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aialFORUM

Editor: Elizabeth Drynan

NO 77

July 2014 Number 77

aialFORUM

Australian Institute of Administrative Law Incorporated.

Editor: Elizabeth Drynan

Contributors are advised that articles published in the AIAL Forum are also reproduced on the AIAL website http://www.aial.org.au and the AUSTLII website http://www.austlii.edu.au

The AIAL Forum is published by

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www.aial.org.au

This issue of the *AIAL Forum* should be cited as (2014) 77 *AIAL Forum.*

The Institute is always pleased to receive papers from writers on administrative law who are interested in publication in the *AIAL Forum.*

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Manuscripts should be sent to the Editor, *AIAL Forum*, at the above address.

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ISSN 1322-9869

Printed on Certified Paper

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Streamlined arrangements for external merits review

On 13 May 2014, the Abbott Government announced its intention to streamline and simplify Australia's external merits review system. The reforms will remove unnecessary layers of bureaucracy and deliver an improved and simplified merits review system for all Australians. This is in line with the Coalition's commitment to streamline government and reduce duplication to deliver efficient, effective government. The measure is expected to save $20.2 million over four years.

From 1 July 2015, key Commonwealth external merits review agencies will be amalgamated—namely, the Administrative Appeals Tribunal (AAT), Migration Review Tribunal and Refugee Review Tribunal, Social Security Appeals Tribunal and the Classification Review Board. Merits review of Freedom of Information (FOI) matters, currently undertaken by the Office of the Australian Information Commission (OAIC), will also be transferred to the AAT from 1 January 2015.

The merger of merits review agencies will provide an accessible 'one stop shop' for external merits review and will ensure that end-users have a review option that is fair, less confusing, just, economical, informal and quick.

Most states and territories have now established a similar 'super tribunal' for merits review, with considerable success.

The complex and multilevel merits review system for FOI matters has contributed to significant processing delays. Simplifying and streamlining FOI review processes by transferring these functions from the OAIC to the AAT will improve administrative efficiencies and reduce the burden on FOI applicants. The AAT will receive a funding boost to assist with the backlog and to better meet acceptable timeframes

Under the new arrangements, the Office of the Privacy Commissioner will be established as a separate statutory office and will continue to be responsible for the exercise of statutory functions under the *Privacy Act 1988* and related legislation.

The Government acknowledges the valuable contribution of Professor John McMillan AO as the Australian Information Commissioner and Dr James Popple as the Freedom of Information Commissioner and the staff of the OAIC.

The Government is committed to an external merits review system that is more efficient, less complicated and more effective.

The Budget is part of the Government's Economic Action Strategy to build a strong, prosperous economy and a safe, secure Australia.

http://www.attorneygeneral.gov.au/Mediareleases/Pages/2014/SecondQuarter/13May2014-Streamlinedarrangementsforexternalmeritsreview.aspx

Law Council of Australia concerned by removal of IAAAS Funding

The Law Council of Australia regrets the Australian Government's decision to cease funding the Immigration Application Advice and Assistance Scheme (IAAAS).

Law Council of Australia President, Mr Michael Colbran QC, said the IAAAS funds professional migration advice and application assistance to eligible immigration clients, including people seeking protection in Australia.

The existing IAAAS model provides modest funding to Australian lawyers and migration agents to provide limited assistance to asylum seekers so they can properly prepare their claims for refugee status or other forms of protection.

'The Law Council considers that the provision of advice and assistance by registered legal practitioners and migration agents is critical to an effective and efficient system of processing protection claims.

'The IAAAS assistance helps ensure that asylum seekers understand the relevant legal process that applies to their claim and ensures that people are able to present these claims in the appropriate form.

'The IAAAS does not extend to providing legal advice about challenging negative decisions in the courts but is important in enabling protection claims to be considered by qualified persons with the result that unsubstantiated protection claims are abandoned at an early stage and unsuccessful applicants are returned swiftly,' Mr Colbran said.

'Without this funding assistance, many vulnerable people will be left to navigate a legally complex system on their own,' Mr Colbran said.

The Law Council is also concerned that the Government's decision to cease funding to the IAAAS will place an unreasonable and unjustified burden on the Australian legal profession to provide pro bono assistance for the tens of thousands of asylum seekers who will otherwise be without help to make one of the most significant legal applications in their lives.

'While the legal profession has always demonstrated great generosity in providing advice to those most in need on a pro bono basis, it cannot be expected to underwrite the threatened failure of the Australian Government to meet this most basic need for assistance.

'While removing legal assistance from this group of clients may at first sound like a cost saving measure, the reality is that without legal assistance, the burden on the community will be increased in many ways, people's claims will be unfairly rejected and their cases could end up in the courts at significantly greater cost in the long run. 'The consequences for further delays in processing claims are obvious – as is the increased social and economic cost of further prolonged detention.

'The Law Council calls upon the Australian Government to reconsider its position and maintain IAAAS funding,' Mr Colbran concluded.

http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/mediaReleases/1409_--Law_Council_concerned_by_removal_of_IAAAS_Funding.pdf

Guidelines urge privacy awareness when publishing personal information

The Queensland Office of Information Commissioner has released a new guideline entitled 'Self-publishing and the privacy principles' to assist people in becoming aware of the privacy implications of publishing their own personal information by explaining how their privacy rights can be affected when they publish or give their personal information for the purposes of publication.

The guidelines are being published during Privacy Awareness Week 2014, a community awareness campaign which encourages individuals to take an active and informed approach to protecting their personal information and raises awareness among public sector staff of their obligations under the *Information Privacy Act 2009* (Qld).

http://www.oic.qld.gov.au/about/news/guidelines-urge-privacy-awareness-when-publishing-personal-information

Australian Human Rights Commission to continue representing people with disability

The Australian Human Rights Commission is pleased that it continues to have the support of the Federal Government.

The President of the Australian Human Rights Commission, Professor Gillian Triggs, has, however, expressed her disappointment that the Commission's budget has been reduced by $1.65 million over the next four years and the reduction of special-purpose Commissioners from the current seven to six.

Professor Triggs notes that the statutory appointment of the current Disability Discrimination Commissioner, Graeme Innes, ends in July 2014. During his term, Commissioner Innes has made an outstanding contribution to the rights of people with disability and the development of the National Disability Insurance Scheme.

Pending a future appointment to be made by the Attorney-General, Professor Triggs will assume responsibility for continuing to meet the statutory obligations required under the Disability Discrimination Act.

The Commission has also decided to convene a national disability rights forum in early 2015, to bring the sector together to identify the key human rights issues being faced by people with a disability.

'It is vital that the human rights of Australians with disability, including older Australians, continue to be heard, especially when they are among the most vulnerable in our community. As President, I will see to it that we ensure people with disabilities have a voice,' said Professor Triggs.

https://www.humanrights.gov.au/news/media-releases/commission-continue-representing-people-disability

Northern Territory Civil and Administrative Appeals Tribunal to reduce red tape

The Northern Territory Country Liberals Government continues to cut red tape with the introduction of the Northern Territory Civil and Administrative Tribunal (NTCAT), a one-stop-shop for civil and administrative appeals.

NTCAT will create a user-friendly appeals process and replace the majority of the 35 commissioners, tribunals, committees and boards, which currently exist.

Attorney-General John Elferink said this is about creating efficiencies for Territorians by providing a single, central, easy to use system.

'The Tribunal will hear and determine a broad range of administrative matters and operate independently of Government,' Mr Elferink said.

'NTCAT will have the ability to make decisions based on information before them, as well as information which has come to light since the original decision.

'The Tribunal will remove unnecessary duplication and inefficiencies, a similar move which has already been adopted in all states across the country, except Tasmania.

'Careful consideration will be given as to whether individual bodies should remain or be abolished and their jurisdiction transferred to the Tribunal.

'The administrative law reforms will require amendments to an estimated 117 acts, a process to be completed carefully and gradually.

'Additionally, the 54 acts which include an appeals mechanism through the Supreme Court and Local Court will be assessed to identify its suitability for the NTCAT.

'The NTCAT also contains the membership structure of the Tribunal, stating that the president must be a magistrate or eligible for appointment as a magistrate.'

Mr Elferink said a report commissioned by the Northern Territory Government last year confirmed that there is a need for a more centralised appeals process, with greater fairness and flexibility.

'NTCAT is part of the Northern Territory Government's plan to create a strong and more efficient justice system through the Pillars of Justice law reforms,' Mr Elferink said.

'The Giles Government has a plan to deliver a justice system that is accessible and effective for Territorians.'

The NTCAT Bill is expected to be debated in Parliament during the August Sittings.

http://newsroom.nt.gov.au/mediaRelease/9395

IBAC Investigations uncover public sector corruption and police misconduct

The results of key investigations into alleged public sector corruption and police misconduct are detailed in a new report from the Victorian Independent Broad-based Anti-corruption Commission (IBAC), which was tabled in Parliament on 15 April 2014.

Investigations into public sector corruption and police misconduct have examined allegations of fraudulent purchasing in local government, bribery of a public official, and excessive use of force by police during an arrest.

The report outlines IBAC's activities in its first year of being fully operational, including investigations, reviews, and corruption prevention and education work, and IBAC's approach to the new integrity legislation.

In IBAC's first year of full operation, 24 new cases were investigated, 10 of which have been completed. Eleven former Office of Police Integrity (OPI) cases, which were unable to be completed by that agency before it was dismantled, were also completed by IBAC.

IBAC also completed 85 reviews of matters investigated by other entities, such as Victoria Police.

'The Victorian public has a right to expect that the people working for the public sector perform their duties with integrity, fairly and honestly,' IBAC Commissioner Stephen O'Bryan QC said.

'IBAC is committed to exposing, investigating and preventing corruption and police misconduct to ensure that the community can have confidence in our government services and that vital public resources aren't wasted.'

IBAC is working with public sector agencies to build capacity to prevent corruption and misconduct through prevention and education initiatives. In its first year, IBAC held 73 education initiatives across the state, reaching more than 1,600 public sector and police employees.

IBAC has also undertaken research to inform its future activities and where to focus its prevention and education efforts. Research into Victorian public sector employees' perceptions of corruption suggested that many senior Victorian public sector employees would have trouble identifying corruption risks, and would not know where to report corruption.

The special report also explains IBAC's approach to aspects of the legislation, highlights areas that may benefit from amendment, and identifies some aspects of the legislation that restrict the performance of IBAC's investigative functions.

IBAC expects to further engage the Parliament, so that the legislation continues to enable IBAC to fully and effectively perform its functions in exposing and preventing police misconduct and corrupt conduct within the broader Victorian public sector.

http://www.ibac.vic.gov.au/news-events/news/Article/2014/04/15/ibac-investigations-uncover-public-sector-corruption-and-police-misconduct

Recent Cases in Administrative Law

Interpreting and the wrong side of the line

***SZSEI v Minister for Immigration and Border Protection* [2014] FCA 465 (16 May 2014)**

The appellants were Nigerian citizens who had lodged protection visa applications shortly after they arrived in Australia. They claimed to have been threatened by members of a secret society who had killed their twin sons.

The Refugee Review Tribunal (the Tribunal) did not believe the appellants and affirmed the Minister's delegate's decision. The primary reason for this disbelief was inconsistencies in the appellants' evidence.

The appellants sought judicial review of the Tribunal's decision by the Federal Circuit Court, which dismissed their appeal. The appellants then appealed to the Federal Court.

Before the Federal Court, the appellants contended that the hearing conducted by the Tribunal did not comply with s 425 of the *Migration Act 1958* (Cth) (the *Act*); and in particular whether:

(a) the interpreter was permitted to engage in exchanges with the first appellant to the extent that the Tribunal member in effect delegated the function of cond*ucting the hearing to the interpreter other than as authorized by s.428 of the Act*; and

(b) non-translation and mistranslation by the interpreter of the Tribunal member's questions and the appellants' answers were such as to prevent the hearing being a lawful exercise of the Tribunal's function and powers pursuant to s 414 and s 425 of the *Act*.

The Court held that while it was evident that the interpreter exceeded her proper role on various occasions, this did not demonstrate that the Tribunal member unlawfully delegated the conduct of the hearing to her, or that she unlawfully usurped the Tribunal's statutory role.

However, the Court found that the standard of interpretation in this case fell well short of the required standard. It not only involved the interpreter making numerous gratuitous remarks by way of commentary on her part which did not reflect questions asked by the Tribunal, but it also extended to the interpreter making several gratuitous remarks on the credibility of some of the first appellant's answers. Furthermore, it is evident that some of the mistranslations and unprompted interventions were the source of confusion by the first appellant on matters which were of particular significance (including the circumstances of the sons' death) to the ultimate disposition of the review.

The Court held that it is well established that the right created by s 425 of the *Act* imposes an objective requirement for the Tribunal to provide a 'real and meaningful' invitation to give evidence and present arguments relating to the issues arising in relation to the decision under review (see *MIMIA v SCAR* [2003] FCAFC 126). While each case necessarily has to be looked at in the context of its own facts and circumstances, the Court considered that this fell on the wrong side of the line. The Tribunal hearing was not fair and did not meet the requirements of s 425 of the *Act*.

Is a former Tasmanian police officer entitled to merits review?

Gadon v Police Review Board *[2014] TASSC 23 (16 May 2014)*

On 22 May 2013, the Tasmanian Police Commissioner terminated the applicant's appointment as a police officer. On 24 May 2013, the applicant sought a review by the Police Review Board (the Board) of his termination.

On 29 November 2013, after hearing submissions, the Board effectively determined that the nature of the review which it was to carry out was not an unlimited merits review, but a review which required the applicant to demonstrate error on the part of the Commissioner in his determination decision.

The applicant sought judicial review of the Board's determination.

The applicant contended that the *Police Service Act 2003* (TAS) requires the Board to carry out a full merits review. While the Commissioner contended that the review is an appeal by way of rehearing on the material before the decision-maker, with express power to receive additional material, but with error on the part of the Commissioner needing to be shown.

The Court held that the starting point is that the Board is an administrative body whose task is to 'review' administrative decisions, determinations or recommendations made by the Commissioner. The Board's power to review is not expressly limited in any way. There is nothing in the text or context of the relevant provisions to compel the implication that the Board is confined to the identification of an error on the part of the Commissioner.

The Court noted the absence of legislative direction that any of the Board members have legal qualifications. While it is possible they might have (and without meaning any criticism of the abilities of the Board members) such a provision might be expected if part of the Board's task was to identify legal errors and to act in accordance with the correct law.

The Court also found it was very significant that the Act provided for the receipt of new material, and the clear mandate that the Board is not restricted to the material before the Commissioner. Such a provision reflects 'de-novo' decision making, where administrative decision-makers are obliged to have regard to the best and most current information available.

The Court also noted that the Board may uphold an application in whole or in part, dismiss it, and make such orders as it considers necessary or desirable for the purpose of giving effect to its decision. With the exception of an express power to remit, these are similar powers afforded to the Commonwealth Administrative Appeals Tribunal, which conducts full merits reviews. Such powers are seen as a convenient and integral part of the merits review process: *Shi v Migration Agents Registration Authority* [2008] HCA 31.

For those reasons, the Court held that a review under the Act is a full merits review of the Commissioner's decision.

Imprecise waste regulations

***Environment Protection Authority v Schon G Condon as liquidator for Orchard Holdings (NSW) Pty Ltd (in liq)* [2014] NSWCA 149 (16 May 2014)**

This appeal was about waste. More precisely, it was about the way in which the 'contribution' payable to the appellant (the EPA) in respect of waste received at a waste facility is to be calculated when no records have been kept.

Section 88 of the *Protection of the Environment Operations Act 1997* (NSW) (the *Act*) requires the occupier of a waste facility to pay to the EPA such contributions as were prescribed by the regulations in respect of all waste received at the facility. Clause 6 of the *Protection of the Environment Operations (Waste) Regulation 2005* applied where there were no or inadequate records, and required the EPA to estimate the tonnes of waste 'at the waste facility'.

The respondent was the liquidator of a company, which had operated a quarry and had also received substantial amounts of waste from off-site. The company had failed kept accurate records of waste received.

The EPA claimed that under cl 6, the respondent was required to pay a contribution of $49,745,055, calculated by estimating the total amount of waste at the site. The EPA contended that cl 6 should be given its ordinary literal meaning. The EPA further argued that where the occupier had chosen not to keep records and had mixed waste received at the site with waste generated on-site, then there was no reason why it should not pay a contribution calculated by reference to an estimation of the total amount of waste at the site.

The respondent contended that the EPA's construction of cl 6 was invalid because (1) it extended beyond the scope of the *Act*, contrary to Shanahan v Scott [HCA] 1957 4; and (2) it was inconsistent with the *Act*, contrary to the regulation-making power in s 323.

The primary judge dismissed the EPA's appeal. The EPA then appealed to the NSW Court of Appeal.

The Court of Appeal held cl 6 was to be construed as a whole and in its context: *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28. Clause 6 should be construed so that it is coherent with s 88 of the *Act*, notwithstanding the textual differences between 'at the site' and 'received at the site'. Critical to the context of cl 6 is s 88, which uses the language of waste 'received at' a waste facility. The Court of Appeal also held that as delegated legislation is less carefully drafted and less keenly scrutinised than legislation, the textual difference on which the EPA relied had less weight: *Liversidge v Anderson* [1942] AC 206.

The Court of Appeal found that the EPA's construction would result in delegated legislation that was inconsistent with the *Act*, because it was an estimate of all waste at the site, not just waste received at the site. It would also expand the operation of the *Act*, as the EPA's construction resulted in a penalty for failing to keep accurate records, which was clearly beyond the scope of s 88, which made no reference to 'penalties' only 'estimates'.

Accordingly the Court of Appeal concluded that on its proper construction cl 6 only authorises an estimate of the waste received at a site. Therefore in calculating the appellant's contribution, the EPA did not comply with the *Act* or cl 6.

Procedural fairness and a lack of legal representation

***Doepgen v Mugarinya Community Association Incorporated* [2014] WASCA 67 (28 March 2014)**

The appellant, a prospector who is not of Aboriginal descent, applied to enter the Yandeyarra Reserve, south of Port Hedland, for the purpose of prospecting. The Reserve is Crown land reserved for the use and benefit of Aboriginal inhabitants. It is leased to the respondent, which controls access to the Reserve by way of by-laws made pursuant to the *Aboriginal Communities Act 1979* (WA). The by-laws permit the respondent to impose conditions on access to the Reserve by people who are not of Aboriginal descent

The appellant's application to enter the Reserve was approved by the respondent, subject to the payment of a fee of $25,000 per annum.

The appellant sought a review of the respondent's decision in the WA State Administrative Tribunal (the Tribunal). The appellant alleged that the imposition of the fee constituted unlawful discrimination on the ground of race, contrary to the *Equal Opportunity Act 1984* (WA). Before the Tribunal, the appellant did not have legal representation but was assisted by a friend, Ms Conlan-Nash.

The Tribunal held that the access fee imposed was lawful. The appellant then sought leave to appeal to the WA Court of Appeal. The appellant was required to attend to show cause why the appeal should not be dismissed on the basis that none of the grounds of appeal had any reasonable prospect of success.

The appellant contended that she was denied procedural fairness in that, being aware the appellant could not afford legal representation, the Tribunal should have adjourned the hearing and referred the appellant to the Tribunal's pro bono scheme (of which the appellant was then unaware) to obtain legal representation, such representation being necessary in order for the appellant to have a reasonable opportunity to present her case.

The Court found that this contention was misconceived. The law of procedural fairness is concerned to avoid practical injustice. At its most basic, procedural fairness ensures that parties are given a fair opportunity to have their case heard and that the decision is made by a decision-maker free of bias. The specific content of the requirements of procedural fairness depends upon the particular circumstances of the case: *Re MIMIA; Ex parte Lam* [2003] HCA 6.

There is no principle which required the appellant to have legal representation when appearing before the Tribunal. While a court has jurisdiction to grant an adjournment or order a permanent stay of proceedings until an indigent person charged with a serious criminal offence is provided with appropriate legal representation (*Dietrich v The Queen* [1992] HCA 57), that aside, the rules of procedural fairness do not extend to a requirement that legal representation be available to a party appearing before a court or tribunal: *The State of New South Wales v Canellis* [1994] HCA 51. The appellant was not denied procedural fairness simply because she did not have legal representation.

The Court also found that the appellant was not denied the opportunity to have legal representation. It is evident from the transcript of the hearing that the appellant attended the hearing with the intention that she would argue the matter herself, with the assistance, so far as needed, of Ms Conlan-Nash. It is apparent that the appellant's contention that she should have been referred to the Tribunal's pro bono scheme was an after-thought. And even if she was referred to the pro bono scheme, it was doubtful that she would have been eligible as she was seeking a permit for commercial gain.

In the Court's view, none of the grounds of appeal had any prospect of success. Accordingly, leave to appeal was refused.

FUTURE DIRECTIONS FOR OMBUDSMAN OFFICES – FOUR TRENDS, TWO REFLECTIONS

John McMillan*

This paper provides an important opportunity to reflect on the work, achievements and future direction of ombudsman offices in Australia and New Zealand. The large number of government and industry ombudsmen and staff signifies the rich ombudsman culture and the strong collaboration that exists in our region.

This paper focuses on the challenges facing ombudsman offices in the next ten years. I will do so by drawing from both my earlier seven years' experience as Commonwealth Ombudsman, and my present four years' experience as Australian Information Commissioner. The paper takes a high level look at the future, noting four possible trends, and offering two reflections on current ombudsman challenges.

Trend 1 – complaints, complaints, complaints: maintaining five decades of achievement

The surest point about ombudsman work is that it will still be vibrant in ten years, twenty years, and indeed for so long as our constitutional systems endure. Over the last fifty years in our region of the world the ombudsman has grown from obscurity to be a highly respected and effective organisation in our institutional arrangements.

It occupies a central place in administrative law, in the government accountability system, in the consumer redress system, in the civil justice system and in our national integrity framework. However we describe relations between the individual and government, or between the individual and business, the office of ombudsman plays a prominent role.

In a ceremony in Wellington in 2012 to mark fifty years of the New Zealand Ombudsman, the Speaker of the House of Representatives commented that the office 'provides a vital check within our democratic system', with a methodology that is distinctive.[1] In a ceremony the following year in Melbourne to mark the fortieth anniversary of the Victorian Ombudsman, the New Zealand Chief Ombudsman commented that the office 'has stood the test of time as a mechanism for resolving citizens' complaints – providing a fair and impartial assessment of grievances and their underlying causes and effecting changes … which strengthen administrative justice, procedural fairness and trust in government, in industry organisations and in other facets of our lives where fair and equitable treatment is critical to harmony in the political, social and economic environment'.[2] In another ceremony in Melbourne this year to mark the twentieth anniversary of the Telecommunications Industry Ombudsman (TIO), the Australian Minister for Communications described the office as 'a world first' that has 'worked so diligently over two decades to deliver a highly professional dispute resolution service for Australia's phone and internet users' and is now 'synonymous with the liberalisation of the telecommunications industry'.[3]

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* *Professor John McMillan, Australian Information Commissioner, presented this keynote speech to the Australian and New Zealand Ombudsman Association (ANZOA) Conference, Wellington, New Zealand, 30 April 2014.*

Those achievements of ombudsman offices were recognised in a draft report in April 2014 by the Australian Productivity Commission on *Access to Justice Arrangements*. One of the Commission's ten Key Points in its distillation of over 700 pages of analysis, is that 'helping people connect with less formal mechanisms, such as ombudsmen, could significantly reduce the level of unmet legal need'.[4]

The Commission identified as many as 73 Commonwealth, State and industry organisations in Australia that are either called an ombudsman or have a similar function (and, pleasingly, adopted the ANZOA statement of six 'Essential Criteria for Describing a Body as an Ombudsman'[5]). Between them, industry and government ombudsmen in Australia resolved 773,000 civil complaints in 2012-3, which was higher than the 373,000 matters finalised by tribunals and the 673,000 civil, criminal, probate and family matters finalised by courts.[6]

The Commission referred to many ombudsman strengths – the offices are independent and impartial, they address a wide range of disputes, they employ a variety of dispute resolution methods, they overcome the power imbalance between the individual and big organisations, they are simple for people to access, and they identify and address systemic issues.

The established but growing popularity and effectiveness of ombudsman offices in resolving grievances is illustrated by caseload trends. Some offices reported a marked increase in complaints in the past year, including a 45% increase for the Energy and Water Ombudsman NSW (EWON), 23% for the Public Transport Ombudsman, 10% for the NSW Ombudsman, and 29% for the New Zealand Ombudsman. Other offices that reported a decrease were able to explain convincingly that this followed steps taken by the office to address systemic issues in industry and government. For example, the TIO explained that an 18% decrease in complaints in 2012-13 followed 'a clear commitment from telcos to do better by their customers, an improved industry code and a focus on compliance';[7] while the Commonwealth Ombudsman pointed to 'efforts over several years to encourage client agencies to improve and promote internal complaint handling services' to explain a 34% reduction.[8]

Trend 2 – Adapting, evolving and re-inventing the office

Why do ombudsman offices continue to grow in strength and reputation? There are many factors, but undoubtedly a key factor is their adaptation to the environment in which they work. This can be seen in many ways.

Ombudsman offices now come in many forms. Joining the parliamentary or government ombudsmen that date back many decades are the specialist industry ombudsman that oversight banking, insurance, energy supply, public transport and telecommunications. Some of those offices have grown from other ombudsman offices – such as the TIO evolving from a function discharged by the Commonwealth Ombudsman. Others, such as the Financial Ombudsman Service, have arisen from a merger of separate complaint bodies that dealt with banking, financial and insurance complaints. Some ombudsman offices span lines that divide others – such as the offices that handle both government and energy complaints or that discharge an information commissioner role that in other jurisdictions is handled by a separate office.

The range of ombudsman oversight functions has flourished. Individual complaint handling remains the core function, but greater prominence is nowadays given by most offices to systemic and own motion investigations. Other specialist functions taken on by offices include whistleblower protection, compliance auditing, records inspection, inspection of places of detention, review of child deaths, review of critical policing incidents, monitoring use of surveillance devices, decision-making training and publication of manuals and guides.

An example from my own period as Commonwealth Ombudsman is that we evolved to hold a number of different statutory hats – Taxation Ombudsman, Defence Force Ombudsman, Immigration Ombudsman, Law Enforcement Ombudsman, Postal Industry Ombudsman, Overseas Student Ombudsman and Norfolk Island Ombudsman. Though a quaint or peculiar arrangement at one level, this transposition was a deliberate strategy to combat a discernible risk that government would hive off some functions to specialist offices. The multiple hats demonstrated that a single ombudsman office could valuably combine both a general jurisdiction and specialist expertise and profile in sensitive areas of government administration.

The internet age has also stimulated a creative phase in ombudsman offices that is relatively new but refreshing. A survey of current ombudsman websites portrays considerable dynamism and cultural awakening as to how the offices represent themselves, describe their work, allow people to complain, elicit customer feedback, and the advice and guidance they publish for organisations and the community.

The lesson for the future is clear. Ombudsman offices must aim to evolve, adapt and remodel themselves as needed to keep pace with changes in government, business and the community. Some pressures are foreseeable, others less predictable. A strong theme in many ombudsman speeches and annual reports is that the offices must constantly respond to demographic changes in their client group, to the emergence of new vulnerable groups in society, to changes in government and industry service delivery methods that adversely affect clients, and to the impact of natural disasters, market events, new government and business programs, and government austerity measures that can have unanticipated consequences.

A current example from Australia of adaptation at work is changed complaint handling arrangements in response to privacy law amendments that impose new obligations on industry regarding the handling of personal credit information.[9] There is now a greater chance that a dispute about financial lending, energy supply or a telecommunications service will have a privacy dimension. Accordingly, the Office of the Australian Information Commissioner (OAIC) can now accredit an industry ombudsman as an external dispute resolution service to which complaints will go in the first instance, before they come to the OAIC. There is likely to be a need for similar hybrid arrangements between privacy and health services commissioners to ensure privacy compliance in the handling of personal health information.

Another example where adaptation and remodelling by ombudsman offices may be required is in response to the popular use of social media channels and portable devices to conduct transactions with government and business. A person using a downloadable app to undertake a simple business transaction with an energy supplier may potentially fall within the jurisdiction of an energy ombudsman, a telecommunications ombudsman, a privacy commissioner and, if there is alleged dishonesty, an ombudsman with police jurisdiction.

Trend 3 – Maintaining relevance and effectiveness in a digital age

The impact of the digital age on ombudsman work warrants a separate heading. Here it is not a question of adapting to and incorporating change, but of being prepared to rethink the role, functions, style and method of the office.

Technology, digitisation, the internet and social media are transformative, in more ways than we can imagine, and at an astonishing pace. Technology is fast changing. Long established patterns in how people relate to government and business are changing – how they purchase goods, do banking, access public transport, change utility service plans, enrol to

vote, lodge forms, obtain a passport, conduct research, apply for a benefit, and make a complaint.

We are entering a world called 'the internet of things' – a world in which everything is connected to or represented in the internet, and all devices, systems and services are linked. It is an open and networked world in which connectivity and intelligence are woven into all interactions. Digital will be the new business DNA.[10]

How will this affect ombudsman offices? I will start with examples from my own office, the OAIC. Naturally we now work on a technological platform: most complaints and freedom of information reviews are received by email or through a web portal, communication with applicants and agencies is mostly by email, all records are digitised, and considerably more material is now published on the web (such as minutes of meetings, office plans and quarterly statistical reports).

Yet the impact of technology goes much further. If people can email an FOI request to an agency or a complaint to the OAIC, they can do so anonymously or by pseudonym, which is essentially what an email address is. No longer do we know with whom we are dealing, and investigatory protocols have had to adapt. Some agencies initially resisted this change but now accept that it is unavoidable.

In a world of online interaction it is also harder to control the complaint and investigation process. A community organisation has created a website called 'Right to Know', through which any person can anonymously make an FOI request to any agency (including the OAIC).[11] The entire interchange between the applicant and the agency is published on the web. The OAIC must keep abreast of what is happening in that space and work constructively but at arms' length with the organisers of the website (including by inviting them to speak at seminars we organise).

Increasingly, too, as FOI disputes are played out live in the media, the OAIC is drawn into but has no control over how an issue will unfold. On occasions we intervene in Twitter conversations to correct, refine or supplement a message. Google is another resource that can be used to check whether documents that an agency claims are exempt from disclosure are not already in the public domain.

We also look for ways to use these developments to reinforce our philosophical goals – to suggest, for example, that if a person can lodge their tax return online they should equally be able to use the same medium to find out how their money is being spent by government. Open government and open data are a natural corollary of online service delivery.

Another dimension of technology is that it may stretch the capability of oversight bodies and their ability to meet client expectations. The community now has the option of conducting many routine business transactions online, such as lodging returns and benefit claims, checking on the progress of a matter, and cross-matching information for multiple purposes. Plans are well advanced in some agencies to move to the next phase, of facilitating transactions through downloadable apps on portable devices, including document lodgment, document sharing, voice authentication and video conferencing and client interviews.[12] These are sophisticated service delivery changes that require considerable resources and expertise to implement.

Will ombudsman clients expect the same innovative service options? An underlying maxim of ombudsman work is that the office should be at least as accessible, competent and responsive as the agencies that are being oversighted. Unless this expectation can be met there is a risk that ombudsman services will be regarded as antiquated and inefficient. A

brief web survey suggests that most ombudsman offices internationally still rely on more traditional means to receive complaints, and only one accepts complaints by SMS.[13] Only a few have adapted their websites for different functional presentation on desktops, tablets and smartphones.

In summary, technology will impact on ombudsman offices from every direction – on business methods, communication with complainants and agencies, the expectations of stakeholders, and the options available to the community to either evaluate ombudsman performance or choose an alternative strategy to resolve a grievance.

The steps taken by ombudsman offices to adapt to the digital and cyber world will influence their effectiveness and stature. But it can also be an important market differentiator. A major reason why ombudsman offices have become more popular as dispute resolution mechanisms than tribunals and courts is that they have been able to adapt more easily and embrace flexible and informal methods that align with community expectations.[14] A challenge for ombudsman offices is to respond to the digital age as an opportunity rather than a threat.

Trend 4 – Building profile and refining the message in a crowded market

Forty years ago Ombudsman offices stood alone in the administrative justice landscape as the alternative forum to courts and tribunals. Now there is a plethora of independent ombudsmen, commissioners, inspectors-general and so-called 'watchdog' bodies. New options and mechanisms are flourishing in the internet age. Ombudsman offices now work in a crowded market.

This luxuriant growth of complaint and dispute options is a welcome development, and aligns with the ombudsman philosophy that people have a right to complain and should have accessible options for doing so. But it also poses a new challenge for ombudsman offices to maintain and lift their stature and convey an understanding of their distinctive role and achievements. This challenge must be addressed in many quarters and at many levels.

The foremost need, in a crowded market, is for ombudsman offices to be visible, understood and accessible. A university research report in the United Kingdom has commented that five decades of ombudsman development in that country have led to a landscape that is 'diverse, fragmented and incoherent', a cluttered dispute resolution landscape that is 'equally incoherent, muddled and confusing to consumers'.[15] The report called on ombudsmen to 'emerg[e] from the shadows of the justice system', including by increasing consumer awareness and accessibility, being proactive and influential in the policy environment and creating a stronger Ombudsman Association.[16]

The Australian Productivity Commission draft report contains similar recommendations for ombudsman offices to be more visible to consumers, particularly disadvantaged and vulnerable client groups who can benefit most from ombudsman services. Confusion surrounding complaint avenues can also be costly for ombudsman offices in dealing with a large volume of enquiries and complaints that are out-of-jurisdiction.

Ombudsman offices must ask whether they are seizing the opportunity to publicise their brand – to the extent, for example, that human rights agencies have been doing. This does not mean that the story should be cast in sensational or attention-grabbing terms – 'watchdog savages agency'. Doubtless that is the media preference, and the greater preparedness of human rights advocates to adopt that stance may explain their high media profile. There is nevertheless interest in story telling that illustrates how ombudsman offices can quietly go about providing redress to complainants and building on human interest

problems to trigger organisational change. Conflict need not be a measure of success. It is important that ombudsman offices are not muffled in a crowded and noisy environment.

Another way the ombudsman profile and image must be addressed is to ensure that influential reports of bodies like the Productivity Commission accurately understand and represent what ombudsman offices can do. While the Commission's draft report contains a pleasing endorsement of ombudsman work, it is troubling that a major theme, to quote a heading from the report, is that 'Ombudsmen provide a mechanism for resolving low value disputes'.[17] Undoubtedly they do, but equally there are countless examples in Australia and New Zealand of ombudsman reports prompting major reform of administrative and legislative systems on issues as diverse as policing, customer billing, ticketing, immigration detention, freedom of information, payment of compensation, complaint handling and benefit and grant administration.[18]

Moving up a level, it must be asked whether the ombudsman role and success is well understood (in Australia at least) in organisational theory and teaching. At a time when judicial review of administrative action is declining in significance as a practical dispute resolution option, there is an outpouring of articles that focus on the judicial role in administrative law and justice. Only a few Australian legal academics or practitioners have ever written about ombudsman theory and practice.[19] By contrast, far more is written about ombudsman themes by British academics[20] and leading jurists and practitioners in New Zealand.[21]

Interestingly, a recent ambitious endeavour in Australia to reposition the ombudsman and similar bodies in legal doctrine by proposing the notion of a fourth or integrity branch of government[22] was assailed by a leading Australian jurist. The Chief Justice of Western Australia, the Hon Wayne Martin, trenchantly criticised this notion, and rejected any suggestion that ombudsman and like bodies could be elevated to the same constitutional plane as courts.[23] While recognising that integrity agencies have an important role to play, he commented that 'they are and must remain firmly with the executive branch of government … and apply standards of conduct stipulated in the statutes which create them, rather than possibly idiosyncratic notions of public purposes and values'.

This criticism misconstrues that 'integrity branch' and 'fourth branch' theories are put forward as a way of stimulating debate on the need to update our constitutional thinking to take account of the profound changes in the dispute resolution landscape that have evolved over the past fifty years. Courts no longer stand alone in checking and curbing government and business power, and arguably have a dwindling practical influence. Ombudsman and similar bodies perform a major role in reviewing and scrutinising decision making and service delivery, cementing legal values in government and business processes, and meeting public expectations by providing an accessible forum to which grievances can be taken and resolved.

Finally, while theory is important it should not obscure the need to distil simple messages that convey the purpose and value of ombudsman work. To draw from the OAIC experience, we decided when established that thirty years of FOI and open government must be captured in a few memorable phrases. They are: 'government information is a national resource to be used for public purposes'; government information is better described as 'public sector information'; and access to information laws embody a 'presumption in favour of disclosure'. Those simple messages have been a powerful tool in shaping the culture of government and projecting the work of the OAIC. Similarly, in privacy regulatory work we echo the simple messages that have been fashioned by the privacy advocacy community – 'personal privacy is an individual and human right to be respected by government and

industry'; 'privacy protection is good business sense and a business enabler'; and privacy safeguards are best implemented through 'privacy by design' in all business processes.

Have ombudsman messages been as simply distilled? There is general recognition of a couple of catch-phrases – 'you have a right to complain' and a 'complaint is a gift'. But what comes next? Is there an equally catchy phrase – or rather a more discursive statement about the need for fairness, propriety and respect in government and business processes?

I now turn to make two brief reflections on ombudsman work.

Reflection 1 – Safeguard the reputation of the office against personal information data breaches

Ombudsman offices are always aware that their reputation can be tarnished. Organisations that throw stones are likely to have them thrown back if the opportunity arises.

The risks are many, but none more acute than the risk that personal information will be mishandled, misused or wrongly disclosed. Probably every case file in an ombudsman office contains identifying personal information, often sensitive information about a person's health, finances, relationships or predicament. The community relies on ombudsman offices to safeguard that personal information, and indeed there is a legal duty to do so under privacy and other laws. Ombudsman offices usually take special precautions to meet that expectation – for example, anonymising case studies in published reports, and ensuring that people purporting to represent complainants have proper authority to do so.

However, data breaches now pose a threat to all organisations, locally and globally. Organisations that have the most to lose from a publicised data breach have not been immune from lapses or targeted cyber breaches. Painful episodes that have recently been given extensive public coverage include Sony Playstation exposing up to 100 million client files; the retailer Target exposing the credit records of upward of 40 million customers; Google street view cameras vacuuming up personal information from unsecured home wifi networks; the Accident Compensation Commission in New Zealand accidentally attaching a spreadsheet containing information on 6700 clients to an email sent to a customer; the Immigration Department in Australia publishing a graph that inadvertently allowed access to source data that contained personal information on thousands of immigration detainees; and Telstra in Australia exposing the personal information of over 15,000 customers to unauthorised internet access.

Lest we think that any of us can be complacent, two publicised data breaches this year affected the Australian Competition and Consumer Commission, when personal subscriber data could be collected by the Commission's website;[24] and the Canadian federal privacy commissioner, which did not properly secure sensitive personal information on 800 current and former employees.[25] The response of the Privacy Commissioner contains a warning to all oversight bodies – the data breach was 'humbling'.

The challenge is unambiguous. A data breach can come in many forms – a file left in a coffee shop; a lost USB stick; a rushed and unedited email; a slip of the tongue; a shared password; an error in publishing data; a lax security system; a website design problem; or a sophisticated and targeted cyber attack. Whatever form a personal information data breach takes can pose a major reputational risk for an ombudsman office. The threat and the challenge are likely to grow over time as digitisation makes it easier both to enlarge and to attack personal information data systems.

Reflection 2 – Customise the office in a constructive way

Ombudsman offices are a mixture of many parts – the constitutive document, strategic plan, customer service charter, governance arrangements, staff, business processes, IT systems, published reports, and stakeholder relationships.

Yet there is of course another key element – the Ombudsman. Almost unique among executive and oversight bodies, the title of the office is the same as that of the head of the office – Commonwealth Ombudsman, New Zealand Ombudsman, Western Australian Ombudsman, Public Transport Ombudsman, Banking and Insurance Ombudsman, Energy and Water Ombudsman.

I was reminded of this unique arrangement soon after I started as Commonwealth Ombudsman and decided to be hands-on and work in the customer call centre once a month. Most people who rang in said 'I'd like to speak to the Ombudsman'. 'You can't; he's unavailable', I'd have to say. Therein ended that experiment.

The message nevertheless remains. The personality and philosophy of the Ombudsman can be an important element in the style and profile of the office. This has current relevance in Australia and New Zealand as four high profile ombudsman in the region move on in the next year or so – Dame Beverley Wakem in New Zealand, Bruce Barbour in NSW, Clare Petre from EWON and George Brouwer has already left in Victoria.

I would not like to follow in the footsteps of any of them. Each has been a towering figure in the ombudsman community and has placed a personal stamp on their office that is distinctive and will endure. However, their departure can also be taken up as a new opportunity to grow and develop each office. I often reflect that I was fortunate to follow two very different Ombudsman – one who came from the community sector and was innovative and publicly assertive, and another with a long and respected career in government who cemented relations with agencies and placed the office on a sound financial footing. This provided an ideal platform for a new ombudsman to develop a different style that drew from both examples.

Over time the influence and durability of an ombudsman office can draw from the fact that each ombudsman will be different. The capacity and flexibility of the institution to accommodate different styles should be embraced as a strength rather than a transitional worry. There should be a vibrant and ongoing debate within all offices and with stakeholders about the direction and philosophy of the office. The departure of one ombudsman and the arrival of another can be an occasion to undertaken that debate in a constructive way.

This point should not be mistaken as suggesting that an ombudsman should uniquely personalise the office or necessarily chase a high media profile. It can be as damaging to the reputation and effectiveness of an office if its approach at any particular time is regarded merely as reflecting the idiosyncrasies of the current occupant.

The point rather is that the profile, commitment and energy of the ombudsman can supplement the other enduring strengths of the office. This is a distinctive feature of the ombudsman role that should be utilised.

The ANZOA community provides an ideal forum for fostering debate on these issues and enabling the institution of ombudsman to build on fifty years of success in the Australian-New Zealand region.

Endnotes

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2 Dame Beverley Wakem, 'The Ombudsman at Large', 12 November 2013.
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11 www.righttoknow.org.au.
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13 Namely, the UK Ombudsman Service: www.ombudsman-services.org. An example of an innovative Australian office is the Energy and Water Ombudsman NSW, 'Social Media Policy, Strategy and Guidelines' (March 2013).
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17 Productivity Commission Draft Report, *Access to Justice Arrangements* (2014) at 278. I note the excellent ANZOA submission in response to the Commission's draft report: www.anzoa.com.au.
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19 The only consistent Australian academic writer has been Anita Stumhcke – eg '"Each for themselves" or "One for All"? The Changing Emphasis of the Commonwealth Ombudsman' (2010) 38 Federal Law Review 143; 'The Evolution of the Classical Ombudsman: A View from the Antipodes' (2012) *International Journal of Public Law and Policy* 83.
20 See the bibliography to the report by Gill et al, note 15 above.
21 Eg Dame Sian Elias, 'The Place of the Ombudsman in the Justice System', Keynote speech to the 2010 ANZOA conference; Mai Chen, 'New Zealand's Ombudsmen Legislation: The Need for Amendments after almost 50 years' (2010) 41 Victoria University of Wellington Law Review 723.
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ETHICS IN THE PUBLIC SECTOR – CLEARLY IMPORTANT, BUT …

*Chris Wheeler**

What does 'ethics' mean?

This article considers the value of a focus on ethics in the public sector from an enforcement perspective. It looks at some limitations on the usefulness of a narrow focus on ethics in public administration and how effective such a focus is in helping to meet the expectations of the community and achieve the objectives of government.

Some commentators have argued for a very broad interpretation of ethics.[1] The problem with a broad definition is that it can encompass a range of matters that have little to do with moral principles, including standards of performance, effectiveness, efficiency, competence, and avoidance of waste. However, in my view ethics is about moral principles and moral character, about whether decisions and actions are right or wrong, about 'morally reflective' decision-making. This narrower interpretation is in line with the derivation of the word 'ethics' from the Greek 'ethos', which means 'moral character'.

Given that it is such an important concept, it is remarkable that we still do not have general agreement as to just what 'ethics' means in practice, or a good understanding of how we can embed high ethical standards into the public sector.

Why are ethical standards in the public sector important?

In representative democracies governments are said to 'govern by consent' – by the consent of the governed. This means that a reasonable level of public trust is of fundamental importance to the proper functioning of a representative government – it is a crucial issue for both governments and the people they govern. The degree to which the public is prepared to trust government is strongly influenced by perceptions as to the general ethical standards of that government. The public's perception as to whether or not a government is 'ethical' is therefore central to whether that government is seen as acceptable.

Must ethical conduct be intentional?

Is a specific intent required for conduct to be ethical?

If ethics is about the application of moral principles, about morally reflective decision-making, presumably conduct should only be considered to be ethical where the person concerned was aware at the time that the conduct was morally good, right or proper - in other words, where the person's conduct was intentional (ie based on specific intent – a consideration of the ethical issues that arose in a particular situation and a conscious decision to act ethically).

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What if there is no relevant mental element?

If we were to be successful in embedding high ethical standards in the public sector, that by itself would not be enough to ensure appropriate standards of conduct by individual public officials and the government generally.

People do what is seen to be the right thing for a range of reasons, some of which may have nothing at all to do with ethical considerations and, indeed, some of which may even be ethically 'challenged'.

Embedding high ethical standards into the public sector is important because it establishes the benchmark of conduct to be achieved by the public sector and provides guidance to those who want to meet those standards. However, embedding high ethical standards by itself will not be enough because it will not address situations where there is no relevant mental element, for example:

- If a person acts out of a proper sense of duty but is innocently mistaken in their judgment as to the morally right course of action, would they still have acted ethically (for example, where there is a conflict between one or more of the obligations on public officials to serve the Parliament, serve the government of the day, serve the public interest, serve their agency and serve the public as citizens/customers/clients)?
- Could a person's conduct be reasonably described as ethical merely because the person's conduct was not unethical or was ethically neutral? For example, in the following circumstances:
    - *automatic behaviour* – the person's actions were based on innate, automatic or routine behaviour;
    - *unthinking behaviour* – the person followed the rules or standard practice without giving ethical issues conscious thought;
    - *lack of opportunity* – the person had no opportunity to act otherwise; or
    - *likelihood of detection* – the person only acted ethically to avoid being caught (ie out of self-interest) not because of any assessment that this was the right and proper thing to do.
- Could it be argued that a person's conduct was unethical because the person innocently failed to perceive or identify an ethical issue? For example, due to:
    - *ignorance* – a failure to perceive or be aware of an ethical issue which was reasonable in the circumstances, for example, due to lack of information; or
    - *complexity* – a failure to identify an ethical issue which was reasonable in the circumstances, for example, in a complex situation involving a significant grey area.

  If there was no mental element – no intention to act ethically – the conduct might be reasonable, appropriate or good practice, but this was not due to the application of moral or ethical principles-. Alternatively the conduct might be seen as being unreasonable, inappropriate, incompetent or otherwise wrong, but not due to ethical failings.

- What if there is 'constructive knowledge' – where the unethical conduct arises out of moral failings involving such things (to borrow from Professor Stephen Cohen) as:
    - *moral negligence* (a reckless failure to consider whether there was an ethical issue);
    - *moral blindness* (a failure to see an obvious ethical issue, such as a conflict of interests); or
    - *moral recklessness* (a rationalisation that there is no ethical issue to consider).[2]

Further confusion can be caused by the fact that in some quarters 'unethical' is equated with 'corrupt', 'illegal' or 'criminal'. Conduct could be criminal or a breach of the law but still be based on a person's firm belief that they were acting ethically (for example, civil disobedience), or conduct could be unethical without being corrupt[3] (for example, intentionally denying a person procedural fairness because the person was perceived to be a nuisance or clearly guilty; being influenced by irrelevant considerations, for example by letting one's strongly held personal religious beliefs inappropriately influence the exercise of discretionary powers; or misleading the public by selectively disclosing information, without lying).

Whether conduct is in fact ethical or unethical depends on cause - the motive or intention of the individual concerned. Looked at this way, while in some matters it may be easy to conclusively determine that someone's motive was unethical, in many cases the question as to whether conduct is ethical will essentially be a personal matter between the individual and their conscience.

To achieve appropriate standards of conduct in the public sector so as to maximise public trust in government, it is necessary to address the range of motivations or causes of the conduct by public officials that could impact on such outcomes and levels of trust. In my view, the range of such motivations or causes could be summarised as being:

- *intentional ethical conduct* (which could result in either appropriate or inappropriate outcomes);
- *unintentional unethical conduct* (arising out of thoughtlessness, misunderstanding, or moral failings);
- *ethically neutral conduct* (for example, routine or automatic behaviour, lack of opportunity, risk avoidance, a reasonable failure to perceive or identify an ethical issue due to ignorance or complexity); or
- *intentional unethical conduct* (either based on 'actual' or 'constructive' knowledge that the conduct was wrong, for example, 'immoral').

From an implementation and enforcement perspective, it may be more useful to focus on outcomes rather than causes, that is, whether the conduct was appropriate no matter what the cause or motivation. Alternatively, where issues about cause or motive are important, maybe the focus should be on questions of judgment rather than ethics. Judgment has a broader application as it extends beyond questions of moral or ethical principle to encompass such things as the soundness of decision-making and standards of performance/service. A third option might be to focus on the conduct and whether it was criminal, illegal, corrupt or otherwise inappropriate.

What factors influence the likelihood of ethical conduct

I think it is a truism that the conduct of individuals is often more influenced by situation than character. I think we would all have seen examples where people have acted ethically/honestly in some contexts or situations but not in others. This cannot be explained by character flaws, but by how people respond to certain events, situations, opportunities and pressures. Some people may be ethical in business but understate their income for tax purposes. Some people may be generally honest in their dealings with their employer but overstate the hours they work, or slow down their pace of work to increase opportunities for overtime.

So, people may consciously act ethically in some situations and, consciously or unconsciously, act unethically in others. Their intentional unethical conduct may not always be premeditated but could be the result of spur of the moment reaction to events or opportunities.

Interestingly, social/psychological researchers have found that people often incorrectly suppose that what other people do is best explained by their character rather than their circumstances – that what somebody does reflects their character. This is referred to variously as 'attribution theory', 'correspondence bias' (ie the correspondence between conduct and character) or 'Fundamental Attribution Error'.[4] While there may be some people whose moral compass always points north and whose conduct is invariably ethical, for most people ethical behaviour is not an absolute.

The various factors that can influence the likelihood of ethical conduct can be summarised as:

- *personal values* – influenced by family, education, religion;
- *personal traits* – the character of the person concerned;
- *supports* – including rules, standards, expectations;
- *deterrents* – which in this context would include the steps that have been taken to prevent and deter unethical conduct and to enforce ethical conduct; and
- *opportunities* – in this context weak or absent systems of prevention and accountability.[5]

What needs to be done to encourage and embed ethical conduct into the public sector?

The encouragement and enforcement of good conduct and administrative practice require various mechanisms, structures and approaches that are both proactive and reactive, and comprehensively address both culture and behaviour, guidance and enforcement, and process and outcomes. They should include:

- *standard setting* – for example, offence provisions, legal obligations, legislated statements of values, jurisdiction wide codes of conduct, agency codes of conduct;
- *expectation setting* – for example, establishing and maintaining an organisational culture that articulates the norms and values of the organisation and the standards of administrative practice and good conduct expected of staff;
- *prevention strategies* – for example, removal of opportunities through fraud prevention measures, disclosure of interests registers, gifts and benefits

registers, merit based selection, records management legislation, internal and external audit, proper supervision, ethics training;

- *enforcement mechanisms* – for example, offence provisions in law, whistleblowing legislation, internal disclosure policies, complaint policies, obligations to report corruption to the anti-corruption body, investigation capacity, FOI/GIPA, records management legislation and policies, merit reviews of administrative decisions; and
- *deterrence mechanisms* – for example, watchdog bodies, internal and external audit, disciplinary action, prosecutions.[6]

The not uncommon approach of government and agencies is to focus most effort and attention on setting standards and expectations. However, focussing merely on setting standards and expectations (for example, on codes of conduct, statements of values) will primarily only impact on those who wish to act ethically and those who don't wish to get into trouble, and may also serve to reduce opportunities for people to rationalise that they are not doing anything wrong. This approach is unlikely to address unintentional unethical conduct, and definitely will not address intentionally unethical conduct (whether due to moral failings or pressure brought to bear by group dynamics or the culture of the organisation).

From a practical enforcement perspective, promoting ethical conduct through such means as codes of conduct and statements of values will have limited effect unless such approaches are part of a comprehensive package of measures covering the setting of standards and expectations, as well as prevention, enforcement and deterrence. It is therefore important to employ the full range of mechanisms, strategies and approaches outlined above so as to maximise appropriate standards of conduct. For example:

- for *intentional ethical conduct*, the most effective mechanisms to encourage or enforce good conduct would be standard setting or expectation setting;
- for *unintentional ethical conduct*, the most effective mechanisms would be standard setting, expectation setting and prevention strategies;
- for *ethically neutral conduct*, the most effective mechanisms would be standard setting, expectation setting, prevention strategies and deterrent mechanisms; and
- for *intentional unethical conduct*, the most effective mechanisms would be standard setting (a pre-requisite for the following strategy and mechanisms to be effective), prevention strategies, enforcement mechanisms and deterrent mechanisms (expectation setting would have little or no impact).

Category of conduct	**Most effective mechanisms to encourage or enforce good conduct**
1) *Intentional ethical conduct*	Standard setting Expectation setting
2) *Unintentional unethical conduct*	Standard setting Expectation setting Prevention strategies

3) *Ethically neutral conduct*	Standard setting Expectation setting Prevention strategies Deterrence mechanisms
4) *Intentional unethical conduct*	Standard setting Prevention strategies Enforcement mechanisms Deterrence mechanisms

If the aim is to ensure appropriate standards of conduct in the public sector, each of these mechanisms, strategies and approaches will need to be put in place as a comprehensive package.

However, these mechanisms, strategies and approaches will be ineffective without the fifth and most important requirement – commitment. By this I am referring to commitment by government and commitment by the management of individual agencies. .

The essential elements of the necessary level of commitment include but are not limited to:

- an awareness of the importance of the issue;
- the allocation of sufficient resources and priority to addressing the issue;
- the implementation of effective governance mechanisms; and
- the establishment of an appropriate ethical culture in the public sector as a whole, as well as in each individual workplace.

Conclusion

While public sector ethics is a nice concept, it has limited relevance to the management of the conduct of public officials to maximise fair and appropriate outcomes in the public interest and public trust in government because:

- there is no general agreement as to the meaning of ethics and what it encompasses;
- ethics involves a mental element and is therefore a very personal and subjective issue, and in practice most people see actual standards of behaviour as more important than what may have motivated that behaviour (other than when things go wrong);
- the application of ethical principles to any complex set of circumstances may well result in a range of possible outcomes, often with no clearly right answer;
- many people can be quite selective in the application of ethical principles to various aspects of their lives and work;
- from a practical enforcement perspective it may be more appropriate or useful to focus on outcomes rather than causes, on whether conduct was criminal, illegal

or corrupt as opposed to ethical, and to talk about questions of judgment rather than ethics; and

- in practice, attempts to improve the standards of conduct and decision-making by public officials need to focus on the full range of potential conduct, not just on trying to encourage public officials to act ethically.

On this last point, while a focus on fostering ethical conduct through setting standards and outlining expectations will assist public officials who wish to act ethically (either generally or in particular circumstances), or who at least would prefer not to act unethically, it will do little to address conduct that is morally negligent, blind or reckless, and will have no impact when people are prepared to place their personal interests above the public interest.

To address the problems that can be caused by such people, a comprehensive approach is required that puts in place adequately resourced mechanisms focusing on:

- standard setting;
- expectation setting;
- prevention procedures and practices;
- enforcement mechanisms; and
- deterrence mechanisms.

ANNEXURE A

WHAT INFLUENCES THE LIKELIHOOD OF ETHICAL CONDUCT?

The main influences on the likelihood of people acting ethically include:

1) *personal values*, for example, influenced by such things as family, education, religion, ethnicity

2) *personal traits*, for example,:

   - strength of character, including a willingness to take responsibility for actions
   - pressure from personal circumstances (for example, a person may be more likely to engage in unethical practices if this will benefit the person personally or if engaging in ethical practices will cost the person personally).

3) *supports*, for example,:

   - *rules (such as codes of conduct, agency policies and procedures, and legislated standards of behaviour)*
   - *guidance as to acceptable behaviour (such as in codes of conduct, codes of ethics, legislated statements of values, guidelines, training, advice)*
   - cultural norms (for example, the culture of an organisation or of the wider society).

4) *deterrents*, for example,:

   - rules (for example, codes of conduct and legislated standards of behaviour)
   - prevention (for example, reduction of opportunities for inappropriate behaviour)
   - strong systems of accountability (for example, internal and external audits)
   - detection of non-compliance (for example, supervision, audits, whistleblowing, watchdog bodies)
   - penalties for non-compliance/breach.

5) *opportunities* (ie situation/circumstances), for example,:

   - weak or absent systems of accountability
   - organisational culture that does not judge certain conduct as being unethical (for example, nepotism or use of organisational resources for personal use).

6) *pressures*, for example,:

- organisational pressure (for example, by management or colleagues)
- political pressure (for example, by Ministers or their staff)
- personal circumstances (for example, financial pressures).

ANNEXURE B

WHAT ARE THE MECHANISMS/STRATEGIES/APPROACHES THAT ENCOURAGE ETHICAL CONDUCT?

Mechanisms, strategies and approaches that encourage ethical behaviour include:

1. Standard setting:

1.1	Offence provisions	-	For example, unauthorised disclosure of information; bribery/secret commissions[1] which apply in all Australian jurisdictions
1.2	Legal obligations	-	Avoidance of bias; obligations of fidelity; disclosure of interests, protection of privacy, transparency and openness in decision making, which are common law or statutory requirements common across Australian jurisdictions
1.3	Legislated statements of values and standards of behaviour	-	A legislative framework setting out overarching principles and standards of behaviour, covering such issues as legality, impartiality, integrity, avoidance of conflicts of interests, acting in good faith, transparency, frankness and candour, use of public resources. Legislative statements of values are the foundation for jurisdiction wide agency codes of conduct and agency statements of values in most Australian jurisdictions.
1.4	Jurisdiction wide codes of conduct	-	Setting out minimum standards of conduct, focusing on the public sector as a whole as apply in most Australian jurisdictions
1.5	Agency codes of conduct	-	Setting out minimum standards of conduct, focusing on the particular characteristics of the agency and its environment and are found all Australian jurisdictions.*

*ICAC/CMC research indicates that 96% of NSW agencies and 92% of Queensland agencies have a code of conduct.

1.6	Ethics training	-	While some argue that 'ethics' cannot be taught, this does not mean that people cannot be given training as to expected standards of behaviour, and given tools to assist ethical decision-making and to create an ethical workplace culture. At present this is ad hoc in most Australian jurisdictions.
1.7	Responsible agency	-	A central agency statutorily charged with promoting and being responsible for appropriate standards of conduct by public officials, applicable in all Australian jurisdictions.
2.	**Expectation setting:**		
2.1	Agency statements of values	-	An articulation of the norms and values of the organisation often set out in a code of conduct, corporate plan/business plan, statement of corporate purpose or guarantee of service. Implementation often involves little more than lip service to a set of values that are not built into an agency's culture, policies, procedures.
2.2	Leadership ('tone at the top')	-	Members of the government of the day demonstrating/ modelling appropriate values and ethical behaviour. Achievement of this outcome is variable across Australian jurisdictions.
		-	Senior management of agencies demonstrating/ modelling a commitment to the organisation's values and to ethical behaviour generally. This is also variable across Australian jurisdictions.
2.3	Duty statements/contracts	-	These set out expected standards of conduct. Duty of employment statements and/or contracts of employment are almost universal for employment in the public sector.
2.4	Oaths of office	-	This is a requirement to hold certain positions in some Australian jurisdictions.
2.5	Ethics training	-	Discussed earlier.
3.	**Prevention strategies:**		
3.1	Whistleblowing legislation	-	Legislation at some level is found in all Australian jurisdictions but is currently under review in several places.

3.2	Disclosure of interests	-	Obligation to disclose pecuniary and other interests or obligations that could lead to a conflict.
3.3	Gifts and benefits registers	-	These requirements are common across all Australian jurisdictions.
3.4	Fraud control plans	-	Ditto
3.5	Use of IT and communication device policies	-	Ditto
3.6	Accounting standards	-	Ditto
3.7	Records management legislation		This requires the making and retention of proper records and is found in all Australian jurisdictions.
3.8	Records management policies		These apply universally in Australian jurisdictions.-
3.9	Merit based selection	-	These practices are almost universal in Australian jurisdictions.
3.10	Criminal records checks	-	These are common pre-requisites across Australian jurisdictions for selection to a position in the public sector.
3.11	Supervision	-	This is particularly important in high risk areas.
3.12	Ethics training	-	Discussed earlier.
4.	**Enforcement mechanisms:**		
4.1	Whistleblowing legislation	-	Discussed earlier.
4.2	Internal disclosure policies	-	To facilitate internal public interest disclosures (whistleblowing) by staff.
4.3	Complaint handling policies	-	Agency policies for the receipt, handling, investigation, of complaints and common across agencies in Australian jurisdictions.

4.4	Reporting of corrupt conduct	-	The obligation on CEOs and Ministers to report suspected corrupt conduct to the anti-corruption body applies in most Australian jurisdictions.
4.5	Internal audit	-	This is common across Australian jurisdictions.
4.6	External audit	-	This practice has universal application in Australian jurisdictions.
4.7	Agency investigative capacity	-	The capacity of agencies to investigate complaints/disclosures is variable across agencies depending on their size and their exposure to and history of illegal/ unethical/inappropriate behaviour.
4.8	FOI (or equivalent)	-	Legislation is found in all Australian jurisdictions.
4.9	Records management legislation	-	Discussed earlier.
4.10	Records management policies	-	Discussed earlier.
4.11	Merit review of administrative decisions	-	Common in Australian jurisdictions, but only for administrative decisions specifically nominated in legislation.

5. Deterrence mechanisms

5.1	Watchdog/integrity bodies	-	Ombudsman offices are found in all Australian jurisdictions.
		-	Anti-Corruption Commissions have been set up in most Australian jurisdictions.
		-	Integrity/Ethics/Standards Commissioners are found in some Australian jurisdictions, such as Queensland, and WA.
		-	Auditors General [in all Australian jurisdictions]
5.2	Internal audit	-	This possibility is common across Australian jurisdictions.
5.3	External audit	-	This mechanism applies universally in Australian jurisdictions.

5.4	Penalties	-	The penalties that can be imposed for non-compliance/breach of acceptable ethical standards/standards of behaviour, for example, warnings, directions, demotions, fines, dismissal, gaol, are common across Australian jurisdictions.
5.5	Disciplinary action	-	This is rare in practice.
5.6	Prosecution	-	This is very rare in practice.

Endnotes

1 It is argued by some that public sector ethics can be categorised as including: *democratic ethics* – that public officials are responsible, responsive and accountable; *managerial ethics* – that public officials are efficient and effective; and *social ethics* – that public officials uphold principles of justice, fairness, equity, individual rights.

2 In other words, where questions of morality are not recognised or are disregarded, as opposed to where questions of morality do arise and the conduct is intentionally unethical, improper.

3 In terms of the normal use of the word rather than any technical definition given in corruption legislation.

4 For example, Lee Ross 'The Intuitive Psychologist and His Shortcomings: Distortions in the Attribution Process', in Leonard Berkowitz, ed, *Advances in Experimental Social Psychology*, vol.10 (New York: Academic Press, 1977); Daniel Gilbert and Patrick Malone, 'The Correspondence Bias', *Psychological Bulletin* 117.

5 Annexure A sets out is a more detailed list of various factors that can influence the likelihood of ethical conduct.

6 These mechanisms, strategies and approaches are set out in more detail in Annexure B.

ADMINISTRATIVE JUSTICE IN JAPAN

Mitsuaki Usui*

Is there 'administrative justice' in Japan? 'Justice' or 'administrative justice' are simple words but very difficult for me to understand precisely in the way that I understand the meaning of civil justice or criminal justice. I suppose that definitions of 'administrative justice' may differ among academics, even in Australia. I understand 'administrative justice' to mean resolving administrative disputes in a fair and impartial process.

Japan introduced almost all of its modern legal systems from European continental countries in the Meiji Era. The first Constitutional Law was enacted in 1890. The Administrative Court was established to resolve disputes relating to administrative actions (decisions). It belonged to the Administrative Branch and was independent of the Judicial Branch. The disputes which people could bring to the Administrative Court were enumerated by Acts; however, there were many disputes which were not within its jurisdiction. Purely civil law matters, for example, disputes concerning contracts of a private nature between government and citizens were decided by the ordinary judicial courts.

After World War II, the Administrative Court was abolished; administrative actions (decisions) are now reviewed by judicial courts. We call this the 'Judicial State'. Generally, it is the choice of complainants whether they use complaints resolution procedures at an administrative level or whether they bring actions directly to the courts. Many Acts prohibit people from bringing actions directly to the courts without first undertaking administrative review at the administrative level. Examples of such Acts are appeals related to taxation and appeals related to social security.

Administrative Review within the Administrative Branch

Japanese law makes provision for reconsideration of decisions by the original decision maker and also for an administrative review system. Remedies are generally sought at the administrative level. Three features of administrative branch remedies are that they:

- are simpler and quicker than court procedures;
- screen cases to be brought before courts; and
- are free.

These elements appear to be similar in Australia.

These procedures are generally governed by the *Administrative Complaints Review Act*, a general Act concerning administrative complaints, objections and review. Many other Acts provide special rules.[1] According to the *Administrative Complaints Review Act*, ordinary adjudicators at the review level have authority to give supervisory directions to original decision makers. Ministers are very often such adjudicators at a national level, and mayors such adjudicators at the city level.

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Example:

In the case of original decisions by the Director of Local Infrastructure Offices within the Ministry of Construction and Transportation, complainants apply for review by the Minister of Construction and Transportation. The Minister can and should supervise the Director's decision. This is an internal review within the Ministry. If there is no higher authority, complainants can seek reconsideration by the original decision maker at an administrative level.

Hearings are available only with leave or if authorised by special legislation.

Internal review is insufficient for a complainant to get a fair and impartial decision, even in a review by a supervising authority. A reviewer's independence from the original decision maker is indispensable for an impartial review decision. As a consequence of the limited rights of review 'administrative justice' in Japan is deficient.

However, it is not correct to say that there is no 'administrative justice' at all. In some cases there is special appeals legislation.

Special legislation establishing administrative appeals tribunals

Special rules are found in several statutes, which set up administrative appeals tribunals. These tribunals were established by the US government after World War II. On the whole, administrative review tribunals are the exception in Japan.

At the national government level there is:

- the Social Insurance Appeals Tribunal; and
- the Labor Insurance Appeals Tribunal.

At the local government level there is:

- the Building Appeals Tribunal;
- the Land Development Appeals Tribunal;
- the Public Health Insurance Appeals Tribunal;
- the Public Nursing Insurance Appeals Tribunal; and
- the Property Valuing Appeals Tribunal.

For civil disputes, there are some administrative tribunals, for example, the Industrial Relations Commission and the Fair Trading Commission.

The members of administrative appeals tribunals at the local government level are all part time appointments. The members are expected to be specialists in each administrative field (building, land development, public health insurance, and so on). It is difficult to find members for tribunals in rural areas due to the shortage of specialists. Administrative law professors are very busy with the work of tribunals.

Tribunals do not have dedicated registrars. Accordingly, it is unclear who has the 'gate keeper' responsibility. Procedures at local government administrative appeals tribunals are usually determined by the tribunals themselves. Often, people cannot find out the detail of the procedures in advance.

National level administrative review tribunals are a little different. Generally the appointment of members requires the Parliament's approval and members are full time appointments.

Special legislation or by-laws for advisory councils

By special legislation advisory councils have been established and are consulted by reviewers and recommend the preferable administrative decision. The council set up under the *Freedom of Information Act* is typical and familiar. At a local government level, similar advisory councils are set up by municipal Freedom of Information By-laws. There are about 1,700 local government bodies in Japan. As a result many members are needed for advisory councils. There are regular calls for administrative law professors to be members, part-time or full-time, of these councils and this can be an onerous and time-consuming task.

The Customs Duty Complaints Review Council is also a kind of advisory council.

Administrative Complaints Review Amendment Bill

Much effort has been made to amend the *Administrative Complaints Review Act*, but the process is difficult because of Japan's unstable Government. The content of the amendment Bill is clear and is designed to:

- establish a position of specialist reviewing (hearing) officer;
- provide for consultation with independent advisory councils; and
- extend the time in which to appeal from 60 days to 3 months.

I would like to see established in Japan a general or comprehensive administrative appeals tribunals such as the AAT in Australia. But my plan is still only a dream in Japan.

Endnote

1 For national taxation we must read the *National Taxation General Rule Act*. The National Taxation Review Tribunal was established by this Act but it belongs to the National Tax Administration Agency and is only partly independent of the Director of National Tax Administration.

THE JUDICIAL REVIEWABILITY OF EXTRADITION DECISIONS: ARE THEY EFFECTIVELY IMMUNE FROM CHALLENGE IN THE ABSENCE OF A REQUIREMENT TO GIVE REASONS?

Dr Peter Johnston*

In my previous article[1] I advanced the proposition that a Commonwealth Minister, when deciding under s 22 of the *Extradition Act 1988* (Cth) (the *Act*) whether to extradite a person to a requesting country, should have regard to international human rights standards and, particularly, the notion of a fair trial as encapsulated in Article 14 of the UN *International Covenant on Civil and Political Rights 1966* (*ICCPR*). I advanced the thesis that the *Act* impliedly incorporates international fair trial standards by giving effect to certain 'extradition exceptions' in bilateral extradition treaties,[2] most notably the exception that extradition can be refused if it would be '*unjust, oppressive, incompatible with humanitarian considerations, or* entail *too severe punishment*' (the 'unjust exception')[3]. This was on the basis that those standards were inherent in the stipulated notions of unjustness, oppression or incompatibility with humanitarian considerations.

Having made the claim for greater and more specific reference to the fair trial standards in the *ICCPR* as relevant to extradition determinations, I now make the counter-claim that any liberalisation of surrender decisions flowing from that realisation will largely be negated by reason of the fact that unless Commonwealth Ministers are required to provide some *explanation* or *justification* for a decision to surrender a person[4] extradition proceedings will be largely insusceptible of judicial review. Even assuming that decisions relating to surrender are open to objection on the basis that surrender would entail contravention of international fair trial standards adopted in the *Act*, the question is: can a challenge to extradition based on the likelihood of such a contravention ever *succeed* in the absence of a confirmatory statement by the relevant Minister? I contend that any enlargement of the scope for taking a more nuanced and articulate consideration of fair trial standards into account will be rendered pointless if extradition decisions are for the most part immune from judicial review by reason of a failure to state reasons.

This article contends that in the absence of a specific, express *statutory duty* to give reasons there is a *constitutional requirement* to provide a *sufficient explanation* of the basis of a decision to enable effective judicial review to take place. What is required in terms of the content of such explanation, in those circumstances, will depend upon the nature of the dispute and the function of the decision-maker in the particular circumstances of the case. The requirement to adequately explain a decision will vary according to the statutory context with the standard impliedly depending on the purpose and object of the legislation.[5]

Inhibitions to effective review

Eight matters significantly qualify the extent to which a court can effectively review extradition decisions of that kind. They are:

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1. The *principle of comity* and respect for foreign judicial process in requesting countries;

2. The 'double layered' nature of the extradition determination under s 22 whereby even if the Attorney is satisfied that it would be unjust to surrender a person because a fair trial in the requesting country is unlikely or impossible, the Attorney may nevertheless conclude that within the scope of *a residual discretion* and *for other reasons* extradition should *not be refused*;

3. The effect of coupling the consideration of the several specific criteria in the 'unjust exception' with the need for the Attorney to take into account the *nature of the extradition offence* and the *interests of the requesting country*;

4. The virtual inviolability of the Minister's exercise of the *general discretion* under s 22 conceived as a 'balancing' process in which minds may differ on the merits and its effect in insulating the decision from review;

5. The effect of the '*no evidence*' principle and the negative objective that extradition proceedings do not entail any judgments about a requested person's guilt;

6. The Attorney General's Department's invocation of *legal professional privilege* relating to the redacted text of legal observations in Departmental submissions to the Minister preventing an applicant accessing and the reviewing court from knowing legal advice upon which an extradition decision was based;

7. Application of the principle of *non-justiciability* and other *discretionary reasons* for not granting relief; and

8. The fact that there is as yet no recognised constitutional, statutory or common law *requirement to provide reasons* or otherwise *explain the basis* of the Attorney's decision, leaving a reviewing court unable to identify how the decision was made, thus effectively immunising it from effective judicial review.

The first difficulty listed above (comity) represents a *general restraint* on the review of extradition cases. Difficulties 2 to 4 constitute *structural obstacles* that stand in the way of a court determining that the Minister has fallen in error on a particular matter. Difficulties 5 to 8 represent *evidentiary or procedural restrictions* impeding review.

1. *Deference to foreign judicial process based on considerations of comity*

It is a truism of extradition law that an Australian court reviewing an extradition decision is obliged under the principle of comity not to impugn the criminal justice system of a requesting country. Respect for comity ostensibly requires that an Australian Minister is obliged to assume that a trial in a foreign country will be properly conducted. This is considered necessary to accommodate the fact that there are often major differences between the criminal trial process in other countries and that in Australia.[6] Respect for the fairness of process in other common law jurisdictions employing adversarial criminal procedures, such as in the UK, New Zealand and Canada is not surprising. Inquisitorial procedures as employed in continental Europe (particularly in Eastern Europe) vary considerably in quality and are accordingly more problematic.

The significance of comity in extradition law was expressed by Gordon J in *Mokbel v Attorney-General (Commonwealth)*:

> The courts of one country will not sit in judgment on the acts of the government of another done within its own territory. This principle of non-adjudication is consistent with the international rule of comity which refers to the respect or courtesy accorded by a country to the laws and institutions of another.[7]

In *Mokbel* her Honour was commenting in the specific context where a decision of a Greek court *had already been made* but it is apparently presumed that the injunction to respect the decisions of foreign courts extends to include *future* criminal process post-extradition. This represents a considerable constraint on the extent to which Ministers and in turn Australian courts are prepared to pass judgment on prospective investigative proceedings or trials in requesting countries. The question is, nevertheless: does comity constitute an *absolute bar* against questioning foreign proceedings?

By way of qualification it may be noted that in *Cabal v United Mexican States (No 3)*[8] French J made the following observation: '[I]t is important to bear in mind that the *general functioning* of the judicial system of an extradition country is *not a matter* for this court.' (Emphasis added.) In dealing with the matter as one of the *general* functioning of a foreign judicial system his Honour appears to have left open the possibility that in a *particular* and perhaps egregious and objectively verifiable *instance*, an Australian court may reflect on the adequacy and fairness of foreign proceedings.

The conclusion can be drawn that while not entirely preclusive of judicial review comity will substantially inhibit it by ensuring that prospective proceedings in foreign courts are likely to receive fairly low-level scrutiny calculated to avoid embarrassment.[9]

2. *The 'double layered' nature of the Attorney's function under s 22 and the possible exercise of the residual discretion to override a conclusion that surrender would be unjust in the circumstances*

The structure of the discretion exercised by the Minister when considering claims based on the 'unjust exception' is governed by sub-ss 22(3)(e) and (f) of the *Act*. They operate in cases where, because of s 11, the *Act* applies in relation to an extradition request subject to a condition or qualification that has the effect that surrender of the person in relation to the offence *shall* or *may* be refused. The effect of these provisions is that first, if in such a case the Minister is satisfied that circumstances exist that would attract the operation of a condition or qualification *mandating refusal*, the Minister is *bound* not to surrender the requested person. If, on the other hand, the Minister is satisfied that circumstances that would attract the operation of a condition or qualification *permitting but not requiring refusal* exist the Minister may still, in the exercise of his or her *discretion*, refuse surrender. Thus even if the Minister is satisfied in the latter circumstances that it is open for her or him to refuse surrender the Minister may nevertheless conclude that surrender of the person in relation to the offence *should not be refused*.

Regarding the nature of the Minister's task when addressing a claim that surrender would be unjust or oppressive Gleeson CJ and McHugh J in *Foster v Minister for Customs and Justice (Foster)* summarised the situation as follows:

> There is a *double layer of satisfaction* involved in s 22(3)(e) and [the regulation incorporating the 'unjust exception']. The section provides that the eligible person is only to be surrendered if the Attorney-General (or Minister) is satisfied that circumstances engaging a limitation, condition, qualification or exception to surrender contained in the Regulations do not exist. [The regulation] provides for such a limitation. It prohibits surrender if the Attorney-General (or Minister) is satisfied that it would be unjust, oppressive or too severe a punishment. Therefore, in order to surrender a person the Attorney-General (or Minister) must be satisfied that he or she is not satisfied that it would be

> unjust, oppressive or too severe a punishment. Since what is involved is the state of satisfaction, or lack of satisfaction, of the one decision-maker, what is critical is whether the decision-maker is satisfied of a matter referred to in [the regulation]. Applying the Act and Regulations to the present case, the Minister was obliged to ask whether she was satisfied that it would… be unjust or oppressive or too severe a punishment to surrender the eligible person. If the answer to that question were in the negative, then she would be satisfied that the circumstances referred to in s 22(3)(e)(iii) did not exist, and the qualification imposed by s 22(3)(e) upon the extent of her powers under ss 22 and 23 would not operate to inhibit their exercise. (Emphasis added)[10]

In the result, where regulations provide that by reason of the 'unjust exception' surrender is discretionary, the Minister may come to a conclusion that in fact surrender would be unjust, oppressive or incompatible with humanitarian considerations yet still decide for other reasons that may not even be disclosed to exercise the *general discretion* not to refuse extradition. Even a conclusion that the Minister may, in exercising the first discretion, refuse extradition does not mandate that he or she must.[11]

3. *The coupling of the criteria in the 'unjust exception' with the need for the Attorney to take into account the nature of the extradition offence and the interests of the requesting country*

The addition of these two extra criteria has the consequence that the value judgment required in the case of treaties incorporating the unjust exception is different from the alternative decision-making process where the 'unjust' criteria are to be considered *solely* by reference to their separate or cumulative elements.

This consequence was recognised by Barker J in *Adamas FFC* in which he said:

> What might be said … about the operation of s 22(3)(e) and Art 9(2)(b) [of the extradition treaty between Australia and Indonesia] is that the Minister at all material times was possessed of a *broad function* to achieve a certain level of satisfaction. He could, even if he were to consider, by reference to the circumstances of the case, that extradition of the first respondent to Indonesia would be unjust, on the basis of the first respondent's conviction in that country in absentia, nonetheless ultimately not be satisfied that it would be unjust to surrender him to Indonesia taking into account the nature of the offence and the interests of Indonesia.[12]

In his Honour's view, this requires ministerial decision-makers to *balance* and *weigh* these various factors when forming the relevant value judgment about whether extradition would be unjust.[13] In that case the interests of the requesting state may 'outweigh' the oppression to the individual.

4. *The virtual inviolability of the Minister's exercise of the general discretion under s 22 conceived as a 'balancing' process on which minds may on the matter of the merits differ, insulating the decision from review*

A formidable and arguably intractable barrier to review is presented by the problem that the balancing process involved both in exercising the residual discretion in s 22 and the 'weighing' of an unjust surrender against the countervailing factors of the nature of the offence and the interests of the requesting country, is that this divergent cluster of factors constitutes a somewhat elusive and judicially unmanageable test (in the sense of providing no clear guidelines).

The indeterminate nature of the process is reflected in the formulaic way in which the Attorney-General's Department couches recommendations in its submission to the Minister. These are often along the following lines:

> While you may give *some weight* to the (applicant's assertion) … it is *open to you* to conclude that extradition in the circumstances would *not be unjust*, oppressive or incompatible with humanitarian considerations. (or to similar effect): that having regard to the nature of the offence/interests of the [requesting state] it is open to you not to refuse extradition. (Emphasis added)

How can a court determine whether the Minister has 'failed to accord *sufficient* weight' to a particular factor?[14]

Taken to its logical limits, it would mean that in the case of extremely serious crimes involving homicide, terrorism or massive defalcation of money the nature of the offence will, as a matter of proportion, virtually outweigh any other mitigating circumstance. Commit an offence against the US *Patriot Act* and off you go, even if you will be tried before an arguably biased military commission in Guantanamo Bay (assuming it is still open)![15] The seriousness of the offence could virtually become the sole and exclusive consideration. Even more elusively the amorphous character of 'interests of a requesting state' comes close to Australia (and arguably the court) having to make political judgments about foreign regimes.

This is compounded by the initial problem that in an extradition challenge the applicant must be able to establish that the Minister had regard to one of other of these factors. As indicated in the next section, in the absence of a clear evidentiary basis for so concluding, any decision resulting from the balancing process is virtually immune from review.

That may be an acceptable outcome so far as it insulates courts from engaging, impermissibly, in a political assessment on the merits entailed in the balancing process itself[16] but arguably goes too far where that process has been contaminated by substantial errors of law and misunderstandings that go to the heart of the process. The need for a means of identifying aberrations of the latter kind in the absence of reasons remains for consideration below.

5. *The inhibiting effect of the 'no evidence' principle and the negative factor that extradition proceedings do not entail any judgments about a requested person's guilt*

While not in terms precluding production of relevant material evidence, the 'no evidence' rule arguably tends to create a context of expeditious extradition that tips the scale against a court scrutinising evidentiary material too closely lest the court infringes the injunction against not arbitrating on issues of guilt. This has a limiting effect on the kind of documentary material that may be produced on judicial review and aggravates the consequential difficulties of relying on inference from Departmental submissions.[17]

Understandably, courts are reluctant to concede that in matters involving the liberty of the subject the exercise of executive discretion is beyond judicial review. In *Minister for Immigration and Citizenship v SZQRB* (*SZQRB*) Flick J commented that where a Commonwealth law authorises an exercise of statutory discretion the power cannot *generally* be conferred free from all judicial scrutiny.[18] Nevertheless, as his Honour concedes, where courts have *no means by which to ascertain the basis of an authority's decision* it may be impracticable to determine its legality by reference to whether it lies within the general limits of the scope and purpose of an Act. In the absence of a statement of the Minister's reasons there can be *no direct evidence* of the basis on which the Minister did not disallow extradition.

Given that the Minister in her or his discretion may decline to refuse extradition notwithstanding that the extradition would be unjust, oppressive or incompatible with humanitarian considerations, this opens the possibility that the Minister may have had regard to *other possible reasons which may remain undisclosed*. In those circumstances it is

appropriate to ask: to what extent can a court reasonably draw *inferences from the Departmental submission*, the one given source of information, to identify the underlying considerations and reasons on which the extradition decision was based? This requires an appreciation of the function of Departmental submissions as part of the decision-making process.

It is axiomatic that the Minister is under no statutory duty to provide reasons for his or her decisions under the *Act*.[19] In fact, it is not the practice for Ministers to do so. The usual process in extradition cases is for the Minister to signify approval of the Department's recommendation by ticking the relevant recommendation box in the Department's written submission and signing his or her name. The main document before the reviewing court will therefore be the Departmental submission itself setting out the facts, law, applicants' submissions, the Department's comments and legal advice, together with the Department's general recommendations regarding the same. Invariably, in cases that are reported, the Department recommends that the Minister should not refuse extradition.

There is, of course, no legal objection to a Minister relying on advice and recommendations in a departmental submission. As Gibbs CJ said in *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (*Peko-Wallsend*) '[A] Minister cannot be expected to read for himself all the relevant papers … It would not be unreasonable for him to rely on a summary of the relevant facts furnished by the officers of his Department.'[20]

It may be accepted that the Departmental submission does not constitute a statement of the Minister's reasons. Case law clearly establishes that submissions prepared by the Department are not a record or substitute for the Minister's reasons. In particular, they cannot be taken to indicate the Minister's decision-making *process* of deliberation and choice.[21] This is especially so where material in the submission has been redacted. This does not preclude, however, the drawing of inferences from statements or omissions in the Departmental submission[22] although there are numerous judicial comments indicating that a court should be cautious and slow to draw any adverse inference about the Minister's reasons.

The problem remains, however, just what inferences, if any, can reasonably be drawn from the contents of the *Departmental* submission concerning the basis of the Minister's decision?[23] In some instances an applicant for review may be able to demonstrate that particular guidance provided in a briefing note was relevant but constituted wrong and misleading advice, or a relevant matter was not addressed. In such cases, a court may find that the exercise of the Minister's power miscarried by reason of jurisdictional error.[24]
One possible ground for challenging the Minister's exercise of discretion would be to argue that a failure to state and identify reasons for a decision implies that no good reasons exist. That approach is not open, however, in circumstances such as those prevailing under the *Act* where it may be *presumed* that the Minister had good reasons although whether they exist is not, however, readily accessible on the face of the record.[25]

Also, compounding this, a court should accept that where, for example, a Departmental submission is extensive and detailed, adverse inferences should not be lightly made concerning whether the Minister fairly turned his mind to the material before him.[26] The assumption is that the Minister has read the same in its entirety together with any submissions made by the applicant.[27] That assumption does not mean that the Minister's opinion in the end depends on anything in the submissions. Ministers may be persuaded by external factors such as the desire to maintain a favourable relationship with another country or for extraneous reasons of domestic politics. These may not in themselves be 'improper purposes'. Whether they are or not, without ministerial acknowledgement the basis of the decision will not be evident, even if their existence is improbable.

Different considerations may apply, on the other hand, where the court is able to deduce from the material put before the Minister that, on *a specific matter,* the Minister was erroneously or inadequately advised on a matter of law. A constructive conclusion may then permissibly be drawn from the objective likelihood that the Minister was misled into error.

Thus in *Adamas FFC*, Barker J, for the majority, found that absence of reasons did not necessarily preclude review regarding whether the Minister was *adequately and correctly advised* about the requirement that potential injustice should be assessed by reference to Australian standards.[28] In his view, having regard to the principles of good public administration it is not only open to a judge to draw an inference about whether the Minister took into account an irrelevant consideration if misled by legal advice in the Departmental submission, it may also be reasonable in all of circumstances to conclude that the Minister *had done so*. Thus, if an applicant can demonstrate that particular guidance provided in the Departmental submission 'was relevant and apparently significant to the recommendation made, but wrong, or a relevant matter was not addressed, then plainly there would be a case for considering that the exercise of the Minister's power miscarried by reason of jurisdictional error.'[29]

The majority of the Full Federal Court held that a deficiency in the advice to the Minister amounted to jurisdictional error, particularly since it failed to advert to how, as a matter of fairness, it would be viewed in an Australian context if a person unaware of charges against him or her was convicted *in absentia*.[30] On that specific matter the High Court on appeal overturned the decision of the Full Federal Court because the Full Court itself had applied an incorrect test of unfairness, in not accepting that in a bilateral treaty unfairness was not to be construed and judged *solely* by Australian standards.[31] It is significant, however, that the broader proposition advanced by the Full Court, that a patent error in advice could amount to jurisdictional error, was not rejected by the High Court.

This opens the possibility that even allowing for the fact that there may be no *direct evidence* about what regard the Minister actually had to a Departmental submission, an egregious failure to properly inform the Minister about the legal significance of a matter central to the *Act's* operation is capable of founding a basis for review. While the Minister's reasoning may not be *generally* accessible to a court of review, a patent error in departmental advice can apparently provide a ground for review.[32] Hence the 'no-evidence' rule does not necessarily work to prevent judicial review. It just makes the matter more difficult in practice.

6. *The resort to legal professional privilege preventing an applicant for review and the reviewing court from knowing the content of legal advice upon which an extradition decision was based*

The fact that the reviewing court has limited scope to infer the Minister's process of reasoning from the Departmental submission is aggravated by the practice whereby the Department usually provides a copy of its submission to a person seeking to challenge in *redacted* form. Legal advice given to the Minister is therefore excluded from scrutiny by both the challenger and a reviewing court. In *Zentai v O'Connor* (*No 2*)[33] McKerracher J held that references to conclusions made in legal advice given by Australian prosecuting authorities that the Department had provided to the Minister sufficiently indicated the nature of that advice to amount to a *waiver* of legal professional privilege. The full text of the various advices was then provided to the applicant in unredacted form.[34] In *Adamas v O'Connor*,[35] on the other hand, the primary judge noted the comprehensive redactions in the Departmental submission and distinguished *Zentai* as turning on its own facts. He held that there was no basis for finding that legal professional privilege had been waived.

In future cases it may be assumed that great care will be taken in redacting the submission to ensure that privilege is not waived. The resort to legal professional privilege will probably continue to be a substantial obstacle to applications for review screening the court from knowing and judging the soundness of any legal advice upon which an extradition decision is based.

7. *Principle of non-justiciability and exercise of discretion not to grant relief*

While it is not a doctrinal bar, considerations of justiciability[36] often work to preclude certain politically contentious administrative decisions from review. In other common law jurisdictions, such as England and Canada, issues of justiciability and deference are often mingled, both operating to create zones of executive non-accountability.[37] They have been criticised as doctrines of abstention[38] constituting an abdication of the judicial responsibility to protect human rights.[39] Avoidance of issues as non-justiciable is compounded by the fact that even if prepared to enter upon consideration of a matter[40] a court can, in the exercise of discretion, decline to grant any relief.[41]

In *Peko-Wallsend* Mason J identified several factors that significantly reduce the scope of judicial review of certain kinds of decisions. One is the level of decision-maker that Parliament selects to exercise the discretionary power. The fact that the power is vested in a Minister, who is accountable to Parliament, and is exerciseable on broad considerations of public policy and national interest are factors that disincline courts to subject such decisions to close scrutiny. While not totally preclusive it makes such decisions less susceptible to review.[42]

So far in Australia the High Court has set its face against allowing *deference* to institutional expertise to emerge as a factor for not intervening to review some decisions.[43] *Justiciability* and its correlative *standing to sue* on the other hand can still pose problems where issues such as national security, global political crises or international relations are concerned.[44] Extradition proceedings can entail elements of each of the latter. Allied with claims of comity these factors can represent significant barriers to judicial intervention in surrender decisions.

8. *The consequence of there being no statutory or common law requirement to provide reasons or otherwise explain the basis of the Attorney's decision, leaving courts unable to identify how the decision was made thereby effectively immunising the decision from effective judicial review*

The above difficulties entail procedural and evidentiary limitations that confront any applicant who seeks review of an extradition decision. They substantially diminish the capacity of a court to exercise judicial review effectively. Where the matter is one where the Minister might have exercised his or her *general discretion* it is particularly difficult to mount a challenge solely by reference to the objects and purposes of the *Act* authorising the exercise of power.[45] Even where resort to inference is possible it is largely inconclusive in the absence of a requirement for the Minister to *particularise the basis* for his or her decision. For the most part the reasoning process will remain inaccessible in the domain of the unknown or speculation.[46]

The problems that face someone challenging extradition can be gleaned from considering the Minister's grounds of appeal in *Adamas FFC.*[47] In elaboration the Minister submitted that in the absence of direct evidence about his reasons for not disallowing extradition no inference could be drawn concerning whether he had adopted the contents of the Departmental document as his own reasoning. For one thing, he *may have had other possible reasons* for deciding to extradite. Accordingly, no conclusion could be inferred that extradition would not be unjust, oppressive or incompatible with humanitarian

considerations. He might, for reasons extraneous to the Departmental submission, have been prepared to extradite the person anyway. Acceptance of propositions of that kind almost totally negates any possibility of judicial review.[48] In fact, the Commonwealth submitted that there were sound reasons for the executive to exercise specific and general discretions that were *not open* to a court to review.[49] In the result, if these submissions are accepted courts will be left in the situation of either impotence or impermissibly engaging in an uninformed exercise of forensic 'Pin the Tail on the Donkey'.[50]

This dilemma is not so much a case of what is not known cannot be explained, rather of what is not explained cannot be known.[51] Without a secure basis in published reasons an applicant and a reviewing court are left to face the Kafkaesque problem that 'The right understanding of any matter and misunderstanding the same matter do not wholly exclude each other.'[52]

The difficulties of challenging a Minister's decision under s 22 because an applicant is ignorant of the specific basis for decision is also compounded by the inability, generally, to go behind the Attorney's prior decision under s 16 of the *Act* to give notice to a magistrate that an individual is an 'extraditable person'. That notice triggers the process whereby the magistrate makes the further determination as to whether the individual is an 'eligible person', which is a precondition to the Minister exercising power under s 22. To assist the Minister in deciding whether to issue a Notice under s 16 the Department usually furnishes the Minister with a submission (sometimes redacted) on the matter, mirroring the later procedure of advising the Minister for the purposes of s 22. Even with the advantage of the Department's briefing note there is little scope for an extraditable person to challenge any matter at that stage. This is significant since a failure to contest at the s 16 stage whether a person legally has the status of an 'extraditable person' may be fatal to further review of that issue.[53]

Necessarily, this intractability of access to the Minister's basis for decision gives scope to the executive to shield a significant field of administrative decisions from effective review and does nothing to enhance transparency and the accountability of government.

The question can alternatively be posed as an element of the Rule of Law: Is the lack of *an obligation* upon the Minister *to explain and justify his or her decision* in an intelligible way consistent with the requirements of Chapter III of the Constitution? The question is framed in terms of explanation and justification to avoid it being too readily and simplistically identified with the cognate but distinct question: is there a common law *duty to provide reasons* for administrative decision.[54]

Arguments for implying a principle of justification

In the first place, it is necessary to appreciate that neither the *Act* nor any other statute such as the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (*ADJR Act*)[55] expressly requires the Minister to provide a statement of reasons.[56] Moreover, there is no general common law duty to do so.[57] It is also debatable, that an obligation can be derived by way of *necessary implication* from s 22 of the *Act* compelling the Minister to provide a statement of relevant findings and reasons in light of the drastic consequences of an adverse decision.[58] The same difficulty of establishing a necessary implication is faced in arguing that it is *incidental to the purpose* implicit in s 39B of the *Judiciary Act 1903* to effect judicial review.

The above arguments converge to support the claim that unless the Minister records findings and reasons a reviewing court will generally not be able to judge whether his or her actions are lawful. Notionally, at least according to *Avon Downs*[59]*,* it may be possible to scrutinise the decision, having regard to the materials before the Minister and infer error, excess of

authority, identifying a wrong issue or asking a wrong question, ignoring relevant material or relying on irrelevant material.[60] However, as demonstrated by some of the cases analysed above there are substantial limitations on that logical process. Another obstacle is that the obligation to provide reasons is not inherently an aspect of the requirement to provide natural justice or procedural fairness.[61]

Is there a constitutional requirement to disclose reasons?

Is there then a *constitutional basis* for asserting that, if not as extensive as a duty to state reasons, some *justification and explanation* of an extradition decision is required in order to ensure that the High Court's jurisdiction under Chapter III, particularly 75(v) of the Constitution is not rendered nugatory? The basic premise is that s 22 of the *Act* requires the Attorney General to determine a number of specific matters. Unless he or she records findings with respect to the same a reviewing court will not be able to judge whether his or her actions are lawful or not. The Court's jurisdiction under s 75(v) would be rendered capricious as depending on executive choice regarding disclosure.

In *Plaintiff M61/2010E v The Commonwealth* (*The Offshore Processing Case*)[62] the High Court referred to the purpose of Chapter III in constraining arbitrary executive power. It said:

> It is an essential characteristic of the judicature established by Ch III that it declares and determines the limits of power conferred by statute upon decision-makers. The various legislative powers for which the *Constitution* provides are expressed as being 'subject to' the *Constitution* and thus to the operation of Ch III, in particular to the exercise of jurisdiction conferred by s 75. The reasoning supporting decisions made in particular controversies acquires a permanent, larger and general dimension as an aspect of the Rule of Law under the *Constitution*.[63]

Section 75(v), together with its counterpart in s 75(iii) (which vests original jurisdiction in the High Court in matters where the Commonwealth or someone acting on its behalf is being sued) is central to both the maintenance of the Rule of Law under the Constitution and the maintenance of the constitutional separation of powers. It ensures that those who exercise public powers are bound by the law authorising their actions.[64] As explained by James Stellios, s 75(v) was included to hold Commonwealth offices to account.[65] The importance of the role of s 75(v) in maintaining governmental accountability and preventing the executive from going outside the bounds of its lawful powers was emphasised by Flick J in *SZQRB*.[66] Regarding the significance of s 75(v) in the scheme of review he said:[67]

> It is one thing for the Commonwealth legislature to pass a law to restrict or even exclude – or attempt to restrict or exclude – the scope of judicial review of administrative decision-making. So long as any such restriction or exclusion of judicial review is consistent with the Commonwealth *Constitution* – and, in particular, s 75(v) – such laws are within the legislative competence of the Commonwealth Parliament. It is thereafter the duty of the courts to apply the law to the matters that come before it.
>
> It is an entirely a different thing for a Minister of the Crown to attempt to administer legislative powers entrusted to him *in a manner which further attempts to exclude from judicial scrutiny* the decisions he has made. (Emphasis added)

In order to determine both the limits on power and the facts which bring the decision within power the High Court must be able to ascertain the basis of the Commonwealth executive decisions. Otherwise the stream is free to rise above its source.[68] To be deprived of access to the Minister's reasons arguably renders judicial review *ineffective*[69] and would leave many questions of validity incontestable if the exercise of Commonwealth executive or statutory power is unexaminable.[70] At the least a refusal to give reasons, if not constitutionally mandated, should attract a heightened intensity of review.

Essentially, the implication of a constitutional requirement, albeit limited, of disclosure of reasons can be justified as *one of necessity* premised on the notion that the system of judicial review for which s 75(v) provides extends to every authority or capacity which is proper to render it 'effective'.[71]

Justification arguably does not require a lengthy explanation nor would it be necessary to refer to every finding of fact or every piece of evidence. However, a bald conclusion leaving it to guesswork about what were the actual reasons moving the decision-making would not be adequate.[72] It may be accepted that the requirement to provide justification is not universal in terms of its content; it will necessarily apply according to variable standards. The standard should be set, not at the optimal level of detail but rather at the minimum acceptable standard.[73]

The argument for a constitutional obligation of justification is rooted not only in the Rule of Law as encapsulated in s 75(v) of the Constitution but also in the principle of *responsible government* which forms part of the basic fabric of Chapters I and II of the Constitution.[74] Not only does non-disclosure of a Minister's reasons thwart the exercise of judicial review, it prevents the Parliament from adequately scrutinising decisions of the executive arm of government.[75] This is irrespective of whether the Minister's failure to explain her or his decision is a result of a deliberate refusal or simply the product of an executive default.[76] In both cases non-compliance arguably constitutes an arbitrary defeasance of the constitutional scheme to ensure accountability of the executive.

Argument by analogy

The effect of failing or declining to furnish reasons can be approached by way of analogy. The inability of applicants for review to access the jurisdiction of the Federal Court due to executive default was raised in a series of refugee cases concerned with non-compliance with the time limit then specified in s 478 of the *Migration Act 1958*.[77] Under that provision an applicant who sought review of a Refugee Review Tribunal decision had to lodge the application with the Federal Court within 28 days of being notified of the decision. The section then provided that the Federal Court must not make any order allowing an applicant to lodge an application outside the 28 day period. Asylum-seeking applicants in detention centres, even if they completed their applications some days before the period expired were totally reliant on departmental officers to fax applications to the Federal Court in time. Not infrequently their applications were not received by the Court Registry until a day or two after the relevant date, preventing the lodging of the application within the specified time limit. No suggestion was made that this was deliberate. It appears to have occurred largely because of systemic factors such as when the outward mail-box was cleared.

The direction to the Federal Court not to extend time limits was challenged as derogating from the essential character of the Federal Court as a Chapter III court since it was incompatible with the standards of fairness appropriate for such a court. Effectively it would allow the executive government, *by inaction*, to *dispense* with an applicant's right to have a decision of the Tribunal reviewed. The Full Federal Court rejected these submissions on several occasions holding s 478 constitutionally valid. It held that s 478 simply *defined the jurisdiction* of the Federal Court and did not constitute an impermissible direction to the Court. The stipulated time limit was held to operate as a definition of the jurisdiction of the Federal Court,[78] not a withdrawal of or impediment to the exercise of jurisdiction within those defined limits.[79]

In one case, *WAFE v Minister for Immigration*[80], special leave to appeal to the High Court was granted.[81] Before the High Court considered the constitutional objection concerning the administrative potential of officers to frustrate access to the Court's jurisdiction the

Commonwealth granted asylum to the appellants. The appeal accordingly lapsed and the constitutional issue was left undetermined.

It might be drawing a long bow to argue that the kind of executive default or negligence entailed in preventing asylum-seekers in a case such as *WAFE* from having their matters reviewed is analogous with Ministers maintaining silence about their extradition decisions but the inhibitive effect of inaction or silence is similar in each case.[82] Both represent instances of substantial limiting access to the constitutional remedies provided under s 75(v).

High Court's holding in *Bodrudazza* that unreasonable time limits on s 75(v) suits is unconstitutional

After those earlier refugee cases the High Court in *Bodrudazza*[83] subsequently held that a provision in the *Migration Act* which purported to impose a 35 day limit on seeking a constitutional writ against an officer of the Commonwealth under s 75(v) of the Constitution was invalid. In the Court's view the time limit subverted the constitutional purpose of the remedy provided by s 75(v) particularly where the failure to comply is not due to any fault on the part of the applicant. *Bodrudazza* was concerned with the *constitutional* jurisdiction under s 75(v) whereas *WAFE* was dealing with a *statutory* jurisdiction that could be abolished at any time. In the end, if a constitutional requirement to provide reasons were confined to s 75(v) matters and not those arising under s 39B of the *Judiciary Act* it might prompt applicants to challenge extradition decisions directly in the High Court.

In SZAJB v Minister for Immigration (*SZAJB*)[84] the Full Federal Court distinguished *Bodrudazza* on the basis that the time limitation in the case of the Federal Court only had the legislative effect that an application beyond the designated time limit fell *outside the statutory jurisdiction* of that Court whereas the limitation in the case of the High Court under s 75(v) considered in *Bodrudazza* was an actual interference with the *constitutional* grant of power to issue 'constitutional writs'. The consequence of the first kind of limitation meant that a person is unable to approach the Federal Court for judicial review but it leaves open access to the High Court's constitutional jurisdiction. Whatever the situation with limiting the statutory jurisdiction of the Federal Court it does not apparently affect the ambit of the High Court's original jurisdiction. The issue of whether the executive arm of government can determine whether or not a matter is heard in either court still awaits final consideration by the High Court.

In *Minister for Home Affairs v Zentai* (*Zentai HC*)[85] the respondent contended that there was a constitutional requirement for the Minister as an 'officer of the Commonwealth' to provide some explanation regarding the basis for his decision. In the event, the High Court apart from Heydon J did not find it necessary to address the issue, dismissing the appeal on its merits. The issue remains currently undetermined at that level.[86]

Heydon J dissented on the major ground of appeal concerning the existence of the offence of war-crime. He therefore had to address the 'reasons' contention. He held that it is not possible to derive from s 75(v) an implication that all decision-making powers subject to s 75(v) review carried with them a duty to provide reasons. In rejecting the respondent's submissions, he made the observation that extradition decisions *were not necessarily unexaminable* for failure to provide reasons. This was because the decision-maker could, in his opinion, be compelled by subpoena to produce documents revealing the reasons for a given decision, or to reveal those reasons in response to interrogatories or under examination in the witness box.[87] In future extradition challenges, therefore, we may well see Commonwealth Ministers floundering under cross-examination for days on end attempting to explain why they decided not to refuse extradition.[88]

Conclusion

This article has sought to establish that because of the segmented structure of the *Act*, a lack of evidence establishing the Minister's basis of decision, the procedural difficulties of having materials produced to the court in unredacted form, and especially because of the fact that the Minister is not required to justify a decision, it is extremely difficult if not impossible to isolate the basis of the Minister's extradition decision regarding the fairness of an overseas trial. The result substantially inhibits or precludes an applicant's ability to subject the decision to judicial review. Only in an exceptional case, such as contemplated in the *Adamas case* will it be possible to infer the existence of jurisdictional error from a misstatement of law in the Departmental submission regarding the correct interpretation and application of the 'unjust exception'.[89] The determination of whether a trial in the requesting state conforms to the appropriate standard of 'justness', according to a correct understanding of notions such as 'just', will only be evident if the Minister acknowledges he or she has accepted the departmental view on the matter. In the event of non-disclosure a court will otherwise be bereft of plausible grounds to uphold a challenge on that ground.

In the end, the problem may not be whether international human rights standards governing a fair trial are incorporated into the *Act* but whether they are capable of realisation in judicial proceedings as constitutional protections against executive incursion. A constitutionally rooted requirement for Ministers to explain the basis of their decisions is vital to that realisation.

Recognition of an implied constitutional obligation to state reasons for an extradition decision will not necessarily provide a panacea guaranteeing a successful challenge. A Minister can, although having concluded that extradition would be unjust by international fairness standards, still exercise the residual discretion under s 22, including determining that the nature of the alleged crime is so heinous that the request should not be refused. The same is true if the Minister puts different 'weight' on diplomatic factors to that which an ordinary citizen would apply. In such events, however, the constitutionally mandated requirement to reveal the basis of the decision would at least provide greater accountability, including possible parliamentary scrutiny and debate. The Rule of Law in terms of restraining arbitrary executive action would thereby be vindicated.

Endnote

1 Peter Johnston, 'The Incorporation of Human Rights Fair Trial Standards into Australian Extradition Law' (2014) 76 *AIAL Forum* 20.

2 By virtue of s 11 of the *Act* and regulations under it giving effect to the provisions of extradition treaties.

3 I referred to this as the 'unjust exception'. I contended that it takes direct effect as if a provision of the *Act* and consequently forms part of Australian domestic law governing extradition.

4 For reasons that follow, I make the distinction between a requirement of *justification* and the more broadly conceived notion of 'a *duty to give reasons'*.

5 *Wingfoot Australia Partners Pty Ltd v Kocak* (*Wingfoot HC*) (2013) 303 ALR 64, 76 at [43]; [2013] HCA 43 at [43], adopted in *Leighton v Hon John Day* (*Leighton*) [2014] WASC 164 at [56].

6 Similar considerations of deference arise from the need to interpret international treaties 'in good faith'. In *Commonwealth Minister for Justice v Adamas* (*Adamas HC*) [2013] HCA 59; (2013) 88 ALJR 364, at [32]-[37], the High Court observed that in light of the requirement to read extradition treaties in good faith, in accordance with Article 31(1) of the *Vienna Convention on the Law of Treaties,* such treaties should be interpreted broadly in a way that is sensitive to international diplomatic relations. See also *Task Technology Pty Ltd v Commissioner of Taxation* [2014] FCA 38 at [10] following *Adamas HC*.

7 (2007) 162 FCR 278, 292-293 at [59]-[60].

8 (2000) 186 ALR 188, 229 at [104].

9 In *O'Connor v Adamas* (*Adamas FFC*) (2013) 210 FCR 364, 445 at [427] Barker J observed, however, that the doctrine of international reciprocity cannot be relied upon to undermine the requirement to address concerns about possible injustice resulting from an *in absentia* conviction by reference to Australian standards under Australian law. This point was not contradicted on appeal to the High Court; *Commonwealth Minister for Justice v Adamas* (*Adamas HC*) n 6 above.

10 (2000) 200 CLR 442 at [7]. The Court was dealing with extradition to the UK where under the regulations a finding that extradition would be unjust *required* the Attorney to refuse.
11 Regarding the capacity of the *residual discretion* to outflank or 'trump' the existence of other facets of a decision under the *Act* that might otherwise constitute jurisdictional error, see McKerracher J in *Zentai v O'Connor (No 3*) *(Zentai (No 3)* [2010] FCA 691; (2010) 187 FCR 495 at [253]-[259], approved by Jessup J in *O'Connor v Zentai* (*Zentai FFC)* (2011) 195 FCR 515 at [190]. I was counsel for Mr Zentai in all his various cases.
12 Above n 9, at [331] per Barker J. On this point his Honour is not inconsistent with anything said in (*Adamas HC*), n 6 above.
13 *Adamas FFC*, n 9 above, at [325]-[328].
14 In *Minister for Immigration v Eshetu* (1999) 197 CLR 611 the High Court held that it was the function of the decision-maker, not a reviewing court, to decide what *weight* should be attributed to various evidentiary factors, otherwise courts would intrude into merits review.
15 The matter is not quite so simple. In the case of US extradition requests, for constitutional reasons ironically, the Commonwealth's decision is subject to a *prima facie* case test.
16 Courts have long recognised the inappropriateness of judicial resolution of complaints about governmental conduct where such complaints are political in nature and require curial judgments about the reasonableness of governmental action. Decisions about the latter involve competing public interests. The absence of any criterion by which a court can assess where the balance lies between the weight to be given to one interest rather than to another precludes review; see *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540, 553 at [6] per Gleeson CJ citing Lord Diplock in *Dorset Yacht Co v Home Office* [1970] AC 1004, 1067.
17 Arguably, the trend towards streamlining the extradition process has been at the expense of individual rights. *Report 40*: *Extradition: A Review of Australian Law and Policy*, Australian Parliament, Joint Committee on Treaties, 2001, para 3.24 citing the submission of Professor Aughterson.
18 (2010) 210 FCR 505, 576; [2013] FCAFC 33 at [383].
19 *Adamas FFC* n 9 above at [234] per Barker J.
20 (1986) 162 CLR 24, 30.
21 *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Palme (Ex parte Palme*) (2003) 216 CLR 212, 224 at [40]; *Brock v Minister for Home Affairs* [2010] FCA 1301 at [68]-[75]; *Adamas FFC*, above n 9 at [235]-[248] per Barker J. Although the task of a court is to review the decision and not the decision-maker's reasons the grounds of review can only be effectively formulated if the reasons are known.
22 *Rivera v Minister for Justice* (2007) 160 FCR 115 and *Foster v Minister for Customs and Justice* (*Foster*) (2000) 200 CLR 442. In *R v Connell; Ex parte The Hetton Bellbird Collieries Ltd* (1944) 69 CLR 407 at 430, 432, Latham CJ said that where the exercise of statutory power is conditional upon the existence of a particular opinion, the Court may inquire whether the opinion has really been formed. This could be established by inference from materials before the decision maker to see if he or she has excluded from consideration some factor which should affect the determination; see also *Avon Downs Pty Ltd v Federal Commissioner of Taxation* (*Avon Downs*) (1949) 78 CLR 353, 360 (Dixon J), discussed in *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252 (French CJ, Gummow, Hayne, Crennan and Kiefel JJ).
23 *Zentai FFC* (2011) n 11 above at [182].
24 *Adamas FFC* n 9 above at [250] (Barker J). The statement of *a wrong legal test* on the face of a Departmental submission should be distinguished from *factual errors* contained in it. The latter cannot be taken to have affected the Minister's decision in the absence of some clear reference to them. Merely taking account of factually erroneous statements in a departmental brief does not normally mean that the Minister has fallen into jurisdictional error; *Oates v Attorney-General (Cth)* (2001) 181 ALR 559 at [133] (Lindgren J); *Zentai (No 3)* n 11 above at [362] (McKerracher J).
25 The difficulty of going behind the 'inscrutable face' of the decision-maker even with the capacity to draw inferences, as indicated in *Avon Downs* n 22 above was recognised by Gummow and Kiefel JJ in *Minister for Immigration and Citizenship v SZMDS* (2010) 240 CLR 611 at [34].
26 See for example *Zentai FFC* n 11 above at [182] per Jessup J.
27 A freedom of information inquiry seeking disclosure of the Minister's diary and time commitments could be illuminating as to the amount of time spent on reading these submissions.
28 Above n 9 at [249-[252].
29 Ibid at [249]-[252] (Barker J). In *Adamas v O'Connor (No 3)* [2012] FCA 365 Gilmour J at first instance found that he could properly draw the inference that the Minister did not judge the question of injustice, oppression or incompatibility according to Australian standards. The Full Court majority in effect endorsed the primary judge's view. This assumes that where erroneous legal advice in a Department brief causes a Minister to take into account a prejudicial consideration adverse to the applicant, that could in some instances be ground for jurisdictional error: *Re Patterson* (2001) 207 CLR 39. The High Court in *Adamas HC* n 6 above overruled Gilmour J and the Full Court but only on the correct understanding of the unjust exception, not on the issue of what inferences could be drawn.
30 *Adamas FFC*, above n 9, at [407], [413], [415], [423]-[428].
31 *Adamas HC*, n 6 above.
32 This can be compared with *Zentai (No 3)* n 11 above where McKerracher J at [234]-[259] concluded that the Departmental submission revealed a misleading description of the Minister's function in determining

whether, under Article 3(2)(b) of the Extradition Treaty between Australia and Hungary, the Australian Federal Police had decided to 'refrain' from prosecuting Mr Zentai for the alleged offence. He held that notwithstanding what he described as an accumulation of errors (including that advice), while it was *possible* that he might have been misled on this point and taken it into account, he may still have decided that there was *another* adequate *discretionary basis* for refusing surrender. The Full Court in *Zentai FFC* n 11 above dismissed an appeal on this point.

33 [2010] FCA 252.

34 Even then, in the case of Mr Zentai when possible erroneous legal advice was disclosed it could not be found to support a finding of jurisdictional error as it could not be shown to have affected the Minister's decision.

35 (2011) 282 ALR 302; [2011] FCA 948.

36 For a discussion of the different senses of justiciability see Geoffrey Lindell, 'Judicial Review and the Dismissal of an Elected Government in 1975: *Then* and *Now*?' Sydney Law School: 4th Winterton Lecture, 14th February 2013, 5 and entry on 'Justiciability' by Lindell in T Blackshield, M Coper and G Williams (eds) *The Oxford Companion to the High Court of Australia* (2001) 391; also *Re Ditford; Ex parte Deputy Commissioner of Taxation* (1988) 19 FCR 347, 368-369 and 367-373 per Gummow J; *Thomas v Mowbray* (2007) 233 CLR 307, 353-355 at [104]-[109] per Gummow and Crennan JJ.

37 Jeffery King, 'Institutional Approaches to Judicial Restraint' (2008) 28 *Oxford Journal of Legal Studies* 409, 411-412, 421. See also generally Lorne Sossin, *Boundaries of Judicial Review: The Law of Justiciability in Canada* (Carswell, Toronto, 1999) 233; Matthew Lewans*,* 'Deference and Reasonableness since *Dunsmuir*' (2012) 38 *Queen's Law Journal* 59.

38 Richard Garnett, 'Foreign States and Australian Courts' (2005) 29 *Melbourne University Law Review* 704.

39 See TRS Allan, 'Human Rights and Judicial Review: A Critique of "Due Deference"' [2006] *Cambridge Law Journal* 671.

40 'Matter' is here used in its commonly-used sense. Justiciability on the other hand may turn on whether judicial proceedings engage a *real controversy*, and hence a 'matter' under Chapter III of the Constitution.

41 Regarding the discretionary factors that influence granting relief by way of declaratory orders and certiorari see *Re McBain* (2002) 209 CLR 372 at [1]-[5] (Gleeson CJ); [92]-[114]; [242-249] (McHugh J) and [268]-[290] (Hayne J) in the context of whether there is a 'matter' within the meaning of ss 75 and 76 of the Constitution; *Truth About Motorways v Macquarie* (2000) 200 CLR 591 at [47]-[52] (Gaudron J); [95] (Gummow J) and [217] (Callinan J); *Bateman's Bay Local Aboriginal Land Council v The Aboriginal Community Benefit Fund Pty Ltd* (1998) 194 CLR 247, 263-264 and *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82, 101-109 at [42]-[59] (Gaudron and Gummow JJ).

42 S*ee Peko-Wallsend*, n 20 above, at 39-40 (Mason J). As to the nature of some powers being inherently insusceptible of review see Wilson and Toohey JJ in *South Australia v O'Shea* (1987) 163 CLR 378 at 402, adopted by Doyle CJ in *Watson v South Australia* (2010) 278 ALR 168,182-193; [2010] SASCFC 69 at [83]-[125]; also Peek J at [128]-[144]; *Moti v The Queen* (2011) 245 CLR 456, 474-475 at [46]-[52]; [2011] HCA 50 at [46]-[52]; *Wilsmore v Court* [1983] WAR 190; *Petrotimor Companhia de Petroleos S.A.R.L. v Commonwealth* (2003) 126 FCR 354 at [64]-[68] (Black CJ and Hill J) citing *Re Ditfort; Ex parte Deputy Commissioner of Taxation* (1988) 19 FCR 347 and *Re Limbo* (1989) 64 ALJR 24. Regarding broad policy considerations see *Minister for Immigration v Jia Legeng* (2001) 205 CLR 507, 529, 565 and *Hot Holdings Pty Ltd v Creasy* (2002) 210 CLR 438 at [50]. These authorities recognise that there are some areas into which a court should hesitate to intrude: *West Australian Field and Game Association Inc v Pearce* (1992) 8 WAR 64, 87; and see *Minister for Immigration and Citizenship v Li* (2013) 297 ALR 225, 257-258 at [108] & [111]; [2013] HCA 18 at [108], [111] (Gageler J). In *Leighton*, n 5 above, Allanson J at [62] cautions about extrapolating from the administrative law principles developed in the context of refugee review decisions to other situations where Ministers exercise power by reference to broad policy considerations. Broad policy determinations are arguably the case with extradition decisions.

43 Michael Taggart, '"Australian Exceptionalism" in Judicial Review' (2008) 36 *Federal Law Review* 1 citing *Corporation of the City of Enfield v Development Assessment Commission* (2000) 199 CLR 135, 151-155 at [39]-[47] (Gleeson CJ, Gummow, Kirby and Hayne JJ). In the latter the High Court declined to follow the American doctrine of judicial deference in *Chevron USA Inc v Natural Resources Defense Council Inc* [1984] USSC 140; 467 US 837 (1984). See Anthony Cassimatis, 'Judicial Attitudes to Judicial Review: A Comparative Examination of Justifications Offered for Restricting the Scope of Judicial Review in Australia, Canada and England' (2010) 34 *Melbourne University Law Review* 1.

44 See Simon Evans, 'Standing to Raise Constitutional Issues' (2010) 22 *Bond Law Review* 3; Peter Johnston, 'Pape's Case: What does it say about Standing as an Attribute of Access to Justice?' (2010) 22 *Bond Law Review* 16; Leslie Zines, 'Advisory Opinions and Declaratory Judgments at the Suit of Governments' (2010) 22 *Bond Law Review* 12; *Thomas v Mowbray*; (2007) 233 CLR 307, 325 at [8] (Gleeson CJ); 353-355 at [104]-[110] (Gummow and Crennan JJ). But in *Habib v The Commonwealth* (2009) 175 FCR 411 the Full Federal Court did not accept that embarrassment of a foreign state in matters of foreign relations and terrorism precluded review.

45 See *Swan Hill Corporation v Bradbury* (1937) 56 CLR 746, 757-758 per Dixon J; *SZQRB* n 18 above at [384] per Flick J. In the case of *Zentai*, after refusing to provide reasons for his decision Home Affairs Minister Brendan O'Connor announced his decision in a press release dated 12 November 2009. After stating that it was not one of determining Mr Zentai's guilt or innocence he observed that it was about

deciding whether or not Mr Zentai should be surrendered to Hungary in accordance with Australia's extradition legislation and its international obligations, adding that Australia '*takes war crimes seriously*' and the methodical application of the Extradition Act 'ensures that *Australia is not a haven for alleged criminals*' (emphasis added). It might well be the case that while his statement could not be taken to represent his reasons officially, it discloses the overriding consideration that could have motivated his decision; namely, concern about criticisms made about Australia never having extradited an alleged war criminal and its effect in damaging Australia's international reputation. Arguably, this could well constitute a legitimate, if questionable, basis for the exercise of his residual discretion under s 22 of the *Act*.

46 See E P Aughterson, 'The Extradition Process: an Unreviewable Executive Discretion?' (2005) 24 *Australian Yearbook of International Law* 13.

47 Note 9 above.

48 In *SZQRB* n 18 above, at [373]-[387] Flick J held that when faced with a virtually inscrutable decision a court may conclude that it can properly be regarded either as '*arbitrary*' or a decision which is not made in accordance with a proper consideration of the objects and purposes of (in that instance) the *Migration Act 1958* (Cth). He stated at [382] that: 'It must be recognised that an exercise of statutory discretion or power conferred by a Commonwealth legislative provision cannot generally be conferred free from all judicial scrutiny.' It appears from his Honour's qualification '*generally*' that he conceives that *some* decisions may in fact be unreviewable.

49 See *Adamas FFC* above n 9 at [276] (Barker J).

50 In *SZMDS*, n 25 above, Gummow ACJ and Kiefel J refer to the *practical importance* of providing reasons and the difficulties inherent in relying on inferences of the kind that were discussed in *Avon Downs* n 22 above.

51 Borrowing generously from Ludwig Wittgenstein, *Tractatus Logico-Philosophicus*: 'Whereof one cannot speak, thereof one must be silent.'

52 Franz Kafka, *The Trial* (1920).

53 The Commonwealth's position on the relationship between ss 16 and 22 is that once a magistrate has determined that a person is 'eligible' for extradition the individual is no longer an 'extraditable person'. Accordingly, the latter is not a jurisdictional fact conditioning the Minister's power under s 22. The Full Federal Court in *Zentai FFC* n 11 above accepted that proposition (Besanko J at [41]-[44] and Jessup J at [122]-[144]) but it remains open until settled authoritatively by the High Court. Regarding the statutory change of status upon a magistrate's determination see also *Snedden v Minister for Justice of the Commonwealth* [2013] FCA 1202 at [25] (Davies J) and *Marku v Republic of Albania* [2012] FCA 804; (2012) 293 ALR 301, and *Marku v Republic of Albania* [2013] FCAFC 51; (2013) 212 FCR 50.

54 This requirement of *justification* has become more evident in Canadian and some English authorities. It is the basis of suggestions by the late Michael Taggart and Professor Dyzenhuis that Australian courts should adopt a similar principle; see 'Reasoned Decisions in Legal Theory' David Dyzenhaus and Mike Taggart, in D Edlin, (ed) *Common Law Theory* (Cambridge University Press, 2007) 134-167 and see David Dyzenhaus, 'Law as Justification: Etienne Mureinik's Conception of Legal Culture' (1998) 14 *South African Journal of Human Rights* 11. The Supreme Court of Canada has recognised the importance of reasons depending, contextually, upon the adjudicative setting. This is justified on the basis that reasons allow the parties and the public to see that justice is done and maintains confidence in the judicial process while facilitating judicial review; *Baker v Canada (Minister of Citizenship and Immigration) (Baker)* [1999] 2 SCR 817; *R v Sheppard* [2002] SCC 26 and *R v R.E.M.* [2008] SCC 51. For a discussion of the significance of *Baker* see Lorne Sossin, 'The Rule of Policy: The Impact of Judicial Review on Administrative Discretion' in David Dyzenhaus, *The Unity of Public Law* (Hart Publishing, 2004) 87; also Mary Liston, '"Alert, Alive and Sensitive": the Duty to Give Reasons, and the Ethos of Justification in Canadian Public Law' ibid, 113; also Lorne Sossin, 'Administrative Law in an Interconnected World' (2013) 74 *AIAL Forum* 24.

55 Decisions under the *Extradition Act 1988* are excluded from the *ADJR Act* (see Schedule 1). Regarding the negative inference to be drawn when a matter is exempted from judicial review under the *ADJR Act* see *C Incorporated v Australian Crime Commission* (2010) 113 ALD 226 at [96], the Full Federal Court was not addressing an argument based on a *constitutional* requirement to provide reasons.

56 In *Commissioner of Police v Eaton* (2013) 294 ALR 608,611-612; [2013] HCA 2, Heydon J at [13]-[14] noted that the intended statutory effect of the Commissioner not being required under a state law to give reasons was that the Commissioner's decision could not be impugned on account of any particular reason. Crennan, Kiefel and Bell JJ at [74] observed that the Commissioner's power to dismiss a probationary police officer without giving reasons implied an unfettered power that was not subject to review on the merits. The Court was dealing with a State officer, not an 'officer of the Commonwealth' within the meaning of s 75(v) of the Constitution.

57 According to *Public Service Board of New South Wales v Osmond* (*Osmond*) (1986) 159 CLR 656 there is *generally* no common law requirement to give reasons. For a critique of *Osmond* see M Taggart, 'Administrative Law: Reasons for Decision' (2003) *New Zealand Law Review* 118. *Osmond* does not exclude the possibility in an appropriate case of an *implied statutory requirement* to that effect; see *International Finance Trust Company Limited v New South Wales Crime Commission* [2008] NSWCA 291 at [41], [47], [50] and [56] per Allsop P; *SZQRB* n 18 above, 210 FCR 505, 575-576 at [382]. It certainly does not deny a *constitutional basis* applying to Commonwealth officers including Ministers. While accepting that there is no general duty to provide reasons Flick J in *SZQRB*, n 18 above, at [382]

conjectured that *the law has moved on in the decades since Osmond* so that a duty to provide reasons should be implied where an administrative decision affects the liberty of an individual, citing *R v Secretary of State for Transport, Ex parte Richmond-Upon-Thames London Borough Council (No 4),* [1996] 1 WLR 1460 at 1475 per Brooke LJ. If so, *Osmond* may have been 'constitutionalised' and undergone a metamorphosis of the kind postulated in *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 and *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503, 534 [67] (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ); see Bradley Selway, 'The Principle Behind Common Law Judicial Review of Administrative Action — The Search Continues' (2002) 30 *Federal Law Review* 232 and Kathleen Foley, 'The Australian Constitution's Influence on the Common Law' (2003) 31 *Federal Law Review* 131.

58 *O'Donoghue v O'Connor* (No 2) (2011) 283 ALR 682, 700-701; [2011] FCA 985 at [128]-[138].

59 Note 22 above.

60 As indicated by Dixon J in *Avon Downs* (1949) 78 CLR 353 at 360:

> His decision… is not unexaminable. … Moreover, the fact that he has not made known the reasons why he was not satisfied will not prevent the review of his decision. The conclusion he has reached may, on a full consideration of the material that was before him, be found to be capable of explanation only on the ground of some such misconception.

Regarding the extent to which inferences about unlawfulness can permissibly be made from materials before a decision-maker see *R v Australian Stevedoring Industry Board; Ex parte Melbourne Stevedoring Co Pty Ltd* (1953) 88 CLR 100, 120. It is questionable whether the guidance provided by *Avon Downs* and *Melbourne Stevedoring* is susceptible of ready and sufficiently determinative application.

61 *Ex parte Palme*, n 21 above, 216 CLR 212, 221 at [30] (Gleeson CJ, Gummow and Heydon JJ). The problem with relying on compliance with the rules of natural justice is that in the event of non-compliance the court at best might grant mandamus to require the Minister to reconsider the decision without testing whether the Minister's decision was based on a correct understanding of law.

62 (2010) 243 CLR 319.

63 Ibid, at [87]-[91].

64 Stricter scrutiny of executive conduct under Part II of the Constitution would be consistent with recent decisions of the High Court such as *Pape v Federal Commissioner of Taxation* [2009] HCA 23; (2009) 238 CLR 1 and *Williams v The Commonwealth (Williams*) (2012) 248 CLR 156; see Anne Twomey, 'Pushing the Boundaries of Executive Power - Pape, the Prerogative and Nationhood Powers' (2010) 34(1) *Melbourne University Law Review* 313; Gabrielle Appleby and Stephen McDonald, 'The Ramifications of Pape v Federal Commissioner of Taxation for the Spending Power and Legislative Powers of the Commonwealth' (2011) 37 *Monash University Law Review* 162*;* Duncan Kerr, 'The High Court and the Executive: Emerging Challenges to the Underlying Doctrines of Responsible Government and the Rule of Law' (2009) 28 *University of Tasmania Law Review* 145.

65 'Exploring the Purposes of Section 75(v) of the Constitution' (2011) 34 *University of New South Wales Law Journal* 70, 71, 90-91; see also Leighton McDonald, 'The Entrenched Provision of Judicial Review and the Rule of Law' (2010) 21 *Public Law Review* 14.

66 Note 18 above at [349]-[362].

67 Ibid, at [359]-[360].

68 To use the metaphor adopted by Leslie Zines, *The High Court in the Constitution*, Ch 11, 300 drawing on the doctrine in the *Communist Party Case* (1951) 83 CLR 1.

69 The argument is therefore one based on a principle of *effectiveness*.

70 The contention that the Minister is *constitutionally or statutorily required* to provide *an adequate and intelligible explanation of his decision* also relies on an extrapolation from recent High Court cases such as *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 467, 513-514 (Gaudron, McHugh, Gummow, Kirby and Hayne JJ) and *Bodrudazza v Minister for Immigration* (*Bodrudazza*) (2007) 228 CLR 651. It draws upon notions of the *efficacy* and *effectiveness* of the judicial review process. It also has received some force from the High Court's decision in *Wainohu v New South Wales* (2011) 243 CLR 181. See also *Plaintiff M61/2002 v The Commonwealth* n 63 above and *MZX0T v Minister for Immigration* (2008) 233 CLR 601, 614 (Gleeson CJ Gummow and Hayne JJ).

71 See *R v Kirby*; *Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 at 278, (Dixon CJ, McTiernan, Fullagar and Kitto JJ) cited by McHugh J in *Re Wakim* (1999) 198 CLR 511, at [70], and Gummow and Hayne JJ at [118] and *Abebe v The Commonwealth* (1999) 197 CLR 510 at [47] (Gleeson CJ and McHugh J).

72 *Kocak v Wingfoot Australia Partners* (*Kocak*) (2012) 35 VR 324, 337; [2012] VSCA 259 at [48]-[50] citing *Westport Insurance Corporation v Gordian Runoff Ltd* (2011) 244 CLR 239, see 271 [53]–[56] (French CJ, Gummow, Crennan and Bell JJ), and 301 [170] (Kiefel J). Although *Kocak* was reversed on appeal in *Wingfoot HC*, n 5 above, the two decisions are not inconsistent with these observations. See also *Ex parte Palme* n 21 above, at 224 [40] (Gleeson, Gummow and Heydon JJ) and 245 [113]–[115] (Kirby J).

73 See *Resource Pacific Pty Ltd v Wilkinson* [2013] NSWCA 33 at [47]-[48] (Basten JA, Beazley JA agreeing).

74 See *Williams*, n 64 above.

75 Of course in the case of Parliament the Minister or officials may be subject to questioning; it can be queried how effective that might be in a case involving a complex extradition matter.

76 The term 'default' is used in a neutral sense without any necessary implication of culpability on the part of the Attorney or the relevant Department.

77 *Oguzhan v Minister for Immigration*; (2000) 99 FCR 285, 291 per Carr J; *Hocine v Minister for Immigration* (2000) 99 FCR 269, 282 (French J); *Abidin v Minister for Immigration* [2002] FCAFC 54; and *WAFE of 2002 v Minister for Immigration* (2002) 70 ALD 57; [2002] FCAFC 254.
78 That is, 'defined' within the terms of s 77 of the Constitution.
79 *Abidin v Minister for Immigration & Multicultural Affairs* n 77 above; *Hocine v Minister for Immigration and Multicultural Affairs* (2000) 99 FCR 269 at 282 (French J); *Oguzhan v Minister for Immigration and Multicultural Affairs* (2000) 99 FCR 285 at 291 (Carr J).
80 (2002) 70 ALD 57; [2002] FCAFC 254.
81 *WAFE v Minister for Immigration* [2003] HCATrans 432 (24 October 2003).
82 It could be argued, on the contrary, that non-compliance with s 478 prevented review *absolutely* whereas a failure to give reasons in extradition cases, though somewhat crippling, is not so extreme.
83 Note 70 above.
84 (2008) 168 FCR 410, following *SZICV v Minister for Immigration* (2007) 158 FCR 260.
85 (2012) 246 CLR 213. I was counsel for the respondent.
86 The issue had been raised and decided against the respondent in the earlier rounds of the *Zentai* litigation.
87 Note 85 above at [94]-[95].
88 Whether this would go so far as allowing a court to make an adverse finding against the Commonwealth on the basis of the rule in *Browne v Dunn* (1893) 6 R 67 if the Minister is not called to give evidence is a different matter.
89 This assumes that the court, unlike the Federal Court in the *Adamas* application, correctly interprets the proper test of 'unjust' according to the intended meaning in the particular bilateral extradition treaty.