[49] However, neither of these requirements seems justiciable. Whether or not the decision in *Williams* will be accompanied by the required statutory source of authority to impose additional criteria of validity, and in the process create incentives for enhanced parliamentary consideration of express criteria, are questions which await clear answers.

Endnotes

1 [2012] HCA 23. All references to paragraph numbers in this comment are taken from this case.
2 See [7]-[8] per French CJ.
3 French CJ, Crennan J and Kiefel J separately agreeing with the answers given in the joint judgment of Gummow and Bell JJ, Hayne J agreeing in part, and Heydon J dissenting.

4 [150] per Gummow and Bell JJ.
5 See [21] and [38] per French CJ; [577] per Kiefel J.
6 [151] per Gummow and Bell JJ, drawing comparisons with *The Commonwealth v John Fairfax & Sons Ltd* (1980) 147 CLR 39 at 51.
7 [38] per French CJ.
8 Crennan J at [521], Gummow and Bell JJ agreeing at [152]. Particularly as the capacity to legislate for more coercive measures under s 51(xxxix) that might be then permitted. See [521] per Crennen J; [581] per Kiefel J; but cf French CJ at [63] discussing the extent to which the executive power to undertake inquiries could authorize legislation compelling the giving of evidence outside Commonwealth legislative competence.
9 [152] per Gummow and Bell JJ.
10 [158] per Gummow and Bell JJ.
11 See [340]–[344] per Heydon J, characterizing the withdrawal from the common assumption through the non-cited quotation of Matthew Arnold's *Dover Beach*: 'So the Court was on a darkling plain, swept with confused alarms of struggle and flight, where ignorant armies clash by night.' [343].
12 At [408]–[441].
13 At [271]–[286].
14 At [574] and [575].
15 [136].
16 [136].
17 [136] emphasis added.
18 [516].
19 [37].
20 [83] per French CJ; [522] per Crennan J (Gummow and Bell JJ agreeing at [152]). See also Heydon J at [406].
21 [143]–[148] per Gummow and Bell JJ; [501] per Crennan J. See also [243] per Hayne J.
22 [544] per Crennan J.
23 [61] per French CJ.
24 See eg French CJ at [4], [34]; Crennan J at [484].
25 (1934) 52 CLR 455.
26 French CJ at [74] quoting Dixon J, with whom Gavan Duffy CJ agreed: (1934) 52 CLR 455 at 493.
27 [532] per Crennan J.
28 [79] French CJ; [139] Gummow and Bell JJ.
29 [141] per Gummow and Bell JJ.
30 [109].
31 Ibid.
32 Citing *Sykes v Cleary* (1992) 176 CLR 77 at 96.
33 [112] Per Gummow and Bell JJ (French CJ at [9]; Hayne J at [168]; [475] per Crennan J; [557] per Kiefel J agreeing).
34 [112].
35 [327]-[331].
36 Passed both houses on 27 June 2012, received royal assent on 28 June 2012.
37 The Amendment Act refers to arrangements as including contracts, agreement or deed. See s 32B(3).
38 [102]-[103] Gummow and Bell JJ (French CJ agreeing [71]-[72], Kiefel J at [596]); [260] Hayne J; [547] Crennan J.
39 As well as, arguably, other decisions relating to the terms and conditions of the financial assistance when given to a State or Territory (see s 32C).
40 [2005] HCA 7; 221 CLR 99.
41 See Daniel Stewart, 'Griffith University v Tang, Under an Enactment and Limiting Access to Judicial Review' (2005) 33 *Federal Law Review* 525; Mark Aronson, 'Private Bodies, Public Power and Soft Law in the High Court' (2007) 35 *Federal Law Review* 1.
42 *Financial Framework Legislation Amendment Bill (No.3) 2012, Explanatory Memorandum*, p.5.
43 Eg *Australian Broadcasting Corporation v Redmore Pty Ltd* (1989) 166 CLR 454.
44 Eg *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 at 513. For a further discussion of the entrenchment of minimum statutory restrictions see Will Bateman, 'The 'Constitution' and the Substantive Principles of Judicial Review: the Full Scope of the Entrenched Minimum Provision of Judicial Review' (2011) 39 *Federal Law Review* 463.
45 See s 32B(1).
46 This was raised in argument but did not have to be decided by the majority in *Plaintiff S10/2011 v Minister for Immigration and Citizenship* [2012] HCA 31 but see the comments by French CJ and Kiefel J that an inquiry preliminary to a consideration of a statutory power was within that aspect of the executive power which 'extends to the execution and maintenance…of the laws of the Commonwealth' at [51].
47 However, it is unclear to what extent the mere authorisation of funding or entering into contracts would give rise to any inconsistency which could be resolved through the Commonwealth statute prevailing over State non-statutory action, or through s 109. Note that the reliance in *Williams* on legislative power and the role of s 109 to avoid potential inconsistencies between Commonwealth and State programs may suggest that a limit might be placed in the future on State executive power, though it was accepted in *Williams* that the States have the legal and practical capacity to provide for a scheme such as the NSCP (see eg [146] per

Gummow and Bell JJ). See also the discussion in *Pape* concerning the relative relationship between Commonwealth and State executive capacities: *Pape v Commissioner of Taxation* [2009] HCA 23, [220]–[225] per Gummow, Crennan and Bell JJ.

48 [532].

49 [531].