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LEGAL UNREASONABLENESS: LIFE AFTER *LI*

*Michael Barker and Alice Nagel**

In *Dunsmuir v New Brunswick (Board of Management)*,¹ the plurality of the Supreme Court of Canada observed of 'reasonableness' that it is one of the most widely used and yet most complex legal concepts and how, in any area of the law we turn our attention to, we find ourselves dealing with the reasonable, reasonableness or rationality. The Court then asked:

But what is a reasonable decision? How are reviewing courts to identify an unreasonable decision in the context of administrative law and, especially, of judicial review?

In *Minister for Immigration and Citizenship v Li*,² the plurality of the High Court partially answered these questions, for an Australian audience at least, by stating that '[u]nreasonableness is a conclusion which may be applied to a decision which lacks an evident and intelligible justification'.³

Common law developments in judicial review in Australia, however, have sometimes been described as 'exceptional', particularly when compared with other common law jurisdictions such as Canada, the United Kingdom and New Zealand.⁴ Not only is Australian law wedded to jurisdictional error as a central 'unifying concept' in administrative law,⁵ but the Constitutional separation of powers has placed a distinct wedge between legality and merits review, with consequences for the availability of administrative law remedies and notions of deference to executive decision-making.

Li therefore provides an opportunity to explore the development of legal unreasonableness in Australia and to contrast the different trajectories of this concept in the United Kingdom, New Zealand and Canada.

Legal unreasonableness shares common origins across these jurisdictions and has been envisaged as a form of judicial 'safety net'⁶ or an intervening 'judge over the shoulder'⁷ in the exercise of discretionary authority. In light of the strong legal and academic interest in *Li*, it is interesting to survey the origins, rationale and continuing development of this concept across the common law world. To what extent is legal unreasonableness a familiar concept, imputed as a necessary component of good government according to law? To what extent does its ongoing development betray a level of convergence or perhaps, exceptional terrain, in Australian administrative law?

Source of legal unreasonableness

*Associated Provincial Picture Houses Ltd v Wednesbury Corporation*⁸ came to be regarded as an authoritative statement of the standard of legal unreasonableness imposed on decision-makers exercising discretionary powers. In his oft-cited judgment, Lord Greene MR stated that decision-makers will fall into error where they remain within the 'four corners of the matters which they ought to consider, [but] have nevertheless come to a conclusion so unreasonable that no reasonable authority could ever have come to it'.⁹

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It is possible to distil from this judgment several principles governing the ambit of discretionary decision-making. First, the Court recognised in *Wednesbury* that a decision might be regarded as unreasonable in a general sense where particular errors are shown in the decision-making process. Yet unreasonableness also exists as a specific, residual ground of judicial review. A court might invalidate a decision on the ground of unreasonableness where a decision-maker has otherwise taken into account all relevant considerations, exercised power for a proper purpose and afforded the applicant procedural fairness.

Second, courts have accepted that legal unreasonableness is not an avenue for the court to substitute its own view of the correct or preferable decision to that of the administrative decision-maker. As Lord Greene MR recognised in *Wednesbury*, the question 'is not what the court considers unreasonable, a different thing altogether'.¹⁰ The *Wednesbury* doctrine thereby preserved a certain realm of decision-making autonomy, recognising that decision-makers may reach different views and this alone will not be sufficient to establish legal unreasonableness.

As such, *Wednesbury* unreasonableness imposed a high threshold. To assuage concerns that this ground of review might allow courts to delve into the merits of a decision, or produce undue uncertainty for administrative decision-makers, legal unreasonableness was regarded as an exceptional ground, not lightly satisfied. Lord Greene MR indeed added in *Wednesbury*, that proving a case of legal unreasonableness 'would require something overwhelming'.¹¹

The decision in *Wednesbury* has been rigorously analysed, applied in a number of common law jurisdictions and, in Australia, until *Li*, had acquired a significance much greater than the concrete factual situation before the court. As the High Court emphasised in *Li*, however, *Wednesbury* was not the first or only decision to import standards of reasonableness.

In *Sharp v Wakefield*,¹² Lord Halsbury LC observed that a discretionary power conferred by statute is intended to be exercised 'according to the rules of reason and justice, not according to private opinion; according to law, and not humour ... (and) not arbitrary, vague, and fanciful, but legal and regular'.¹³ In *Rooke's Case*, the Court stated that the discretion of the commissioners of sewers 'ought to be limited and bound with the rule of reason and law'.¹⁴

A common thread underlying *Li*, by reference to earlier decisions, is the recognition that reasonableness is an essential element of administrative decision-making and is implied as a statutory condition on the exercise of discretionary power. French CJ observed that this 'framework of rationality' is premised on an implication that 'parliament never intended to authorise' a decision attended by legal unreasonableness.¹⁵ Likewise Gageler J recognised that legal unreasonableness has its origins in a statutory implication, which is well-understood by the three branches of government.¹⁶ So too the plurality emphasised that parliament is taken to intend that a discretionary power will be exercised reasonably.¹⁷

While, therefore, legal unreasonableness has common law origins and potentially even deeper historical antecedents, its force is now principally derived as a statutory implication. Analogous with the requirements of procedural fairness and the formation of specific states of mind in administrative decision-making, principles of statutory interpretation have an important role to play.

The emphasis placed on legal unreasonableness as a statutory implication, however, raises the question as to whether this requirement could be excluded by express statutory language. Could parliament grant a decision-maker licence to make decisions that are

arbitrary or patently unreasonable? Would the only check on such legislation be democratic processes, or would any Constitutional limitation stand in its way?

In *Minister for Immigration and Border Protection v Singh*, the Full Court of the Federal Court (Allsop CJ, Robertson and Mortimer JJ) accepted that reasonableness as a statutory presumption could be modified or abrogated by clear statutory language.¹⁸

Subject to any impinging Constitutional consideration, the presence of a clear statutory qualification or contrary intention may be capable of modifying or excluding either implication (natural justice or legal unreasonableness).

The Full Court left open what this 'impinging Constitutional consideration' might be. Indeed, following the High Court's decisions in *Plaintiff S157/2002 v Commonwealth*¹⁹ and *Kirk v Industrial Court of New South Wales*,²⁰ there is ongoing discussion as to whether the entrenched minimum provision of judicial review might serve to shield substantive grounds of review, such as natural justice or legal unreasonableness, as well as a court's general supervisory jurisdiction.²¹

While not attempting to grapple with these Constitutional law dimensions here, the judiciary's approach to attempts to exclude or limit natural justice requirements is illustrative. Courts have accepted that the legislature may limit the application of natural justice principles by clear statutory language. The starting point, however, is always an assumption that the legislature intends such principles to apply, unless an express contrary intention is shown.²² From this perspective, reasonableness will always remain the default position in administrative decision-making under statute.

Rationale for legal unreasonableness

The acceptance of legal unreasonableness as a ground of judicial review raises important questions about the relationship between different arms of government and the intensity of review applicable to discretionary decision-making. In our system of law and government, it is not really controversial that discretionary powers should be bounded in some way; indeed, the notion of completely unbridled discretionary power is the antithesis of the rule of law. Yet, once it is accepted that discretionary powers should be subject to some form of legal regulation, the key question is the extent to which the judiciary should interfere in examining the reasonableness of the process or outcome of decision-making, and the ambit of decisional freedom otherwise left to a decision-maker.²³

Notions of reasonableness in decision-making have long pervaded legal, political and philosophical thought. In *Laws*, Plato described reason as a 'sacred and golden cord ... the common law of the State'.²⁴

Standards of legal reasonableness have been imported into a number of areas of decision-making. In the context of planning law, for example, the High Court has affirmed the test articulated by the House of Lords in *Newbury District Council v Secretary of State for the Environment*,²⁵ that a condition attached to a grant of a planning permission will be invalid unless:

- the condition is for a planning purpose and not for any ulterior purpose;
- the condition reasonably and fairly relates to the development permitted; and
- the condition is not so unreasonable that no reasonable planning authority could have imposed it.²⁶

The ground of unreasonableness, or at least the formulation articulated in *Wednesbury*, also finds clear expression in s 5(2)(g) of the *Administrative Decisions (Judicial Review) Act 1977* (Cth). This section provides that a person aggrieved by an administrative decision may challenge the decision on the ground that the exercise of power 'is so unreasonable that no reasonable person could have so exercised the power'.

Legal unreasonableness also shares parallels with the grounds for appellate review of discretionary judicial decisions. In *House v The King*, Starke J recognised that judicial discretion is 'very wide, but it must be exercised judicially, according to the rules of reason and justice, and not arbitrarily or capriciously or according to private opinion'.²⁷ The plurality (Dixon, Evatt and McTiernan JJ) similarly observed that appellate error might be demonstrated where the exercise of judicial discretion produces a result which is 'unreasonable or plainly unjust'.²⁸

As an abstract value, reasonableness has strong appeal in administrative decision-making. The Hon Dame Sian Elias, Chief Justice of New Zealand, writing extra-judicially, has observed that '[g]ood government according to law is the end sought by administrative justice. It must entail reasonableness, fairness, legality, consistency, and equal treatment ...'²⁹ Likewise, Chief Justice French, also writing extra-judicially, has described reasonableness in the exercise of governmental power as 'an aspect of the rule of law'.³⁰

The doctrine of unreasonableness serves to shore up a level of credibility, transparency and accountability in governmental decisions, helping to legitimate and justify the conferral of power on administrative decision-makers. In the modern administrative state, a plethora of functions and discretionary powers has been conferred on private and public decision-makers and lines of accountability have become increasingly complex. It is a core component of the rule of law that administrative decisions are made in accordance with the subject matter, scope and purpose of enacting legislation, which includes the requirement of reasonableness. This framework of rationality ultimately provides a level of indirect accountability for decision-makers exercising discretionary powers. As Galligan has suggested, 'discretion is a legitimate and central part of modern government, and legal regulation is concerned in its main emphasis to enhance that legitimacy'.³¹

To this end, legal unreasonableness provides an important final check on administrative decision-making. While unreasonableness has been regarded hitherto as an exceptional ground of review in Australia, its existence confirms the importance our system of law and government places on logical and rational decision-making.³² When it is viewed as a component of good decision-making and an aspect of accountability which the legislature and executive are taken to have endorsed, legal unreasonableness promotes a level of certainty and stability in administrative law decision-making over time.³³

Nonetheless, the invocation of unreasonableness as a ground of judicial review has often been controversial, due to concerns that it presents an assault on the traditional distinction between merits and legality review.³⁴ There is a fine line between an unreasonable decision and a reasonable decision with which one disagrees.³⁵ The High Court has repeatedly emphasised that legal unreasonableness is not a covert method for the judiciary to express its disapproval of an administrative decision.³⁶ The tension in every legal system is how to introduce a check on discretionary authority and ensure that judges are not blinkered when it comes to the reasonableness of an administrative decision; yet simultaneously, manage to preserve the flexibility at the heart of discretionary power and accommodate the expertise, democratic accountability and Constitutional limitations placed on different decision-makers.

A survey of recent developments in the United Kingdom, New Zealand, Canada and Australia provides a useful framework for examining how each common law country has responded to these tensions in reasonableness review.

United Kingdom

Wednesbury unreasonableness continues to be applied in the United Kingdom, although the precise formulation and level of scrutiny applied to discretionary powers has evolved considerably. Several attempts have been made to reformulate the test. For example, Lord Diplock described legal irrationality as 'a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it'.³⁷

In its various guises, the notion of legal unreasonableness has survived and continued to prosper in the United Kingdom. The trend has been towards adopting a variegated standard of *Wednesbury* review, which requires courts to give 'anxious scrutiny' to decisions impacting on fundamental rights,³⁸ rather than to anxiously scrutinise the distinction between merits and legality review. Under this approach, the intensity of judicial review of a decision will vary according to the subject-matter and the gravity of the impact on individuals affected by the decision.³⁹

Laws LJ explained this approach in *R v Department of Education and Employment; Ex parte Begbie*.⁴⁰

Fairness and reasonableness (and their contraries) are objective concepts; otherwise there would be no public law, or if there were it would be palm tree justice. But each is a spectrum, not a single point, and they shade into one another. It is now well established that the *Wednesbury* principle itself constitutes a sliding scale of review, more or less intrusive according to the nature and gravity of what is at stake.

According to Laws LJ, the principle of variegated unreasonableness review is closely intertwined with other developments in the United Kingdom, such as the doctrine of substantive legitimate expectation. At their roots, each of these concepts is directed towards limiting 'abuse of power'.⁴¹

On occasion, judges in the United Kingdom have expressed concerns about the vagueness or circularity of *Wednesbury* unreasonableness, and some commentators have gone so far as to call for a 'Wednesburial'.⁴² For example, Lord Cooke of Thorndon stated in *R (on the application of Daly) v Secretary of State for the Home Department* that 'the day will come when it will be more widely recognised that [*Wednesbury*] was an unfortunately retrogressive decision in English administrative law, in so far as it suggested that there are degrees of unreasonableness and that only a very extreme degree can bring an administrative decision within the legitimate scope of judicial invalidation'.⁴³

As *Wednesbury* has evolved and courts have become more familiar with principles flowing from the *Human Rights Act 1998* (UK), the debate has shifted to whether proportionality should replace unreasonableness as a more apt instrument of legal regulation. Proportionality, a concept emerging from civil legal systems and adopted in the text of treaties and jurisprudence of the European Court of Human Rights, has come to be regarded by some as 'at least a rival to, if not a complete substitute for, *Wednesbury* unreasonableness'.⁴⁴ However, courts have not yet made the leap to embrace proportionality review and, instead, legal unreasonableness continues to be applied as the appropriate legal test.⁴⁵

New Zealand

The development of legal unreasonableness in New Zealand has largely paralleled trends in the United Kingdom. Initially, New Zealand courts accepted the primacy of Lord Greene MR's judgment in *Wednesbury*. In *Wellington City Council v Woolworths New Zealand Ltd (No 2)*, the Court of Appeal held that a decision may be vitiated on the ground of unreasonableness, 'if the outcome of the exercise of discretion is irrational or such that no reasonable body of persons could have arrived at the decision'.⁴⁶ In this respect, legal unreasonableness was similar to the position in Australia at the time.⁴⁷

However, in the 1990s, New Zealand courts followed the United Kingdom and recognised a variegated standard of legal unreasonableness.⁴⁸ Courts have accepted that the intensity of review will adapt to the context of the discretionary power, and will require heightened scrutiny when a decision affects fundamental rights.

This approach is exemplified by the decision in *Discount Brands Ltd v Northcote Mainstreet Inc*.⁴⁹ Hammond J explained that New Zealand courts have moved to adopt a 'hard-look doctrine' or 'super-*Wednesbury*' doctrine, whereby the depth of review is 'altered to (at least) a less deferential "reasonableness" inquiry' where important interests are involved.⁵⁰

In *Wolf v Minister of Immigration*, Wild J stated that the context in which a decision is made is important, having regard to the identity of the decision-maker, the process of decision-making, the subject matter, policy content and the importance of the decision to those affected by it.⁵¹ His Honour explained the basis for the variegated standard of unreasonableness as follows:⁵²

- a) The decision in *Wednesbury* was made more than fifty years ago, a time at which administrative law scarcely existed as a discrete area of law and neither New Zealand nor the United Kingdom had enacted a Human Rights Act.
- b) Courts have recognised a variable standard of legal unreasonableness for at least twenty years.
- c) Many leading administrative law texts and commentators have accepted this shift.
- d) Similar developments have occurred in the United Kingdom and Canada.

Canada

Legal unreasonableness in Canada has been characterised by attempts to create a more 'finely calibrated system of judicial review', which adequately balances respect for parliamentary supremacy with the rule of law.⁵³ In *Canada (Director of Investigation and Research) v Southam Inc*, Iacobucci J held that an unreasonable decision is one that 'in the main, is not supported by any reasons that can stand up to a somewhat probing examination'.⁵⁴

The Supreme Court endorsed a 'pragmatic and functional' approach to legal unreasonableness in *Baker v Canada (Minister of Citizenship & Immigration)*.⁵⁵ It recognised that there is a spectrum of standards of review, ranging from patent unreasonableness, which is the most deferential; through to correctness, where no deference is shown; with reasonableness *simpliciter* lying somewhere in the middle.

However, these three standards produced complexity and uncertainty, which cut against the usefulness of having multiple standards of review. The plurality remarked in *Dunsmuir* that '[t]he recent history of judicial review in Canada has been marked by ebbs and flows of deference, confounding tests and new words for old problems, but no solutions that provide

real guidance for litigants, counsel, administrative decision makers or judicial review judges'.⁵⁶

The plurality acknowledged that it may be difficult to distinguish between the patent unreasonableness standard and the reasonableness *simpliciter* standard, and that the strictness of the patent unreasonableness standard contemplates that there will be times when parties must simply accept an unreasonable or irrational decision, if the unreasonableness of the decision is not sufficiently immediate or obvious.

The plurality decided in *Dunsmuir* that only two standards of review should be used: correctness and reasonableness. Questions of fact, discretion and policy will generally attract a reasonableness standard, whereas constitutional questions, legal questions important to the legal system as a whole and matters of jurisdiction will involve a correctness standard.⁵⁷ A court reviewing the reasonableness of a decision should consider the 'justification, transparency and intelligibility' of the decision-making process and whether the decision 'falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law'.⁵⁸ The plurality observed in *Canada (Citizenship and Immigration) v Khosa* that the test of reasonableness 'takes its colour from the context' in which it is invoked.⁵⁹

In determining which standard of review is to be applied, the court will consider the tribunal's purpose and expertise, in light of its 'home statute', the nature of the decision, and the existence of any privative clause.⁶⁰ The plurality in *Dunsmuir* noted that this inquiry is not required in every case and courts may have regard to previous case law in determining the level of deference to be applied.

In decisions after *Dunsmuir*, courts have continued to grapple with the level of deference given to administrative tribunals' interpretations of their enacting legislation.⁶¹ In *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, Rothstein J (McLachlin CJ, LeBel, Fish, Abella and Charron JJ concurring) suggested that there is a presumption in such cases that the standard of reasonableness, rather than correctness, will apply.⁶² They queried whether, for the purposes of judicial review, there is a category of true questions of jurisdiction that will attract a standard of correctness in Canada.⁶³ Wihak has drawn attention to the 'overwhelming extent' to which Canadian courts have applied the reasonableness standard in cases not involving a legislated standard of review or constitutional law question.⁶⁴

Australia - Li unreasonableness

The recent decision in *Li* provides a useful basis for contrasting the standard of legal unreasonableness in Australia.⁶⁵ As McDonald has noted, it is one of a small number of cases where a decision has been invalidated on the sole ground of unreasonableness, offering 'a sighting of the "rare bird" of unreasonableness in solo flight'.⁶⁶

Ms Li had been training and working as a cook in Australia and applied for a Skilled-Independent Overseas Student visa in 2007, which required her to obtain an assessment that her skills were suitable for this occupation. The Minister's delegate initially refused her visa application on the basis that her application contained false information and Ms Li sought merits review of this decision before the Migration Review Tribunal. By this time, Ms Li had obtained further work experience and sought a fresh skills assessment. This further skills assessment was unsuccessful, but Ms Li's migration agent advised the Tribunal that there were errors in the skills assessment and asked the Tribunal not to make any decision until the assessment authority had reconsidered the assessment. Nonetheless, the Tribunal decided not to grant an adjournment and informed Ms Li that it considered she had

'been provided with enough opportunity to present her case and is not prepared to delay any further'. The Tribunal relied on the unfavourable skills assessment and dismissed her application for merits review.

All members of the High Court found that the refusal of an adjournment in these circumstances had a certain arbitrariness about it that rendered it unreasonable. In reaching this conclusion, the Court revisited the test of legal unreasonableness and held that Lord Greene MR's statement of principle in *Wednesbury* does not exhaustively cover the errors in decision-making that will give rise to a finding of legal unreasonableness in Australia.

French CJ recognised that once the process and reasoning requirements have been met, there is generally an area of 'decisional freedom' left to a decision-maker exercising discretionary power.⁶⁷ However, every decision is bounded by 'rules of reason' derived from legislation and will be affected by jurisdictional error where it is 'arbitrary or capricious or ... abandon(s) common sense'.⁶⁸

The plurality emphasised that legal unreasonableness is not confined to an irrational or bizarre decision, or one so unreasonable that no sensible decision-maker would have made it, as '*Wednesbury* is not the starting point for the standard of reasonableness, nor should it be considered the end point'.⁶⁹ Instead, a decision will be vitiated by legal unreasonableness where it 'lacks an evident and intelligible justification'.⁷⁰

In examining the justifications for a decision, the plurality emphasised⁷¹ that the scope and purpose of the statute conferring the discretion will need to be regarded.

The plurality also appears to have accepted that, at least in certain circumstances, questions of proportionality in decision-making may be a relevant consideration. For example, their Honours noted⁷² that one of the paradigm cases of unreasonableness considered in *Fares Rural Meat and Livestock Co Pty Ltd v Australian Meat and Live-stock Corporation*⁷³ involved the application of a proportionality analysis by reference to the scope of the power.

In particular, their Honours, by reference to the case before them said⁷⁴ regard might be had to the scope and purpose of the power to adjourn and, with that in mind, consideration could be given to whether the Tribunal gave excessive weight – more than was reasonably necessary – to the fact that Ms Li had had an opportunity to present her case. Their Honours then observed:⁷⁵

So understood, an obviously disproportionate response is one path by which a conclusion of unreasonableness may be reached. However, the submissions in this case do not draw upon such an analysis.

French CJ also accepted that a disproportionate exercise of an administrative discretion might be characterised as irrational and unreasonable on the basis that it 'exceeds what, on any view, is necessary for the purpose it serves'.⁷⁶

By contrast, Gageler J relied upon the stringent test in *Wednesbury*. His Honour emphasised that this ground of review is difficult to satisfy, particularly where a decision is made by an administrative decision-maker and influenced by matters of public policy. Gageler J observed that the successful invocation of *Wednesbury* unreasonableness has been rare and '[n]othing in these reasons should be taken as encouragement to greater frequency'.⁷⁷

How then does the standard of legal unreasonableness formulated in *Li* compare with the common law developments discussed earlier?

There are obvious differences in the constitutional background, institutional relationships and influence of human rights jurisprudence in each country. This has had a real impact on the continuing evolution of legal unreasonableness. While *Li* appears to have broadened the test for legal unreasonableness in Australia, the plurality and French CJ did not expressly endorse a variegated standard of review. The Federal Court has disavowed this concept on several previous occasions.⁷⁸ In *SHJB v Minister for Immigration and Multicultural and Indigenous Affairs*, the Full Court (Carr, Finn and Sundberg JJ) observed that the *European Convention on Human Rights*, related human rights jurisprudence and the legislative enactment of the *Human Rights Act 1998* (UK) have each had a gradual and important influence on administrative law in the United Kingdom.⁷⁹ The Full Court emphasised that while a number of recent High Court cases have involved basic human rights, the High Court has not adopted a notion of variable intensity of review in such cases and it is not possible to import such a test from other common law jurisdictions.⁸⁰ Instead, legal unreasonableness has typically been regarded as an 'exception that proves ... the rule' in Australia,⁸¹ rather than a standard that might expand or contract in its intensity, depending on the nature of the rights and interests affected by the decision.

Yet, simply because Australian courts have not endorsed a variegated intensity of review, this is not to say that an administrative decision is less likely to be successfully challenged on the basis of unreasonableness or another ground of review in Australia than in these other jurisdictions. In *Li*, a majority of the Court accepted that specific errors in decision-making may overlap with a finding of unreasonableness, or unreasonableness may invalidate a decision on its own. McDonald has observed that 'harsh or inhumane decisions and policies' have often been resisted through vehicles other than legal unreasonableness in Australia.⁸²

The dicta of the plurality in *Li* concerning legal unreasonableness suggests that the ground of unreasonableness may be applied in relation to any statutory discretion, whether or not it is thought to impact on fundamental rights. In Ms Li's case, not having the opportunity to convince the Tribunal that she was wrongly denied a residence visa was no doubt of great moment to her. But there is no reason to think that the particular value to be attached to a right or interest effectively or potentially denied by a decision-maker should affect the application of the *Li* unreasonableness test. Nothing in *Li* suggests that it should. That said, the value at stake is, however, likely to be regarded in the course of ascertaining the scope, subject and purpose of the statutory power in question for the purpose of deciding whether its exercise was unreasonable, that is to say, lacking an evident and intelligible justification.

Subsequent decisions have confirmed that a contextual and fact-driven approach to legal unreasonableness will be taken and there is no reasonableness 'checklist' in administrative decision-making.⁸³ Since *Li* was handed down on 8 May 2013, it has been applied on at least 16 occasions,⁸⁴ distinguished on six occasions and considered in more than 35 judgments, including the recent decision of the High Court in *Plaintiff S156/2013 v Minister for Immigration and Border Protection*.⁸⁵ Of these cases, legal unreasonableness was successfully invoked on three occasions, in *Singh*; *SZRHL v Minister for Immigration and Citizenship*;⁸⁶ and *SZSNW v Minister for Immigration and Border Protection*.⁸⁷

In *Singh*, the Full Court held that the Migration Review Tribunal's refusal of an adjournment, in the circumstances, was legally unreasonable. The principal factor leading to this conclusion was that Mr Singh had sought the adjournment in order to obtain a re-marking of an English language test, which the Tribunal had accepted he should be able to take before it made its decision. The Court found that the Tribunal had not given an 'objective or intelligible' justification for its decision to refuse the adjournment, in circumstances where the request was for a specific purpose, there was a reasonable basis to doubt the accuracy of the result for one component of the test, the period required for the re-mark was not likely to

be very long and there would be significant and inevitable prejudice to Mr Singh if his request was refused.⁸⁸ The Court noted that if a proportionality analysis were undertaken, the decision to refuse the adjournment was disproportionate to the way the review had been conducted to that point, to what was at stake for Mr Singh and what he reasonably hoped to secure through the re-mark.⁸⁹

In *SZRHL* and *SZSNW*, the Court found that the process of reasoning which led the decision-maker to make adverse credibility findings in each case was legally unreasonable. In *SZRHL*, Logan J held that the Refugee Review Tribunal's adverse credibility findings were premised upon the basis that the first appellant had made no reference to a 'false case' brought against him in Bangladesh at the time his protection visa application was made, when this was not the case.⁹⁰ His Honour found that this false premise was not 'peripheral' to the Tribunal's reasoning,⁹¹ with the consequence that the reasoning process was 'illogical or irrational' or procedurally unfair to the appellant.⁹²

Similarly, in *SZSNW*, Judge Driver held that the way the Independent Merits Reviewer dealt with the 'delicate and sensitive' issue of the applicant's claim of sexual torture was legally unreasonable and coloured the Reviewer's opinion of the applicant's credibility.⁹³ His Honour found that the Tribunal had dealt with the applicant's claim of sexual torture in a 'dismissive' way,⁹⁴ had not taken into account his unique circumstances as a vulnerable person under the relevant guidelines,⁹⁵ and had relied upon a false factual premise.⁹⁶ Due to the importance of this finding to the outcome, Judge Driver concluded that the Reviewer's report and recommendation were 'fatally flawed'.⁹⁷

Yet, in other cases following *Li*, courts have not acceded to arguments based on legal unreasonableness. In *Chava v Minister for Immigration and Border Protection*, Mortimer J observed that *Li* does not mark the beginning of a new era for courts to minutely scrutinise the reasoning of an administrative decision-maker and in that case, it was not appropriate to apply 'excessive hindsight or document-based logic ... to a busy tribunal conducting a review hearing'.⁹⁸ In *Minister for Immigration and Border Protection v Pandey*, Wigney J accepted that the legal reasonableness of the Tribunal's decision was 'borderline', but the decision fell within a category of decisions where reasonable minds might differ as to the correct or preferable decision.⁹⁹

These decisions highlight that courts will give close consideration to the reasoning process and outcome of an exercise of discretionary power. While courts will not seek to substitute their own view of the merits of the decision, *Li* confirms that decision-makers should take care to ensure a decision is lawfully made, even where a wide discretion has been conferred.¹⁰⁰

The decision in *Li* also indicates that courts have a 'margin of evaluation'¹⁰¹ in applying legal unreasonableness to the specific statutory context and factual circumstances of each case, recognising that conceptions of reasonable decision-making change over time. For example, it was not overly long ago in *Short v Poole Corporation*¹⁰² that the English Court of Appeal upheld the decision of a local education authority to dismiss all married women teachers in its employment. The education authority justified its decision on the basis that there was an oversupply of teachers at the time and it had elected to favour those female teachers who were 'devoting their lives and energies entirely to the business of teaching without assuming the privilege and the burden of domestic ties'.¹⁰³ The Court of Appeal allowed this decision to stand and held that it was not made for an improper purpose or taking into account irrelevant considerations.¹⁰⁴ However, it is very difficult to imagine such a decision being accepted as anything other than unreasonable in today's Australia.

Conclusion

Legal unreasonableness shares a similar origin and rationale in Australia, the United Kingdom, New Zealand and Canada, although in the latter three countries it has shifted to become a more flexible standard, capable of adapting to different decision-makers, subject-matters and legislation. The formulation and practical application of this concept in Australia, however, have differed. While Australian courts have not adopted a variegated standard of legal unreasonableness or gravitated towards any explicit notion of deference towards administrative expertise, the High Court in *Li* has now endorsed a more flexible, contextual approach to legal unreasonableness in Australia that is capable of responding to a range of administrative decisions. The High Court also appears to have explicitly recognised that in some circumstances at least, a proportionality analysis of the decision-making process may be appropriate in determining whether or not the decision produced was unreasonable.

It may be, as Justice Basten has suggested, that *Li* marks the commencement of the next 'large step' in the process of reformulating public law concepts in Australia.¹⁰⁵ The fact that *Li* has been applied on at least 16 occasions since it was handed down on 8 May 2013 suggests this is so. Indeed, *Li* unreasonableness may reasonably be said to constitute the ultimate rule of law governing the exercise of statutory discretion. Decision-makers made aware of the ruling in *Li* will surely think twice before making a decision, the second thought being whether the decision has an evident and intelligible basis and, in appropriate cases, is a proportionate response to the question to be decided, having regard to the evident scope and purpose of the discretionary power in question.

Endnotes

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- 3 *Ibid* [76].
- 4 See eg, Michael Taggart, 'Australian Exceptionalism' in *Judicial Review* (2008) 36 *Federal Law Review* 1; Cheryl Saunders, 'Constitution as Catalyst: Different Paths within Australasian Administrative Law' (2012) 10 *New Zealand Journal of Public Law and International Law* 143.
- 5 Hon JJ Spigelman AC, 'Public Law and the Executive' (Garran Oration, Institute of Public Administration Australian National Conference, Adelaide, 22 October 2010) 20.
- 6 Michael Taggart, 'Proportionality, Deference, Wednesday' [2008] *New Zealand Law Review* 423, 427.
- 7 Hon Dame Sian Elias, 'National Lecture on Administrative Law: 2013 National Administrative Law Conference' (2013) 74 *AIAL Forum* 1, 6.
- 8 [1948] 1 KB 223 (*Wednesday*).
- 9 *Ibid* 234 (Somervell LJ and Singleton J concurring).
- 10 *Ibid* 230.
- 11 *Ibid*.
- 12 [1891] AC 179 at 180.
- 13 Cited in *Li* at [24] (French CJ).
- 14 (1597) 5 Co Rep 99b at 100a.
- 15 *Li* at [26]-[28].
- 16 *Ibid* [88]-[92].
- 17 *Ibid* [63].
- 18 [2014] FCAFC 1 at [43] (*Singh*).
- 19 (2003) 211 CLR 476.
- 20 (2010) 239 CLR 531.
- 21 See generally Will Bateman, 'The Constitution and the Substantive Principles of Judicial Review: The Full Scope of the Entrenched Minimum Provision of Judicial Review' (2011) 39 *Federal Law Review* 463.
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- 25 [1981] AC 578.
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- 27 (1936) 55 CLR 499 at 503.
- 28 *Ibid* 505.

- 29 Hon Dame Sian Elias, 'National Lecture on Administrative Law: 2013 National Administrative Law Conference' (2013) 74 *AIAL Forum* 1, 6.
- 30 Chief Justice French, 'Singapore Academy of Law Annual Lecture 2013: The Rule of Law as a Many Coloured Dream Coat' (2014) 26 *Singapore Academy of Law Journal* 1, 14.
- 31 D J Galligan, *Discretionary Powers: A Legal Study of Official Discretion* (Clarendon Press, 1986), 218.
- 32 *Ibid* 4.
- 33 Philip Sales, 'Rationality, Proportionality and the Development of the Law' (2013) 129 *Law Quarterly Review* 223, 228.
- 34 Bill Lane and Eleanor Dickens, 'The Revitalisation of Wednesbury Unreasonableness – The Decision in Minister for Immigration and Citizenship and Li [2013] HCA 18' (2013) 33 *Queensland Lawyer* 168, 168.
- 35 Leighton McDonald, 'Rethinking unreasonableness review' (2014) 25 *Public Law Review* 117, 122-4.
- 36 See, eg, *Minister for Immigration and Multicultural Affairs v Eshetu* [1999] HCA 21; (1999) 197 CLR 611, 626 (Gleeson CJ, McHugh J).
- 37 *Council of Civil Service Unions v Minister for Civil Service* [1985] AC 374 at 410.
- 38 *Bugdaycay v Secretary of State for the Home Department* [1987] 1 All ER 940 at 952.
- 39 See, eg, *R (on the application of Mahmood) v Secretary of State for the Home Department* [2001] 1 WLR 840 (EWCA) at [18].
- 40 [2000] 1 WLR 1115 at [78].
- 41 *R v Department of Education and Employment; Ex parte Begbie* [2000] 1 WLR 1115 at [76].
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- 43 [2001] 2 AC 532 at [32].
- 44 Michael Taggart, 'Proportionality, Deference, Wednesbury' [2008] *New Zealand Law Review* 423, 427.
- 45 See *R (Association for British Civilian Internees – Far Eastern Region) v Secretary of State for Defence* [2003] QB 1397.
- 46 [1996] 2 NZLR 537 at 545.
- 47 *Discount Brands Ltd v Northcote Mainstreet Inc* [2004] 3 NZLR 619 at [49].
- 48 Michael Taggart, 'Proportionality, Deference, Wednesbury' [2008] *New Zealand Law Review* 423, 446; Dean R Knight, 'A Murky Methodology: Standards of Review in Administrative Law' (2008) 6 *New Zealand Journal of Public International Law* 117, 123.
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- 51 [2004] NZAR 414 at [47].
- 52 *Ibid* [48].
- 53 See *Dunsmuir* at [44] (plurality).
- 54 [1997] 1 SCR 748 at [56].
- 55 [1999] 2 SCR 817 at [55].
- 56 *Dunsmuir* at [1].
- 57 *Ibid* [58]-[61].
- 58 *Ibid* [47].
- 59 [2009] 1 SCR 339 at [59].
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- 68 *Ibid*.
- 69 *Ibid* [68].
- 70 *Ibid* [76].
- 71 *Ibid* [67] and [74].
- 72 *Ibid* [73].
- 73 (1990) 96 ALR 153 at 167-168.
- 74 *Li* at [74].
- 75 *Ibid*.
- 76 *Ibid* [30].
- 77 *Ibid* [113].
- 78 See *STKB v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCA 546; *SZADC v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCA 1497.
- 79 [2003] FCAFC 303; (2003) 134 FCR 43 at [30].
- 80 *Ibid* [31].
- 81 Leighton McDonald, 'Rethinking unreasonableness review' (2014) 25 *Public Law Review* 117, 127.
- 82 *Ibid* 127-8.

- 83 *Singh* at [42].
- 84 See *A v Corruption and Crime Commissioner* [2013] WASCA 288; *Agar v McCabe* [2014] VSC 309; *Chava v Minister for Immigration and Border Protection* [2014] FCA 313; *D'Amore v Independent Commission Against Corruption* [2013] NSWCA 187; *Financial Ombudsman Services Ltd v Pioneer Credit Acquisition Services Pty Ltd* [2014] VSC 172; *Flegg v Crime and Misconduct Commission* [2014] QCA 42; *Isbester v Knox City Council* [2014] VSC 286; *Jones v Office of the Australian Information Commissioner* [2014] FCA 285; *Lo v Chief Commissioner of State Revenue* [2013] NSWCA 180; *McLaren v Rallings* [2014] QSC 68; *Minister for Immigration and Border Protection v Pandey* [2014] FCA 640; *Minister for Immigration and Border Protection v Singh* [2014] FCAFC 1; *Regional Express Holdings Limited v Dubbo City Council (No 3)* [2014] NSWLEC 87; *SZRHL v Minister for Immigration and Citizenship* [2013] FCA 1093; *SZRHS v Minister for Immigration and Citizenship* [2014] FCA 121; *SZSNW v Minister for Immigration and Border Protection* [2014] FCCA 134.
- 85 [2014] HCA 22 at [45].
- 86 [2013] FCA 1093 (*SZRHL*).
- 87 [2014] FCCA 134 (*SZSNW*).
- 88 *Singh* at [73]-[76].
- 89 *Ibid* [77].
- 90 *SZRHL* at [34].
- 91 *Ibid*.
- 92 *Ibid* [35]-[36].
- 93 *SZSNW* at [37].
- 94 *Ibid*.
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- 96 *Ibid* [55].
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- 98 [2014] FCA 313 at [72].
- 99 [2014] FCA 640 at [51].
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- 101 See Philip Sales, 'Rationality, Proportionality and the Development of the Law' (2013) 129 *Law Quarterly Review* 223, 228.
- 102 [1926] Ch 66.
- 103 *Ibid* 92 (Warrington LJ).
- 104 *Ibid* 88 (Pollock MR); 91-2 (Warrington LJ); 95 (Sargant LJ).
- 105 Justice Basten, 'Judicial Review of Executive Action: Tiers of Scrutiny or Tears of Frustration?' in Neil Williams (ed), *Key Issues in Judicial Review* (Federation Press, 2014) 35, 35.

THE RISE AND RISE OF MERITS REVIEW: IMPLICATIONS FOR JUDICIAL REVIEW AND FOR ADMINISTRATIVE LAW

*The Hon Justice Janine Pritchard**

Much of the focus of the teaching of administrative law in universities, and of the academic discussion of administrative law, is on judicial review and its importance in the review of administrative action. In the past decade there has been a resurgence of interest in judicial review, and significant judicial development of some key principles concerning judicial review. In contrast, merits review has, for the most part, escaped much of that attention. Yet there is a strong argument that merits review is no less significant than judicial review as a means for obtaining the review of an administrative decision. My aim in this paper is to explore some of the reasons why that is so. I do so by considering the extent to which, and the areas in which, judicial review and merits review are being pursued in courts and tribunals, to examine the similarities between the judicial method at the heart of judicial review and merits review, and to consider the implications of these issues for the future development of administrative law. As we are approaching the 10 year anniversary of the establishment of the Western Australian State Administrative Tribunal (SAT) in January 2015, it is an opportune time to reflect on the place of merits review within administrative law.

In this paper, I will explore three issues:

1. the practical significance of merits review in achieving the objectives of administrative law;
2. the judicial method at the heart of judicial review and merits review; and
3. the implications of these issues for the role of judicial review and merits review as avenues for the review of administrative decisions, and for future policy development.

I should say at the outset that some of these issues have previously been discussed by others, and in preparing this paper I have been particularly assisted by a paper prepared by the Hon Justice Duncan Kerr, President of the Administrative Appeals Tribunal (the AAT), in 2012,¹ and by a paper written by Professor Peter Cane in 2000.²

The context for the discussion in this paper is primarily the position in the Western Australian Supreme Court and SAT. However, I have also endeavoured to draw some comparisons with the position in the Federal Court and the High Court, and in the AAT. Those comparisons suggest that the position in Western Australian is not markedly different from those other Australian jurisdictions.

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The practical significance of merits review in achieving the objectives of administrative law

The objectives of the review of administrative decisions

Before we can begin to assess what significance merits review might have in achieving the objectives of administrative law, we need to bear in mind the objectives of administrative law remedies which permit the review of administrative decisions.

In a broad sense, the underlying objective of all administrative law remedies can be summarised as being to promote observance of the rule of law. But a number of forms of relief falling under the administrative law umbrella are directed to the even broader objective of promoting good governance. These broad objectives may be achieved in a number of ways: through the availability of remedies to restrain the unlawful exercise of administrative power, including administrative decisions and subsidiary legislation; the availability of remedies to enable the correction of decisions which do not represent the correct or preferable exercise of discretionary decision making power; and the grant of rights the exercise of which tends to increase accountability for, and the transparency of, administrative action (such as rights to the provision of reasons for decisions, or rights of access to documents under freedom of information legislation) and which tend to produce more consistent administrative decision making at first instance.

Judicial review and merits review in Western Australia – the facts

In Western Australia, judicial review of the decisions of inferior courts, tribunals and other administrative decision-makers is available through the grant of the prerogative writs, or injunctive or declaratory relief, in the Western Australian Supreme Court.³ Merits review for a wide range of administrative decisions is available in the SAT.

The statistics below reveal that the number of applications for judicial review which are brought each year in the Supreme Court of Western Australia is very small, particularly when compared with the number of applications for merits review which are brought in the SAT each year.

The number of applications for prerogative relief commenced each year in the Western Australian Supreme Court, compared with the total number of civil actions commenced by writ, and compared with the total number of civil actions commenced in the Court, are set out in Table 1 below.⁴

Table 1 – Supreme Court Judicial Review Applications and Civil Lodgments: 1998 - 2013

Year	No of Judicial Review Applications	Total Writs	Total Civil Applications	Judicial Review as % of Total Actions
2013	32	1,954	2,893	1.1%
2012	26	2,073	2,980	0.87%
2011	23	2,447	3,330	0.69%
2010	29	2,076	2,972	0.97%
2009	14	2,167	3,242	0.43%
2008	13	1,832	2,884	0.45%
2007	8	1,364	2,195	0.36%
2006	17	1,391	2,201	0.77%
2005	15	1,513	2,487	0.60%
2004	36	1,656	2,656	1.35%

Year	No of Judicial Review Applications	Total Writs	Total Civil Applications	Judicial Review as % of Total Actions
2003	43	1,575	2,633	1.63%
2002	75	1,767	2,789	2.68%
2001	177	1,984	3,328	5.31%
2000	184	1,745	2,953	6.23%
1999	43	1,452	2,466	1.73%
1998	52	1,419	2,303	2.25%
TOTAL	807			

(The significant difference in the number of judicial review applications in 2000 and 2001 appears to be an anomaly which resulted from amendments to workers' compensation legislation in this State.)

Each initiating application in the table above is counted equally, whether it be a writ which commences an extremely large and complex piece of commercial litigation, or an application by a mortgagee to repossess in the event of a mortgagor's default on loan repayments. I immediately acknowledge that any comparison of raw figures is therefore highly flawed because those raw figures say nothing about the substance of each matter. The point of starting with the raw figures, however, is simply to provide an overall impression. That impression could not be clearer: judicial review applications constitute a very small proportion of the civil applications brought in the Supreme Court of Western Australia.

Of course, not all applications which are filed result in the delivery of a judgment. Table 2 below sets out the number of 'final' judgments delivered by the Court since 2000 in judicial review applications (that is, excluding reasons delivered in respect of applications for orders nisi).

Table 2 - Number of Final Judicial Review Judgments Delivered 2000 – 2014

Year	Number of Judgments
2014 (to July 2014)	6
2013	14
2012	10
2011	20
2010	4
2009	4
2008	2
2007	8
2006	8
2005	10
2004	5
2003	7
2002	9
2001	2
2000	3
Total	112

The next line of inquiry is to identify the factual context for the applications. Table 3 attempts to broadly categorise the 112 judgments the subject of Table 2 above.

Table 3 - Judicial Review Judgments 2000 – 2014

Subject	Number
Applications by prisoners relating to their conditions of imprisonment	14
Applications related to worker's compensation	20
Applications related to grant of mining licences	10
Applications to quash adjudications under the <i>Construction Contracts Act 2004</i> (WA)	7
Applications related to planning decisions (whether by Minister, local council or Western Australian Planning Commission)	21
Applications related to Ministerial decisions on environmental matters (including issue of notices under the <i>Contaminated Sites Act 2003</i> (WA))	7
Applications related to Ministerial decisions about heritage matters	3
Applications relating to decisions of lower courts	5
Applications relating to decisions of SAT, other tribunals, and the Liquor Commission	6
Applications relating to decisions of Corruption and Crime Commission	3
Other	16
Total	112

There is some overlap in the categories in the table above – for instance, 'applications related to planning decisions' would include some decisions of the SAT, which overlap with 'applications relating to decisions of SAT'. However, no application has been counted twice.

The judicial review decisions published by the Court since 2000 have been focused in certain areas – prisons, workers' compensation, mining, planning, and ministerial decision making, particularly in the environmental context. With the possible exception of planning matters, there are few applications for judicial review in subject areas where there exists the alternative option of pursuing merits review.

The SAT position

The SAT has both original jurisdiction and review jurisdiction.⁵ The SAT has review jurisdiction if an enabling Act provides that an application may be made to the SAT to deal with the matter concerned and that matter expressly or necessarily involves a review of a decision.⁶ According to SAT's annual report for 2012/2013, SAT derives its review jurisdiction from more than 150 enabling Acts,⁷ in areas as diverse as Aboriginal Heritage, Animal Welfare, Building, Child Care, Construction Contracts, Firearms, Fisheries, Local Government, Planning, Taxation, Taxis, Vocational licences, and Working with Children authorisations.

The number of applications for merits review filed in the SAT in each year since 2005 is set out in Table 4 below. To give those figures some context, I have also included a comparison of the total number of applications in the SAT's original jurisdiction and in each of the key areas of the SAT's original jurisdiction (namely applications under the *Guardianship and Administration Act 1990* (WA) and under the *Commercial Tenancy (Retail Shops) Agreements Act 1985* (WA)).

Table 4 - The Number of Applications for Merits Review Filed in the SAT: 2005 - 2014

Year	Review Applications (% total matters in SAT)	Original Juris'n Application (G'ship & Admin Act)	Original Juris'n (Commercial Tenancies Act)	Original Juris'n (Other)	Total Original Jurisdiction Applications (% total matters in SAT)
2014 (to July 2014)	540 (12%)				3,876 (88%)
2013	1,010 (14%)	4,876	1,229	305	6,410 (86%)
2012	1,221 (16%)	4,610	1,273	317	6,200 (84%)
2011	1,125 (16%)	4,213	1,364	412	5,989 (84%)
2010	802 (13%)	3,681	1,461	366	5,508 (87%)
2009	959 (16%)	3,305	1,501	365	5,171 (84%)
2008	893 (15%)	3,015	1,627	364	5,006 (85%)
2007	865 (16%)	2,559	1,581	396	4,536 (84%)
2006	738 (13%)	2,583	1,662	484	4,729 (87%)
2005	1,034 (19%)	2,316	1,465	728	4,509 (81%)

Some federal comparisons – the Federal Court, High Court and AAT

The Federal Court

The jurisdiction of the Federal Court to deal with judicial review derives from s 39B of the *Judiciary Act 1903* (Cth) in respect of applications for judicial review of decisions by officers of the Commonwealth in respect of which an application under s 75(v) could have been made to the High Court, and from the *Administrative Decisions (Judicial Review) Act 1977* (Cth),⁸ which provides for the judicial review of decisions made under Commonwealth 'enactments'.

It is not entirely clear from the Federal Court's 2012/13 Annual Report how many of the matters commenced in that financial year were judicial review applications, because the Report refers to matters by subject rather than by the nature of the application. With that rider, however, it appears that 87 Administrative Law matters, and a further 11 Migration matters, were commenced in the 2012/2013 year. In the same period, 1,564 matters were commenced.⁹ If it is assumed for the moment that all 'Administrative Law' and 'Migration' matters were judicial review applications (and not all of them may have been), judicial review applications made up approximately 6.26% of the number of matters commenced in the 2012/2013 year.

A better indication of the nature and extent of the judicial review work done by the Federal Court can be gleaned from considering the published decisions of the Court. In the last three years, approximately 300 substantive judicial review decisions were delivered in the Federal Court. Those decisions can be broadly categorised as follows:

- 43% involved a review of a decision of the Immigration Minister;
- 16% involved a review of a decision of another Minister (Finance, Environment, Justice, Infrastructure and Transport, Attorney General, Home Affairs, Health);
- 12% involved a review of a decision of a regulatory board or authority (eg Australian Communications and Media Authority, Takeovers Panel, Civil Aviation Safety Authority, Information Commissioner, ASIC, Food Standards Aust-NZ);
- 9% involved a review of a decision of the Commissioner of Taxation, Police or Patents;
- 18% involved a review of a decision of the Federal Magistrates Court or of a federal tribunal (eg Superannuation Complaints Tribunal, Native Title Tribunal, Fair Work Commission, AAT, Anti-Discrimination Boards, Competition Tribunal); and
- 2% involved a review of other decisions (e.g. Australian Research Council, Australian Postal Corporation, Universities).

The High Court

For completeness within the federal context, it is appropriate to mention the judicial review jurisdiction of the High Court.

The High Court has power to issue writs of certiorari, mandamus and prohibition pursuant to s 75(v) of the *Constitution*. The High Court's 2012/2013 Annual Report indicated that the number of applications for 'constitutional writs' filed in the High Court in 2012-13 was 84, which was down from the 170 applications filed in 2011-2012.¹⁰ There were just over 100 applications in 2010-11, of which approximately 95 were in immigration. There were only 40 applications in 2009-10 of which 30 involved immigration. There were 40 applications filed in 2008-09, of which approximately 25 involved immigration.¹¹

When it comes to the number of decisions delivered by the High Court (reflecting matters that actually proceed to a hearing in the Court) the numbers are significantly lower. In each of 2013 and 2012, five of the Court's 61 decisions were decisions made in relation to matters arising under s 75 of the *Constitution*.

Merits review in the AAT

As with the SAT, the AAT's merits review jurisdiction depends upon conferral of jurisdiction upon it under another Act.¹²

The 2012/2013 Annual Report for the AAT divides its workload into the following areas: social security, veterans' affairs, workers' compensation, taxation, immigration and citizenship, and other.

6,176 applications were lodged at the AAT in 2012/13, 241 of which related to immigration and citizenship and 1,471 of which related to taxation.¹³

In the areas of immigration and taxation, in particular, there appears to be a degree of overlap with the subject matter of cases that are heard in the Federal Court.¹⁴

Conclusions about the significance of merits review vis-a-vis judicial review as an avenue for the review of administrative decisions

There is clearly a very significant disparity between the raw number of judicial review applications commenced in the Supreme Court or the Federal Court or High Court, on the one hand, and the number of merits review applications commenced in the SAT or the AAT on the other hand. In the absence of information as to why litigants choose a particular forum, it is impossible to do more than speculate about the possible reasons why so many more merits review applications are made. Nevertheless, a range of possible reasons come quickly to mind, including:

- cost of litigation;
- speed of litigation;
- informality / 'user friendly' tribunal setting – may be more suitable for self-represented litigants, as compared with the formality of court proceedings and the technicality of prerogative writ applications in particular;
- review based on the facts at the time of the review;¹⁵
- availability of reasons in respect of the decision at first instance;¹⁶
- tribunal rules and procedures which require the decision maker to put material before the Tribunal and to assist the Tribunal;¹⁷
- specialist tribunal member input in the merits review process;
- remedies - especially the possibility of substituting the original decision with the correct and/or preferable decision by a tribunal (cf referring the matter back to the original decision maker in judicial review); and
- merits review may include examination of the legal framework (and of the legality) of the decision under review.

Whatever the reason, the point remains that the figures set out above suggest that in practical terms, merits review is far more significant than judicial review as an avenue for the review of administrative decisions, because more applicants avail themselves of merits review than of judicial review when they are dissatisfied with an administrative decision.

However, despite the relatively small numbers of judicial review applications, the judicial review jurisdiction of the High Court and of State Supreme Courts remains of fundamental importance, for two reasons. First, the High Court's jurisdiction under s 75(v) of the *Constitution*, and the supervisory jurisdiction of State Supreme Courts to review the decisions of inferior courts and tribunals for jurisdictional error, cannot be excluded or eroded by legislation.¹⁸ In contrast, a right to merits review exists only by virtue of legislation. That right could be abolished or eroded if the legislature saw fit to do so. Secondly, the importance of the independence of the Courts from the executive government should not be overlooked. In contrast, the independence of tribunal members could be undermined by legislative amendment, such as by removing or limiting the security of tenure of tribunal members, if the legislature saw fit.

The judicial method at the heart of judicial review and merits review

In this part of the paper, I explore one of the possible reasons why a litigant might prefer to pursue merits review (if that course is open), instead of judicial review, namely that in the course of a merits review, it is open to the tribunal to examine the legal framework for (and the legality of) the decision under review, as well as its merits.

The orthodox view is that judicial review and merits review are like oranges and apples – that is, that they are qualitatively different exercises¹⁹ with little in common. Particularly in

the context of merits review,²⁰ however, the orthodox view does not withstand scrutiny. That is because a very similar judicial method is applied in merits review and judicial review.

A court undertaking judicial review will examine the decision under review having regard to the source of power to make the decision (ordinarily a statute) and to the parameters for the exercise of the decision making power which are set out in the statute. Leaving to one side those cases where judicial review of a decision is sought for error of law on the face of the record, or for a denial of procedural fairness, the court's role in a judicial review will be (i) to identify the decision in question, (ii) to engage in statutory construction so as to ascertain the parameters of the decision making power under the statute, and (iii) to determine whether the decision-maker fell into jurisdictional error by exercising the decision making power in such a way as to fall outside the parameters established by the statute for the exercise of that power.

In the context of a merits review, the tribunal must stand in the shoes of the original decision maker and exercise the decision making power *de novo*.²¹ The tribunal will ordinarily be charged with determining the correct and/or preferable decision at the time of the review.²² In this context, a 'correct' decision 'might be taken to be one rightly made, in the proper sense', while a 'preferable' decision is 'apt to refer to a decision which involves discretionary considerations'.²³ In determining whether the original decision was 'correct', considerations of the parameters of the power of the decision maker will arise.

Accordingly, a tribunal exercising a merits review jurisdiction must (i) identify the decision it has to make; (ii) form its own view about the parameters of the decision making power; and (iii) having regard to the evidence, determine what is the correct and/or preferable exercise of that power. In undertaking that exercise, the tribunal may form the view that the decision made at first instance was not the correct decision, because it has formed the view that that decision was not validly made.

Although a tribunal cannot make a declaration as to the invalidity of an administrative decision made by a decision maker at first instance, nor quash that decision, that limitation has little practical significance within the merits review context, for two reasons. First, administrative tribunals like the SAT and the AAT can, and do, express conclusions on points of law in relation to the legal framework for the exercise of the particular power they are called upon to exercise on the review, if it is necessary to do so in the proper conduct of the review. Secondly, those tribunals have the power to substitute their own (different) decision for that of the original decision maker if the initial decision was not the correct and/or preferable one in all of the circumstances.

Professor Cane has observed that:

At least as practised by Australian merits-review tribunals, merits review reaches most of the types of issues that can be handled by courts exercising judicial review jurisdiction.²⁴

That that is so can be illustrated by reference to a number of examples of cases dealt with by the SAT and the AAT.

In *Uniting Church Homes (Inc) and City of Stirling*²⁵ and *Retirees WA (Inc) and City of Belmont*²⁶ the SAT reviewed decisions of Councils to levy council rates on land which the rate payer claimed was used for a charitable purpose, namely for provision of aged care (retirement village). Both cases involved the construction of the rating legislation, which provided an exemption from rates for land used for a 'charitable' or 'public purpose', as well as a determination as to whether the evidence supported the conclusion that the land was being used for a charitable or public purpose.

*Treby and Local Government Standards Panel*²⁷ concerned a review by the SAT of a decision by the Local Government Standards Panel which found that two members of a Council had breached some Council standing orders and Regulations. The review involved the construction of the relevant regulations to ascertain the conduct which they prohibited, and then a determination of whether the evidence supported the conclusion that the Council members had contravened the standard of behaviour required of them. One of the issues which arose was whether the regulations should be construed in such a way as to ensure they were not inconsistent with the implied freedom of political communication in the *Constitution*.

In *Young and Lyon and Commissioner of Taxation*²⁸ and *Walsh and Commissioner of Taxation*²⁹ the AAT reviewed decisions by the Commissioner of Taxation to disallow an objection by each of the taxpayers to a superannuation contribution surcharge assessment for various tax years. The legislation in question imposed a surcharge on the members of constitutionally protected superannuation schemes. The taxpayers' objections were based on the decision of the High Court in *Clarke v Commissioner of Taxation*.³⁰ The taxpayers contended that because they occupied very senior positions in the South Australian and Western Australian governments, the legislation was invalid in so far as it purported to apply the surcharge to them. Deputy President Jarvis concluded that the AAT could consider the constitutional validity of legislation in order to determine whether or not it had jurisdiction to review a decision, and could form an opinion on whether the legislation could validly apply to particular persons or circumstances even though it could not reach a conclusion having legal effect that the legislation was invalid. Deputy President Jarvis assessed the evidence as to the role of the taxpayers within the State governments and the impact of the levying of the superannuation surcharge on the States, in order to reach a conclusion as to whether the legislation could validly apply in respect of the individual taxpayers.

In each of these cases, if an application had been commenced for judicial review, it is difficult to see how a court's approach would have differed from the approach taken by the tribunal in each case, save that the court could have made a declaration about validity, but could not have gone on to substitute its own decision for that of the original decision maker.

In pursuing a merits review, an applicant is able to secure a review of the merits of the decision, and at the same time (in an appropriate case) will derive the benefit of the tribunal's analysis of the legality of the original decision, having regard to the applicable legislative provisions. For this reason, Professor Cane observed that:

The task of merits-review bodies, such as the AAT, of reviewing the legal component of administrative decisions can be described in precisely the same way as I have just described the task of a court exercising judicial review jurisdiction. ... In respect of the standard of review of administrative decisions on legal issues, there is no difference between merits review and judicial review. Moreover, once the nature of questions of law is properly understood, it can be seen that the standard of review is accurately stated in terms of making the correct or preferable decision on the point of law in issue, with the proviso that 'correct' is to be understood as referring to a judgment by the reviewing body that the question of law in issue admits of only one reasonable answer.³¹

Accordingly, Professor Cane argued that merits review can be seen as 'judicial review in disguise'.³² He contended:

[The AAT] operates and behaves like a court. ... In this light, the AAT finds its real significance not in being a general merits-review tribunal, but rather in being the vehicle of a massive expansion of judicial review by stealth. ... The establishment of the federal merits review system not only made an expansion of the grounds of judicial review undesirable. It also made such an expansion unnecessary.³³

That brings me to a consideration of the implications of the extensive use of merits review for the future development of merits review itself, for the development of judicial review, and for the development of administrative law more generally.

The implications of these issues for the role of judicial review and merits review as avenues for the review of administrative decisions, and for future policy development

The figures set out above suggest that if litigants have a choice between judicial review and merits review, they are likely to pursue merits review in a tribunal as a means to review an administrative decision about which they are dissatisfied. In doing so, they will obtain the benefit of the tribunal making an assessment as to whether the decision at first instance was legally correct and whether that decision was preferable in all of the circumstances at the time of the review. These features of merits review, and the extent to which it is being pursued in preference to judicial review, have some interesting implications for the development of administrative law which would benefit from greater analysis and consideration by academics, practitioners and policy makers alike.

One question which arises is whether the success of merits review will result in the slow demise of judicial review. The figures cited above suggest that judicial review applications are predominantly being made in relation to decisions for which merits review is not available – in this State, the majority of judicial review applications involve applications by prisoners, applications to challenge decisions of Ministers, and applications in construction contracts cases, for example, where no, or very limited, avenues for merits review are available. Justice Basten recently made a similar observation in the context of federal judicial review applications when he observed that ‘administrative law is being developed by reference to a discrete area of asylum seeker related decisions and migration decisions more generally.’³⁴ However, there is no doubt that the cohesive development of the law benefits from the exploration of its application in a variety of different contexts. For that reason, one potential consequence of fewer applications for judicial review, and the concentration of those applications in a confined range of subject areas, may well be a stultification of the development of the law in relation to judicial review.

In addition, if we return to the objectives of administrative law which I mentioned at the outset, the use of judicial review and merits review raises a number of questions about how those avenues of review might be enhanced in order to better fulfil the objectives of administrative law.

One of those questions concerns the range of decisions for which merits review should be available. The existence of merits review jurisdiction depends on an enabling Act granting jurisdiction to a tribunal to review a particular decision. This has resulted in a patchwork of enabling Acts, each identifying particular decisions for merits review. One of the reasons for that approach has probably been the assumption that judicial review is the ‘fallback’ or ‘default’ position for the review of an administrative decision, so that it is not necessary to facilitate the wide availability of merits review. However, the limited recourse to judicial review which can be seen in the figures set out above suggests that maintenance of the rule of law, and good governance more generally, will be facilitated by the availability of merits review for a wider range of administrative decisions than presently exists. Justice Kerr has posed the question as to whether the AAT should have universal jurisdiction, subject to express exclusion, rather than the reverse.³⁵ Justice Basten has made a similar point.³⁶

A further question in relation to the development of merits review in tribunals concerns the composition of tribunals. The potential for issues of statutory construction, and issues relating to the legality of administrative decisions, to arise in a merits review raises questions about the qualifications and expertise of members of merits review tribunals, for the

appropriate balance on a merits review tribunal between legally qualified members and members with expertise outside law, and for the composition of multi-member panels dealing with applications for merits review.

If it is the case that litigants pursue merits review instead of judicial review where that course is open to them, the question arises as to whether judicial review, particularly at the State level, would benefit from reform. In Western Australia, some reform has been pursued through amendments to the *Rules of the Supreme Court 1971* (WA). But these reforms have been limited in scope – they focus on a more streamlined, simplified procedure for pursuing judicial review, but are necessarily limited to relief by the grant of the prerogative writs, or declaratory or injunctive relief, within the Court's existing jurisdiction. The desirability of reform has been identified in the past, but not pursued by government. The issue was the subject of recommendations in a 2002 report of the Western Australian Law Reform Commission,³⁷ which were accepted by the then government of the day, but which were not ultimately reflected in legislation. Some possible areas for reform include simplification of the nature of, and basis for, relief on an application for judicial review, requiring the decision maker to provide all documents relevant to the decision under review,³⁸ requiring the decision maker to provide reasons for the decision under review,³⁹ and modifying the usual approach to costs so that applicants seeking judicial review do not face the prospect of a significant costs bill if they are not successful in the review (provided that the application had some prospect of success).

Other reforms may also warrant consideration. In a paper published in 2000 Stephen Gageler SC (as he was then) suggested that rather than continuing to focus on the scope of judicial review, a better approach might be to direct greater attention to the jurisdiction being exercised.⁴⁰ In other words, more precision in the legislative prescription of the parameters of the decision making power, such as the preconditions for the exercise of jurisdiction, the factors which must be taken into account in making a decision, and the procedures required to be followed in the exercise of jurisdiction, would be of assistance to decision makers in identifying the task they are required to perform, and to courts and tribunals required to undertake a review of such decisions.

Conclusion

The significant extent to which merits review has been used as an avenue for the review of administrative decisions shows no sign of abating. For that reason alone, merits review warrants closer consideration than it has previously received, from the perspective of both principle and policy. Like judicial review, merits review has an important role to play in ensuring the observance of the rule of law, consistent, rational and transparent decision making, and thus of good governance generally. Closer consideration of the Australian model of merits review will not only enable the strengths of that model to be identified and understood, but in turn may permit some conclusions to be drawn about any limitations of the avenues for judicial review which are available in Australian courts. In turn, that analysis will assist to identify ways in which the avenues for both merits review, and judicial review, might be enhanced, so as to improve their accessibility and their utility in the review of administrative decisions.

Endnotes

- 1 D Kerr, 'The Intersection of Merits and Judicial Review: Looking Forward' (2013) 32 *University of Queensland Law Journal* 9.
- 2 P Cane, 'Merits Review and Judicial Review - The AAT as Trojan Horse' (2000) 28 *Federal Law Review* 213.
- 3 *Supreme Court Act 1935* (WA) s 16.

- 4 These figures are drawn from those applications where the remedy claimed was a 'prerogative writ'. It is likely that these figures are not an entirely accurate reflection of the number of judicial review applications, for a variety of reasons. For example, the figures will not include those cases in which a declaration was the only relief sought in what was an application for judicial review.
- 5 *State Administrative Tribunal Act 2004* (WA) ss 8, 14.
- 6 *State Administrative Tribunal Act 2004* (WA) ss 13(1), 17(1).
- 7 State Administrative Tribunal, *Annual Report 2012 - 2013*, Appendix 1.
- 8 Section 8 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) confers jurisdiction on the Federal Court to hear and determine applications under that Act.
- 9 Federal Court of Australia, *Annual Report 2012 - 2013*, 29.
- 10 High Court of Australia, *Annual Report 2012 - 2013*, 15.
- 11 See High Court of Australia, *Annual Report 2012 - 2013*, 16 (Table E).
- 12 *Administrative Appeals Tribunal Act 1975* (Cth) s 25.
- 13 Administrative Appeals Tribunal, *Annual Report 2012-13*, 26, 30, 189.
- 14 See further Federal Court of Australia, *Annual Report 2012 - 2013*, 29 (Table 3.1), specifically the statistics relating to migration and taxation.
- 15 *State Administrative Tribunal Act 2004* (WA) s 27(1); see also *Shi v Migration Agents Registration Authority* (2008) 235 CLR 286.
- 16 *State Administrative Tribunal Act 2004* (WA) s 21, s 22; cf *Wingfoot Australia Partners Pty Ltd v Kocak* [2013] HCA 43; *Public Service Board of NSW v Osmond* (1986) 159 CLR 356.
- 17 *State Administrative Tribunal Act 2004* (WA) s 24(b), s 30.
- 18 *Kirk v Industrial Relations Commission (NSW)* (2010) 239 CLR 531; *Public Service Association of South Australia Inc v Industrial Relations Commission (SA)* (2012) 249 CLR 398.
- 19 *Attorney-General (NSW) v Quin* (1990) 170 CLR 1, 35 - 36 (Brennan J).
- 20 Even in the context of judicial review, there are signs that the orthodox approach – that courts undertaking judicial review do not engage in a consideration of the merits of the decision under review – may be eroded, especially in the context of findings as to jurisdictional facts: see, for example, *The Pilbara Infrastructure Pty Ltd v Economic Regulation Authority* [2014] WASC 346 [116] (Edelman J).
- 21 *State Administrative Tribunal Act 2004* (WA) s 27(1).
- 22 *State Administrative Tribunal Act 2004* (WA) s 27(2); see also *Drake v Minister for Immigration and Ethnic Affairs* (1979) 46 FLR 409; *Collector of Customs (NSW) v Brian Lawlor Automotive Pty Ltd* (1979) 41 FLR 338.
- 23 *Shi v Migration Agents Review Authority* (2008) 235 CLR 286, 327 [140] (Kiefel J).
- 24 P Cane, 'Merits Review and Judicial Review - The AAT as Trojan Horse' (2000) 28 *Federal Law Review* 213, 220.
- 25 *Uniting Church Homes (Inc) and City of Stirling* [2005] WASAT 191.
- 26 *Retirees WA (Inc) and City of Belmont* [2010] WASAT 56.
- 27 *Treby and Local Government Standards Panel* [2010] WASAT 81.
- 28 *Young and Lyon and Commissioner of Taxation* [2013] AATA 347.
- 29 *Walsh and Commissioner of Taxation* [2012] AATA 451.
- 30 *Clarke v Commissioner of Taxation* (2009) 240 CLR 272.
- 31 P Cane, 'Merits Review and Judicial Review - The AAT as Trojan Horse' (2000) 28 *Federal Law Review* 213, 228.
- 32 *Ibid*, 243.
- 33 *Ibid*, 242.
- 34 J Basten, 'Judicial Review of Executive Action: Tiers of Scrutiny or Tears of Frustration?' in N Williams SC (ed) *Key Issues in Judicial Review* (2014) 3.
- 35 D Kerr, 'The Intersection of Merits and Judicial Review: Looking Forward' (2013) 32 *University of Queensland Law Journal* 9.
- 36 J Basten, 'Judicial Review of Executive Action: Tiers of Scrutiny or Tears of Frustration?' in N Williams SC (ed) *Key Issues in Judicial Review* (2014) 3.
- 37 Law Reform Commission of Western Australia, *Report on Judicial Review of Administrative Decisions* (2002).
- 38 Cf *State Administrative Tribunal Act 2004* (WA) s 24(b).
- 39 Cf *State Administrative Tribunal Act 2004* (WA) ss 22, 24(a).
- 40 S Gageler SC, 'The Legitimate Scope of Judicial Review' (2001) 21 *Australian Bar Review* 279.

RECENT DEVELOPMENTS IN ADMINISTRATIVE LAW

Katherine Cook

Counter-Terrorism Legislation Amendment Bill (No. 1)

On 12 December 2014, the Commonwealth Parliament passed the Counter-Terrorism Legislation Amendment Bill (No. 1). The legislation addresses urgent operational needs identified by Australia's intelligence and law enforcement agencies.

The measures in the Bill will assist these agencies to disrupt domestic terrorist threats and support the international coalition to degrade ISIL in the Middle East. They are part of the Government's comprehensive legislative reform agenda to address the threat posed by Australians participating in, and supporting, foreign conflicts or undertaking training with extremist groups.

The Bill will enhance the control order regime in the *Criminal Code Act 1995* (Cth) to allow the Australian Federal Police (AFP) to seek control orders in relation to a broader range of individuals of security concern. This will allow the AFP to take timely action against those suspected of funding, enabling or supporting persons who are suspected of terrorist activity and of fighting with terrorist organisations in foreign conflicts.

The Bill also amends the *Intelligence Services Act 2001* (Cth) and will improve the ability of the Australian Secret Intelligence Service (ASIS) to provide timely support to the Australian Defence Force in military operations.

The Bill incorporates amendments proposed by the bipartisan Parliamentary Joint Committee on Intelligence and Security (PJCIS), which unanimously recommended passage of the Bill. The PJCIS acknowledged that the improvements provided in the Bill were urgently needed to ensure that Australia's intelligence and law enforcement agencies could undertake relevant activities to protect Australian security at home and in support of the Australian Defence Force operations in Iraq against ISIL.

<http://www.attorneygeneral.gov.au/Mediareleases/Pages/2014/FourthQuarter/2December2014-ParliamentPassesCounter-TerrorismLegislation.aspx>

Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill

On 30 October 2014, the Commonwealth Parliament passed the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill.

This Bill provides measures that will enhance the capability of law enforcement, intelligence and border protection agencies to keep Australians safe.

The conflicts in Syria and Iraq, and the terrorist organisations involved, have changed the threat environment, providing an opportunity for radicalised Australians to travel overseas, become further radicalised and develop the ability to undertake terrorist acts. Returning foreign fighters and supporters of foreign conflicts pose a significant threat to Australia.

This Bill is the second stage in the Government's reform of Australia's national security legislation.

<http://www.attorneygeneral.gov.au/Mediareleases/Pages/2014/FourthQuarter/30October2014-ParliamentPassesForeignFightersBill.aspx>

Freedom of Information Amendment (New Arrangements) Bill 2014

The Freedom of Information Amendment (New Arrangements) Bill 2014 proposes changes to an applicant's right to seek review of a freedom of information (FOI) decision. Currently, an FOI applicant can choose to seek review of an information access refusal decision in two ways:

- internal review: an application must be made within 30 days; and
- Information Commissioner review (IC review): an application must be made within 60 days.

Upon commencement of the New Arrangements Bill, the only option for review of an initial access refusal decision will be to make an application for internal review, which must be made within 30 days. When the Bill commences, an applicant seeking review of a decision made between 30 and 60 days beforehand, will lose the right to apply for IC review.

Section 54B gives agencies the discretion to accept an application for internal review even after the 30-day time limit. The Bill will not change that provision. The Office of the Australian Information Commissioner (OAIC) encourages agencies to exercise that discretion and accept applications for internal review from applicants who have been affected in this way: that is, from applicants seeking review outside the 30-day time limit, having lost the right to apply for IC review.

The Bill was proposed to come into effect on 1 January 2015 but was not considered by the Senate before the end of the 2014 sitting period. Accordingly, the OAIC continues to be operational.

<http://www.oaic.gov.au/news-and-events/statements/australian-governments-budget-decision-to-disband-oaic/review-rights-and-the-foi-new-arrangements-bill>

Department of Immigration and Border Protection unlawfully disclosed personal information of asylum seekers

The Department of Immigration and Border Protection (DIBP) has been found in breach of the *Privacy Act 1988* (Cth), by failing adequately to protect the personal information of approximately 9,250 asylum seekers. They have also been found to have unlawfully disclosed personal information.

The Office of the Australian Information Commissioner (OAIC) was notified by the *Guardian Australia* on 19 February that a 'database' containing the personal information of 'almost 10,000' asylum seekers was available in a report on DIBP's website. DIBP removed the report from its website within an hour of being notified. The report was available on DIBP's website for approximately eight and a half days.

The categories of personal information compromised in the data breach consisted of full names, gender, citizenship, date of birth, period of immigration detention, location, boat arrival details, and the reasons why the individual was deemed to be 'unlawful'.

'This incident was particularly concerning due to the vulnerability of the people involved,' said Australian Privacy Commissioner, Timothy Pilgrim.

The breach occurred when statistical data was mistakenly embedded in a Word document that was published on DIBP's website. The report was accessed a number of times, and was republished by an automated archiving service.

Mr Pilgrim said that OAIC's investigation found that DIBP was aware of the privacy risks of embedding personal information in publications, but that DIBP's systems and processes failed adequately to address those risks. This meant that DIBP staff did not detect the embedded information when the document was created or before it was published.

'This breach may have been avoided if DIBP had implemented processes to de-identify data in situations where the full data set was not needed,' he said.

This data breach also demonstrates the difficulties of effectively containing a breach where information has been published online, and highlights the importance of taking steps to prevent data breaches from occurring, rather than relying on steps to contain them after they have occurred.

'I have made a number of recommendations about how DIBP could improve their processes, including requesting that they engage an independent auditor to certify that they have implemented the planned remediation. I have asked DIBP to provide me with a copy of the certification and the report by 13 February 2015', Mr Pilgrim said.

The OAIC is still receiving privacy complaints from individuals affected by the breach. The OAIC has received over 1,600 privacy complaints to date, and these complaints are on-going.

<http://www.oaic.gov.au/news-and-events/media-releases/privacy-media-releases/dibp-unlawfully-disclosed-personal-information-of-asylum-seekers>

President reports on KA, KB, KC and KD v Commonwealth (Department of Prime Minister and Cabinet, Department of Social Services, Attorney-General's Department) [2014] AusHRC 80

Four Aboriginal men with intellectual and cognitive disabilities were held for years in a maximum security prison in the Northern Territory despite being found either unfit to stand trial or not guilty by reason of insanity.

If two of these men had been found guilty they would have received a sentence of 12 months. Instead, they were imprisoned for four and a half years and six years respectively.

The Australian Human Rights Commission conducted an inquiry into whether this involved any breach of human rights by Commonwealth.

The Commission found that there was a failure by the Commonwealth to work with the Northern Territory to provide accommodation and other support services, other than accommodation in a maximum security prison, for people with intellectual disabilities who are unfit to plead to criminal charges.

There was an obligation at international law on the Commonwealth to act. This obligation was consistent with domestic obligations undertaken by the Commonwealth in the Northern

Territory. The need for action was well known and had been well known for many years. Specific administrative measures to take this action were provided for by legislation.

The failure to act was inconsistent with or contrary to the complainants' rights under articles 9(1) and 10(1) of the *International Covenant on Civil and Political Rights* and articles 14(1), 19, 25, 26(1) and 28(1) of the *Convention on the Rights of Persons with Disabilities*. In particular, it was contrary to their right not to be arbitrarily detained, and their right as people with disabilities to live in the community with choices equal to others.

In the case of Mr KA and Mr KD, the failure to act was also inconsistent with article 7 of the ICCPR and article 15 of the CRPD which prohibit inhuman or degrading treatment. Mr KA was subject to regular restraint including being strapped to a chair and the use of shackles when outside his cell, seclusion and the use of tranquilizers. Mr KD was subject to regular seclusion and the use of tranquilizers. The prison environment in which they continue to be detained is inappropriate for people with their disabilities.

The Commission made the following recommendations:

1. The Commonwealth provide a copy of the Commission's findings to the Northern Territory and seek assurances from the Northern Territory that it will take immediate steps to identify alternative accommodation arrangements for each of the complainants so that Mr KA and Mr KD are no longer detained in a prison and Mr KB and Mr KC are progressively moved out of held detention. These arrangements should be the least restrictive arrangements appropriate to each individual and should include a plan to progressively move each of them into the community along with necessary support services.
2. The Commonwealth cooperate with the Northern Territory to establish an appropriate range of facilities in the Northern Territory so that people with cognitive impairment who are subject to a custodial supervision order can be accommodated in places other than prisons. This range of facilities should include secure care facilities and supported community supervision. The number of places available in these facilities should be sufficient to cater for the number of people who are anticipated to make use of them.
3. The Commonwealth cooperate with the Northern Territory to ensure that people with cognitive impairment who have not been convicted of an offence are detained as a measure of last resort, for the shortest appropriate period of time, and in the least restrictive appropriate environment.
4. The Commonwealth cooperate with the Northern Territory to ensure that when a person with a cognitive impairment is detained under a custodial supervision order, a plan is put in place to move that person into progressively less restrictive environments and eventually out of detention.
5. The Commonwealth cooperate with the Northern Territory to develop model service system standards for the detention of people with a cognitive impairment.
6. The Commonwealth cooperate with the Northern Territory to ensure that when a person with a cognitive impairment is detained he or she is provided with appropriate advice and support, including the appointment of a guardian or advocate.

The Commonwealth did not directly respond to these recommendations, on the basis that it considered that the Commission did not have jurisdiction to inquire into the complaints.

<https://www.humanrights.gov.au/news/media-releases/president-reports-ka-kb-kc-and-kd-v-commonwealth-department-prime-minister-and>

NTCAT up and running as president appointed

Richard Bruxner, a local lawyer with more than 35 years' experience in the profession, has been appointed inaugural President of the new Northern Territory Civil and Administrative Tribunal (NTCAT) for 12 months.

A person is eligible to be appointed President of NTCAT if they are a magistrate or eligible for appointment as a magistrate. NTCAT was introduced by the Government this year to cut red tape and create a one-stop-shop for civil and administrative appeals. The Tribunal is intended to create a user-friendly appeals process and replace the majority of the diverse appeals processes sitting with 35 commissioners, tribunals, committees and boards.

NTCAT is designed to produce efficiencies for Territorians by providing a single, central, easy to use system which operates independently of Government. It will base its decisions on 'fairness' rather than strictly legal interpretations and will be less intimidating than the court-based appeals.

The Northern Territory Government has passed legislation in Parliament which will see the appeals processes under several pieces of legislation moved to NTCAT and this will continue over the next 12 months.

NTCAT will operate out of its new headquarters at Casuarina.

<http://newsroom.nt.gov.au/mediaRelease/10082>

Recent Cases in Administrative Law

A well-founded fear of persecution and the test in S395

Minister for Immigration and Border Protection v SZSCA [2014] HCA 45 (12 November 2014)

The respondent, an Afghan citizen of Hazara ethnicity, arrived in Australia by boat on 21 February 2012. Before coming to Australia, the respondent had lived in Kabul with his family and worked as a self-employed truck driver transporting construction materials between Kabul and Jaghori. Around late January 2011, the respondent was stopped en route to Jaghori by the Taliban, who warned him not to carry construction materials. Thereafter, he took measures to avoid Taliban checkpoints, but continued to carry construction materials. In about November 2011, another truck driver showed the respondent a letter from the Taliban which called on 'local council people to perform their Islamic duty ... to get rid of' the respondent. The respondent left Afghanistan 10 days later.

The respondent's application for a protection visa was refused by a delegate of the Immigration Minister and that decision was affirmed by the Refugee Review Tribunal (the Tribunal). The Tribunal accepted that, if the respondent was again intercepted by the Taliban on the roads on which he usually travelled, he would face a real chance of serious harm and even death for a reason specified in the Refugees Convention. However, The Tribunal found that the risk of persecution would only arise on these roads, which could be avoided by the respondent. It therefore concluded that the respondent did not satisfy the criteria for the grant of a protection visa and affirmed the delegate's decision.

The respondent then sought judicial review of the Tribunal's decision in the Federal Circuit Court.

The Tribunal's decision was quashed by the Federal Circuit Court and an appeal from that Court was dismissed by a majority of Federal Court of Australia.

Both Courts held that the Tribunal had committed the error identified by the High Court in Appellant S395/2002 v Minister for Immigration and Multicultural Affairs [2003] HCA 71 (S395).

The Minister then appealed by grant of special leave to the High Court.

The High Court unanimously held that the Tribunal did not fall into the error identified in S395. In S395 the Tribunal had accepted that it was not possible for the protection visa applicants to live openly as homosexuals in Bangladesh, but found that they had conducted themselves discreetly and there was no reason to suppose that they would not continue to do so if they returned to that country. A majority of the High Court held that, by reasoning in this way, the Tribunal failed to consider the question it had to decide – whether the applicants had a well-founded fear of persecution. The question for the Tribunal was whether there was a real chance that, upon return to Bangladesh, the applicants would be persecuted for a Convention reason. This was not addressed.

A majority of the High Court held that rather than considering this question the Tribunal had focused on an assumption about how the risk of persecution might be avoided. Gummow and Hayne JJ said that the enquiry was what might happen if the applicants returned, not whether adverse consequences could be avoided. It followed that the issue to which the correct enquiry was directed – whether the fear of persecution was well founded – had not been addressed.

In SZSCA, by contrast, the Tribunal did not fall into that error. Rather, the critical aspect of the reasoning of the Tribunal in this case was its finding that the respondent would not face a real chance of persecution if he remained in Kabul and did not travel on the roads between Kabul and Jaghori. The Tribunal found that he would suffer a real chance of harm for a Convention reason if he carried construction material in another area, but that he was safe in Kabul. Therefore, in contrast to S395, the Tribunal did not divert itself from the question of whether the respondent would face a real chance of persecution if he returned to Afghanistan.

Instead a majority of the High Court found that the Tribunal erred by failing to address whether it would be reasonable to expect the respondent to remain in Kabul and not drive trucks outside it. By failing to do this, the Tribunal was unable to make a final determination as to whether the respondent had a well-founded fear of persecution. As this constituted an error of law, the majority dismissed the appeal.

Judicial discretion and venomous snakes

Hoser v Department of Sustainability and Environment [2014] VCSA 206 (5 September 2014)

The applicant was licensed under the *Wildlife Act 1975* (Vic), which allowed him to earn a living by performing demonstrations with venomous snakes. The applicant was charged with 13 breaches of the conditions of his licence in demonstrations he performed in 2008 and 2009. The charges related to the applicant demonstrating with more than one snake at a time and doing so within three metres of the audience, without adequate barriers or pits. On 16 February 2011, the applicant was found guilty of these charges in the Ringwood Magistrates' Court. He appealed to the County Court but ultimately pleaded guilty due to a lack of funds.

On 7 July 2011, the applicant conducted a demonstration at a shopping centre in which he allowed two snakes to bite his twelve-year-old daughter, for the purpose of demonstrating in his pending County Court appeal that his snakes were safe because he had removed their venom glands.

Following the County Court proceedings the respondent cancelled the applicant's licence. The applicant sought a review of this decision in the Victorian Civil and Administrative Appeals Tribunal (the Tribunal). The Tribunal affirmed the respondent's decision finding, among other things, that the applicant was 'an unreliable witness who displayed little regard for the truth and his demeanour and evidence, displayed a contempt and reckless disregard for the licence conditions, and he showed no real insight into the nature of his prior offending, in particular by claiming that he pleaded guilty in the County Court because of cost considerations'. The Tribunal also stated that the applicant was unable to substantiate his claimed expertise and did not provide any evidence of his alleged publications. The Victorian Court of Appeal gave the applicant leave to appeal.

Before the Court the applicant contended that the Tribunal erred in its fact finding.

The Court held that an appeal from the Tribunal is limited to questions of law. Therefore the applicant must show errors of law in the exercise of the Tribunal's discretion, by showing there was either no evidence to support the impugned conduct or that finding was not reasonably open. In attacking the exercise of discretion, it was necessary for the applicant to demonstrate error of law in accordance with the well-known principles of *House v the King* [1936] HCA 40:

If the judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some material consideration, then his determination should be reviewed and the appellate Court may exercise its own discretion in substitution for his if it has the materials for doing so. It may not appear how the primary judge has reached the result embodied in his order, but, if upon the facts it is unreasonably or plainly unjust, the appellate Court may infer that in some way there has been a failure properly to exercise the discretion, which the law reposes in the Court of first instance. In such a case, although the nature of the error may not be discoverable, the exercise of the discretion is reviewed on the ground that a substantial wrong has in fact occurred.

The Court found, among other things, that the Tribunal's credibility findings failed to take into account the relevant expertise of the applicant in determining that his snakes were safe.

The Court found that when the applicant was asked about his publications in cross-examination he offered to provide copies of his publications, which were in his car. The respondent's counsel did not take up the offer but the applicant produced the materials to the Tribunal later that day. That the Tribunal failed to have regard to this evidence may have established that the applicant's expertise and his expert opinion was relevant to whether the public was at risk.

The Court held that the Tribunal's findings that the applicant failed to establish his expertise and that he had reckless disregard could not be sustained. As any expertise the applicant had may have been relevant to the question as to whether, by his conduct, he put the public at risk, the error in the analysis as to that expertise was an error that infected the exercise of discretion. The Tribunal's analysis was not directed at the actual risk posed by the snakes. The Tribunal's discretionary decision to affirm the respondent's suspension and cancellation decision must be set aside.

Procedural fairness and preliminary administrative procedures and particulars

Coppa v Medical Board of Australia [2014] NTSC 48 (17 October 2014)

The plaintiff was a medical practitioner working at a clinic in a remote community in Central Australia. On 30 September and 7 October 2013, the Australian Health Practitioner Regulation Agency (AHPRA) received two notifications about the defendant's alleged impairment due to possible substance abuse.

In response to the first two notifications, the Senior Notifications Officer wrote to the plaintiff by letter dated 18 November 2013 providing him with a copy of the two notifications, and informing him that AHPRA would assess the notification to decide whether or not further action was required, including formal referral to the defendant under the *Health Practitioner Regulation National Law (NT)* (the National Law).

The plaintiff was invited to provide a written response and any other information he might consider relevant.

On 10 December 2013, solicitors acting for the plaintiff replied to AHPRA. The plaintiff's solicitors submitted, among other things, that the allegations were vexatious, did not warrant further investigation and that no further action should be taken.

The defendant did not accept the plaintiff's submission and on 13 January 2014, instead decided to investigate the plaintiff's health, pursuant to s 160(1) of the National Law. The defendant required the plaintiff to undergo a health assessment pursuant to s 169 of the National Law.

On 6 February 2014, AHPRA received a further notification in relation to the plaintiff. This was communicated to the plaintiff.

The plaintiff's solicitors commenced proceedings by originating motion in the Northern Territory Supreme Court, seeking an order restraining the defendant from requiring the plaintiff to undergo a health assessment.

The plaintiff contended, among other things, that the principles of natural justice apply prior to the making of decisions pursuant to s 169 of the National Law. He further contended that the defendant had failed to provide him with procedural fairness by (1) not providing sufficient particulars to enable him to provide a detailed and meaningful response to the allegations, and (2) by requiring him to attend a health assessment based on uncorroborated allegations before giving the plaintiff an opportunity to respond to the further allegations made against him.

The Court rejected the plaintiff's arguments in relation to natural justice and procedural fairness.

The Court found that the rules of natural justice did not apply to the preliminary administrative process that occurred before the respondent reached a 'reasonable belief' necessary to require the plaintiff to undergo a health assessment pursuant to s 169 of the National Law. The defendant's decision to require the plaintiff to undergo a health assessment, did not involve making findings of fact or determining the merits of the notifications. The defendant's decision did not determine any question affecting the plaintiff's rights. The situation was not one where the exercise of the defendant's power had the capacity to interfere with rights, interests or legitimate expectations. There is nothing in the National Law, which expressly or impliedly required the defendant to do more than it did.

In this context, the full process required under Division 9 is a relevant consideration. Importantly, before the defendant could have made any decision under the National Law affecting the plaintiff, it would have had to (1) provide a copy of the report of the health assessor to the plaintiff, (2) nominate a person to discuss the report with the plaintiff, and (3) consider the assessor's report and the discussions held between the plaintiff and the nominated person. Division 9 thus contains its own express procedural fairness requirements.

The Court also rejected the plaintiff's submission that the defendant failed to provide sufficient particulars to enable him to provide a 'detailed and meaningful response' to the notifications. The defendant provided all the information then available to it (except for the identity of the two notifiers), and could not have given any further 'particulars' at that time.

The Court held that the word 'particulars' suggests particulars in civil and criminal litigation, the dual purpose of which is to identify matters in issue, and confine the scope of the evidence relevant to those issues, for the purpose of a hearing or trial. There was no justification for the request for 'particulars' by the plaintiff's solicitors in the preliminary administrative process underway at the time of the request.

DECISION-MAKING IN THE NATIONAL INTEREST?

Joanne Kinslor and James English***

The character provisions of the Migration Act 1958 contain extraordinary powers for the Minister for Immigration and Border Protection, acting personally, to refuse or cancel visas without affording non-citizens natural justice or merits review and to overturn lawful decisions of merits review tribunals. The powers are restricted to cases where 'the national interest' arises.

*This article considers whether the 'national interest' requirement has been operating as a check on these extraordinary powers. We particularly draw on the judgments of Gaudron and Kirby JJ in *Re Patterson*; *Ex parte Taylor*¹ to argue that the 'national interest' must be given independent operation as a precondition to the exercise of the relevant powers. In *Re Patterson*, Gaudron J identified that the national interest required separate and distinct consideration beyond the person failing the character test and Kirby J interpreted the 'national interest' as involving an emergency or threat to the nation as a whole.*

A line of cases have applied Gaudron J's requirement without applying Kirby J's interpretation of the 'national interest' itself. We argue that these decisions have approached the 'national interest' as if it were an open discretion and left little work for the 'national interest' as a precondition to the discretion otherwise conferred by the relevant provisions. Our concern is that insufficient attention has been given to the specific legislative context of the national interest requirement. Being a precondition to the exercise of a statutory power that significantly interferes with the rights and freedoms of an individual, it should be closely scrutinised by the Courts.

The *Migration Act 1958* (the *Act*) is strewn with references to 'the national interest' to support a partialist² immigration system, favouring Australian citizens over non-citizens. The stated purpose of the *Act* is 'to regulate, *in the national interest*, the coming into, and presence in, Australia of non-citizens'³ and a number of powers within the *Act* allow the Minister for Immigration and Border Protection (the Minister) to act 'in the national interest' in areas of contentious public policy.⁴ In this article, we will focus upon visa cancellations on character grounds where the national interest arises.

The character provisions in ss 501-501A of the *Act* contain extraordinary powers for the Minister for Immigration and Border Protection (the Minister) to act personally to refuse or cancel visas without affording non-citizens natural justice or merits review and to overturn lawful decisions made by the Administrative Appeals Tribunal. The powers are restricted to cases where the national interest arises. The article begins by discussing the nature and operation of the relevant provisions and then examines the particular challenges that a legislative requirement to act in the national interest creates for judicial review.

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The character provisions

Sections 501-501B of the *Act* provides three powers that the Minister may exercise personally where it is in the national interest to do so. The powers are:

- to refuse or cancel the visa of a person who the Minister reasonably suspects does not pass the character test: s 501(3);
- to set aside a decision of a delegate of the Minister or of the Administrative Appeals Tribunal (AAT) that is favourable towards a visa applicant/ visa holder and substitute the decision with a decision to refuse or cancel the visa of a person who the Minister reasonably suspects does not pass the character test: s 501A; and
- to set aside a decision of a delegate of the Minister to refuse or cancel a visa which would ordinarily be reviewable before the AAT and substitute it with a personal decision to refuse or cancel the visa of a person who the Minister reasonably suspects does not pass the character test, with the new decision not being reviewable before the AAT: s 501B.⁵

Each of these powers may only be exercised by the Minister personally and cannot be delegated.⁶

For a decision under s 501(3) natural justice does not apply.⁷ For a decision under s 501A the Minister may elect whether or not natural justice applies.⁸ Natural justice has not been excluded for a decision under s 501B. Merits review is not available for any of these decisions.⁹

Significantly, these are not the only powers by which visas for non-citizens may be refused or cancelled on character grounds. A non-citizen may be refused a visa or have her or his visa cancelled solely because she or he fails the immigration character test and without any consideration of 'the national interest'.¹⁰ It is only decisions made without affording the non-citizen natural justice or to overturn a decision made by the Administrative Appeals Tribunal in the non-citizen's favour where the Minister must be satisfied that the decision would be in the national interest.

The terms of these three distinct powers identified above are distinct because the decisions to be made are distinct, but they share common requirements and structure. It is instructive to commence by looking at the terms of s 501(3):

501(3) The Minister may:

- (a) refuse to grant a visa to a person; or
- (b) cancel a visa that has been granted to a person;
if:
- (c) the Minister reasonably suspects that the person does not pass the character test; and
- (d) the Minister is satisfied that the refusal or cancellation is in the national interest.

The Minister's discretion to refuse or cancel a non-citizen's visa under s 501(3) arises where three conditions are met:

- the person subject to the decision is an alien under the Commonwealth Constitution- (which equates to a person who is not an Australian citizen);¹¹

- the Minister reasonably suspects that the person does not pass the character test; and
- the Minister is satisfied that the decision is in the national interest.

The character test

The character test is defined in subsection 501(6) of the *Act*. It is an important part of the legislative context in which the Minister makes character decisions 'in the national interest'.

Section 501(6) includes a large range of situations in which a non-citizen may not pass the character test, such as if the non-citizen has an 'association' with a person or a group suspected by the Minister of being involved in criminal conduct,¹² or there is a significant risk the non-citizen will engage in criminal conduct in Australia.¹³

In the majority of cases considered in this article, the person failed the character test because she or he had a substantial criminal record,¹⁴ defined in s 501(7) as including a sentence of imprisonment for 12 months or more¹⁵ or two or more sentences where the total imprisonment is two years or more.¹⁶ Section 501(7) covers terms of imprisonment imposed in any country, including for matters not considered crimes in Australia and not reflecting adversely upon a person's morals.¹⁷ An assessment that a non-citizen does not pass the character test is not necessarily an assessment of a person's character; it is a singular character test that covers a range of conduct.

The national interest

In the Second Reading Speech for the Migration Legislation Amendment (Strengthening of Provisions Relating to Character and Conduct) Bill 1998, the then Minister for Immigration and Multicultural Affairs, Phillip Ruddock, said that the accountability of the Minister to Parliament and the Australian community meant that he should have power to act in the national interest in exceptional cases.¹⁸ He went on to say that 'the government of the day...ought to be able to take responsibility,' as proposed in s 501A, to overturn decisions of the Administrative Appeals Tribunal (AAT) against the national interest.¹⁹

The High Court has not conclusively ruled on the interpretation of the national interest in the context of the character test. However, in *Re Patterson; Ex parte Taylor*²⁰ both Gaudron and Kirby JJ discussed the term in a case of a s 501(3) cancellation that was quashed on other grounds.

Gaudron J's statements in relation to the term national interest were not focused upon interpreting the term per se, but upon criticising the Department for failing to advise the Minister²¹ that consideration of whether a non-citizen passes the character test must be a separate consideration to whether the national interest arises in a particular case. She stated that the 'national interest considerations are separate and distinct from the question of whether or not a person passes the character test.'²² Her Honour did, however, suggest that the conduct which caused the person to fail the character test could also satisfy the national interest criterion, such as where the conduct was 'more likely than not to cause discord in the Australian community,'²³ circumvented immigration laws or involved particularly serious crimes.²⁴

Kirby J noted that there are a wide range of considerations potentially relevant to the national interest and that it could not be given a confined meaning.²⁵ However, he found that it was 'impossible to regard' the facts of the case (a long term resident of Australia convicted of child sex offences on parole) 'as sufficient to sustain a reasonable or rational conclusion'

that it was in the national interest to cancel Mr Taylor's visa since there was no emergency and no significant threat to the 'nation as a whole' or the 'community of the nation'.²⁶

Kirby J described the term as follows:

The expression the national interest is different from 'the public interest'. In the Migration Act, it takes colour from the emergency circumstances in which it applies and the peremptory procedures which then, exceptionally, govern the case...something more [than a substantial criminal record] was obviously intended by requiring, additionally [to the character test not being met] that the danger to national interest justified the ministerial decision...

While it might be said that the general problem of paedophilia and criminal offences against children is one involving 'the national interest', the decision to be made by the minister under s 501(3) of the Migration Act is not made at such a level of abstraction. It is one personal to the visa holder...On that level, the materials contained in the minute, upon which the respondent based her decision, did not afford any reasonable or rational foundation for a conclusion that cancellation of the prosecutor's visa was 'in the national interest'. The jurisdictional fact necessary to attract the second condition of which a Minister was to be satisfied before making a decision under s 501(3) was, therefore, not present.²⁷

Gaudron and Kirby JJ's respective discussions of the national interest in this case took different approaches. Gaudron J focused upon the steps involved in the process, while Kirby J focused upon the absence of what he described as the jurisdictional fact of the national interest necessary to enliven the power. They both found the decision to be invalid and their judgments are not in conflict. Since Gaudron J did not seek to define the national interest it cannot be concluded that she agreed or disagreed with Kirby J's approach.²⁸

However, Kirby J's approach has not been adopted by the Federal Court in subsequent cases. In *Madafferi*²⁹ the Full Federal Court (in a joint judgment) stated that 'His Honour set a high threshold for the enlivening of the national interest criterion... and [w]ith respect to that view, the bar of national interest does not seem to be set that high by the words of the Act which must be the primary guide to legislative intention.'³⁰

In our respectful view, a high threshold approach for the interpretation of provisions that impact upon individual rights and freedoms is consistent with the principle of legality. This principle of statutory interpretation³¹ was employed by the Full Federal Court when it interpreted part of the character test in a different national interest character case: *Haneef*.³² The case concerned cancellation of a temporary work visa, which the Court described as having granted the applicant 'valuable rights', including the right 'to live here, to be at liberty here, to be with his wife here, and to work here.'³³ Cases such as those discussed by the Court concerning a permanent resident's 'right to community' raise even stronger rights. In *Haneef*, the Court applied the principle of legality to support an interpretation of the association ground of the character test (s 501(6)(b)) that limited its impact upon individuals with visas. In our respectful view, the line of authority referred to by the Court³⁴ to demonstrate the applicability of the principle of legality to interpreting s 501(6)(b) is equally apt for deciding between interpretations of the national interest as it applies to character decisions under s 501(3), 501A and 501B of the Act.

The Court in *Madafferi* held that the question of the national interest was 'an evaluative one entrusted by the legislature to the minister to determine according to his satisfaction'³⁵ and found that the Minister had not erred in law or acted unreasonably in being satisfied that the national interest was enlivened in the case in which Mr Madafferi had been convicted of offences involving violence, attempted extortion and drug possession. In *Maurangi v Bowen*³⁶ the plaintiff challenged the Minister's construction of the national interest by arguing that the Minister did not have regard to any matters other than the plaintiff's failure to pass the character test in determining that it was in the national interest to cancel the plaintiff's visa and overturn the AAT's decision. Lander J rejected that submission and stated:

It does not follow that simply because the Minister relied upon the fact that a visa holder cannot pass the character test because of the visa holder's criminal record and *decided that the visa holder's criminal record was the ground for finding that the cancellation was in the national interest* meant that the Minister proceeded in jurisdictional error.³⁷

Lander J went on to emphasise the very broad scope of the criterion, saying, 'In my view it is for the Minister to determine when a person's criminal history is such that it is in the national interest to cancel that person's visa, providing of course that the Minister exercises the discretion reasonably.'³⁸ Although a person's failure to pass the character test and national interest are separate criteria, they may be satisfied by the same facts.³⁹

In the case of *Plaintiff S156* the High Court recently considered the national interest in relation to s 198AB of the *Act*, which gives the Minister power to designate that a country is a regional processing country if the Minister thinks that it is in the national interest to do so.⁴⁰ Section 198AB(3) requires the Minister to have regard to whether the country has given assurances that it will not *refouler* a person taken to that country and will make or permit an assessment of whether the person is a refugee. The Minister may also have regard to any other matter which, in the Minister's opinion, is in the national interest. In *Plaintiff S156*, the Court stated that 'what is in the national interest is largely a political question',⁴¹ and rejected arguments based on failure to consider relevant factors and unreasonableness. The statutory context of 'the national interest' in s198AB is significantly different from the character provisions, especially considering the nature of the decision being made. Kirby J's approach in *Re Patterson* is important in recognising that the factors considered in exercising judgment about visa cancellation on character grounds must be applicable to the individual.

Discretion

Section 501(3) confers a broad discretion⁴² upon the Minister to refuse or cancel the visas of non-citizens who do not pass the character test where the Minister is satisfied that the refusal/cancellation is in the national interest. Section '501 prescribes the failure to satisfy the character test as a condition precedent to the exercise of the discretion to cancel a visa and does not create a presumption as to how the discretion should be exercised.'⁴³ The same can be said of the national interest condition precedent in s 501(3). Once both are satisfied the Minister is then free to exercise that discretionary power as he or she sees fit in the circumstances. That is the way in which each of the national interest powers discussed here is structured. It is also the way in which the powers enabling visa refusal or cancellation on character grounds without a national interest requirement operate.

In exercising the discretion the Minister is given a power both to determine what is relevant and to determine the preferable decision in the circumstances.

In *Klein v Domus*, Dixon CJ commented on Parliament's intentions in conferring a discretion as follows:

...the real object of the legislature in such cases is to leave scope for the judicial or other officer who is investigating the facts and considering the general purpose of the enactment *to give effect to his view of the justice of the case*.⁴⁴

Dixon CJ's statement highlights the personal nature of the decision and the perception of justice. The discretion is critical to the operation of the character test and was used in Parliament to justify the broad terms of the character test.⁴⁵ Without the discretion, decision-makers would be required on the terms of the character test to refuse and cancel the visas of people whom the Australian community would not consider to be of bad character. The discretion enables a critical judgment to be made after weighing up competing

considerations. As was found in *Minister for Immigration and Citizenship v Li*, this must be done in a way which is rational according to 'the rules of reason', and is limited by the subject matter, scope and purpose of the legislation.⁴⁶ French CJ in that case balanced the traditional understanding of a discretion (such as in *Klein v Domus*) with Dixon J's statement in *Shrimpton v Commonwealth* that 'complete freedom from legal control, is a quality which cannot...be given under our *Constitution* to a discretion' that would otherwise 'go outside the power from which the law or regulation conferring the discretion derives its force.'⁴⁷

Grounds of review

Judicial review of decisions made under ss 501 and 501A is limited by the terms of the statute. Administrative law 'confers no jurisdiction to review an exercise of power by a repository when the power has been exercised or is to be exercised in conformity with the statute which creates and confers the power.'⁴⁸ Section 75(v) of the *Constitution* does not protect grounds of review; it only protects the Court's jurisdiction⁴⁹ to act where acts are done outside the limits of statutory power. There are some limitations, referred to as 'the *Hickman* conditions', which apply to every power and cannot be excluded by statute. These require 'that a decision is a bona fide attempt to exercise power, that it relates to the subject matter of the legislation, and that it is reasonably capable of reference to the power.'⁵⁰ Furthermore, an exercise of discretionary power must be exercised reasonably 'according to rules of reason and justice'⁵¹ A decision that does not adhere to these basic requirements is taken not to be a decision at all.⁵² In some cases a ground of review may be completely excluded by the terms of a statute, such as the exclusion of natural justice in s 501(3). Other grounds of review may be available but may have a very limited operation because of the scope of the legislative power, as in review on the grounds of failure to take into account a relevant consideration, discussed below.⁵³

In this section we consider the scope of judicial review of character decisions made personally by the Minister by reference to the national interest. We contend that the national interest raises particular difficulties for judicial review that have not yet been resolved.

Jurisdictional fact

A decision will be invalid on account of jurisdictional error where a jurisdictional fact necessary for the exercise of the power does not exist. This term refers to a factual criterion, satisfaction of which is necessary to enliven the power of a decision-maker to exercise a discretion.⁵⁴ Provided the s 501 power is only used towards aliens,⁵⁵ it is the decision-maker's state of mind, not a set of objective facts, that create the pre-conditions for the exercise of power.⁵⁶

For s 501(3) and s 501A the critical pre-conditions are that (i) the Minister reasonably suspects the person does not pass the character test and (ii) the Minister is satisfied that the refusal or cancellation is in the national interest.⁵⁷

Reasonable suspicion person does not pass the character test

In considering the scope of the 'national interest' criterion some consideration should be given to the first pre-condition of a failure to pass the character test, since this defines the scope of cases in which the Minister may consider whether the national interest arises.

A jurisdictional fact based on a 'reasonable suspicion' is not unreviewable,⁵⁸ but it sets a low bar. Courts will not substitute their own judgment for that of the decision-maker, who alone is responsible for forming the relevant state of mind.⁵⁹

A suspicion has long been accepted to mean 'something more than a mere idle wondering.'⁶⁰ In *Goldie v Commonwealth*, the Full Federal Court found that holding a 'reasonable suspicion' imposed an obligation 'to make due inquiry to obtain material likely to be relevant for the formation of that suspicion.'⁶¹ Given the way in which s 501(6) is worded a person passes the character test unless the Minister finds as a matter of fact that one of the matters in 501(6) applies.⁶²

A decision that a person does not pass the character test because they have a substantial criminal record⁶³ 'can only be determined by means of an objective finding by the Minister.'⁶⁴ Other matters, such as whether a person does not pass the character test because of an association,⁶⁵ their past and present criminal and/or general conduct⁶⁶ or the significant risk they pose to the Australian community,⁶⁷ are matters requiring a judgment to be made by the Minister. However, the Minister's decision will be invalid if this judgment is made applying the wrong legal test⁶⁸ or where the Minister was not actually satisfied in the manner required by the Act⁶⁹ – such as where there was no or inadequate material for the Minister to be satisfied of the matters set out in s 501(6). A reasonable suspicion can be sustained in circumstances where the decision-maker is mistaken as to the true situation.⁷⁰ A reasonable suspicion involves a subjective/objective test where a decision-maker's subjective belief is judged according to whether it was reasonably formed in the circumstances at the time of decision.

Satisfaction that refusal or cancellation in the national interest

The criteria for judicial review with respect to a subjective jurisdictional fact were discussed by Lord Wilberforce in *Secretary of State of Education and Science v Tameside Metropolitan Borough Council* and cited with approval by Gummow ACJ and Kiefel J in *SZMDS*:

Sections in this form may, no doubt, exclude judicial review on what is or has become a matter of pure judgment. But I do not think that they go further than that. If a judgment requires, before it can be made, the existence of some facts, then...the court must inquire whether those facts exist, and have been taken into account, whether the judgment has been made upon a proper self-direction as to those facts, [and] whether the judgment has not been made upon other facts which ought not to have been taken into account.⁷¹

Judicial review includes consideration by a Court as to whether a decision-maker has applied the correct legal test in forming a stating of satisfaction and whether, applying the correct legal test, there is material capable of supporting the conclusion reached as a reasonably formed conclusion. If there are no facts before the Minister capable of enabling the Minister to reasonably and rationally form the view that the national interest arises, the Minister will not have formed a state of satisfaction in the legally required sense and his or her decision will be invalid at law. However, determining whether the facts existed to enable the formation of a valid state of satisfaction requires consideration of the relevant legal test. Whether there are sufficient relevant facts for the Minister to be satisfied that the national interest arises requires consideration of what is meant by the national interest.

The Federal Court has found that the fact of the determination being specific to a particular case (the relevant national interest being about whether a particular individual's visa should be refused or cancelled) does not necessitate that the Minister's consideration of the national interest must be specific to the individual. It may be answered at a broad level.⁷² As stated in *Gbojueh*,

The exercise calls for a broad evaluative judgment. It calls for the minister's satisfaction in relation to a power that may only be exercised personally by the minister...Political responsibility and accountability is reposed in the minister in relation to a subject matter of wide scope. All of that, strongly suggests that the minister is left largely unrestrained to determine for him or herself what factors are to be

regarded as relevant when determining whether the cancellation or refusal of a visa is in the national interest.⁷³

The Federal Court has also found that where the Minister has considered the nature and circumstances of a non-citizen's crime and potential for future harm from the non-citizen re-offending the Minister has not impermissibly limited the concept of the national interest to a local or personal level.⁷⁴

Difficulties arise on judicial review when a statutory power interfering with individual rights and liberties is conditional upon 'a subject matter of wide scope' where relevant considerations are determined by a decision-maker 'left largely unrestrained'. It is well established that a non-judicial officer of the Commonwealth cannot determine conclusively the limits of her or his own jurisdiction.⁷⁵ This is the role of the Courts and this role extends to cases in which a statutory power rests upon the formation of a state of mind. Latham CJ emphasised the importance of this role in *The King v Connell and Another*, stating:

It is therefore well settled that if a statute provides that a power may be exercised if a person is of a particular opinion, such a provision does not mean that the person may act upon such an opinion if it is shown that he has misunderstood the nature of the opinion which he has to form. Unless such a rule were applied legislation of this character would mean that the person concerned had an absolutely uncontrolled and unlimited discretion with respect to the extent of his jurisdiction and could make orders which had no relation to the matters with which he was authorized to deal.⁷⁶

The Federal Court has consistently required that the Minister must determine the matter of national interest as a precondition to the exercise of discretion.⁷⁷ However, this precondition has been approached as if it were an open discretion for the Minister to decide. In *Maurangi*, Lander J described the determination of this precondition as a 'discretion' which must be exercised reasonably.⁷⁸ In *Huynh*, the Full Court stated that 'the Minister may consider that the national interest requires that the commission of a particular type of offence will inevitably result in the cancellation of a visa...[and that requiring the Minister to consider the visa holder's level of involvement in offences] would cut across that *broad discretion*.'⁷⁹

In several Ministerial decisions considered by the Federal Court it is difficult to see how the national interest requirement adds to the requirements that must be met for the exercise of discretionary power. In a number of cases the approach has been upheld where the Minister took the view that cancellation of a visa is in the national interest because there was a risk that the visa holder may recommit the crime that led to his or her failure to pass the character test (even if the risk was low).⁸⁰

This line of cases uses the reasoning of Gaudron J in *Re Patterson* outlined above as a starting point. It focuses upon the nature of the crime committed as founding the satisfaction of national interest, which was an approach approved by Gaudron J. However, as explained above, Gaudron J did not define what it was about the nature of the crime committed that would satisfy the national interest requirement. In grappling with this task the Federal Court has not adopted Kirby J's approach that for the national interest to be satisfied (by the nature of the crime) there must be a significant threat to the 'nation as whole' or the 'community of the nation'. The Federal Court has focused upon the 'something' referred to by Gaudron J, which may be as confined in scope as the nature and circumstances of the offences committed being serious. This approach is illustrated in the judgment of *Euta Leiataua v Minister for Immigration and Citizenship*,⁸¹ in which the applicant argued that in deciding where the national interest lay it was not enough for the Minister to identify that the non-citizen had committed heinous offences. It was argued that this did not identify a consideration at a significantly abstract level to engage the national interest, as it simply attached the label 'heinous' to the applicant's offences and was an approach giving rise to a

situation where almost every offence bearing that description would engage the national interest.⁸² The Court rejected the applicant's argument and held as follows:

...I could not accept...that the respondent decided the matter of national interest simply by attaching the label 'heinous' to the applicant's offences. ...he described the offences as heinous because it was his view that 'they involved [the applicant] taking advantage of a number of girls under the age of 16 for his own sexual gratification'... In doing so, the respondent went beyond what was required for the applicant not to pass the character test. He was basing himself on 'something in the nature, or the seriousness of [the applicant's] conduct, of in the circumstances surrounding it'.

In this context it is worth noting how little a conclusion that a particular person did not pass the character test by reason of having a substantial criminal record, as defined, would tell one about the facts and circumstances surrounding the case at hand. *Almost inevitably as it seems to me, once a decision-maker identifies those facts and circumstances – and most certainly in cases of sexual offences committed against minors – there will be the 'something' referred to by Gaudron J.* The nature of the facts and circumstances may inform the exercise of the decision-maker's discretion under s 501(2), of the Minister's assessment of the national interest under s 501A(2), or his or her discretion under that subsection. But, however the matters arises, once the actual facts of the case are taken into account, it would, in my view, be infrequently the case that the decision-maker had merely carried over his or her conclusion with respect to the character test into later stages of the decision.⁸³

With respect to His Honour, this approach risks giving no independent operation to the national interest requirement in the context of character decisions – which was a requirement inserted by Parliament in addition to the discretionary power to refuse or cancel visas of non-citizens who do not pass the character test. Under s 501(1) and s 501(2) the Minister has the power to refuse or cancel a non-citizen's visa on character grounds without being satisfied that the refusal or cancellation is in the national interest. The national interest is an additional requirement that was inserted for exceptional cases in which decisions could be made personally by the Minister without natural justice or merits review and to overturn decisions of merits review tribunals.

With respect, we agree with His Honour's observation that failing the character test on account of having a substantial criminal record discloses little about the facts and circumstances of a case given the scope of the character test described above. This is why it is critical that character decisions (made by reference to the national interest or not) are discretionary decisions. This is reflected in the structure of the provisions and was a significant aspect of Parliamentary discussions about these provisions, as highlighted above.

However, the character provisions are structured so that there is an additional step for decisions made 'in the national interest'. Identification of the facts and circumstances giving rise to a non-citizen's 'substantial criminal record' as being sufficient for the national interest to be satisfied without identifying how the national interest is satisfied fails to give independent operation to this additional requirement.

Natural justice

Where it is not excluded by statute, natural justice is a critical aspect of the process by which national interest character decisions must be made and the broad scope of the national interest means that careful attention needs to be given to whether a person is given notice of matters the Minister will consider. However, the Minister is only required to provide natural justice for national interest decisions where he or she elects to do so. As explained below, the Minister is never required to follow a process providing natural justice for national interest character decisions.

The classic statement of the principle of natural justice was made by Mason J in *Kioa v West*:

...when an order is to be made which will deprive a person of some right or interest or the legitimate expectation of a benefit, he is entitled to know the case sought to be made against him and to be given an opportunity of replying to it.⁸⁴

Natural justice is chiefly engaged by adverse material before the decision-maker. A person has a common law right to respond to adverse material that is credible, relevant and significant to the decision.⁸⁵ Procedural fairness in the context of character decisions also entitles a non-citizen to hold a legitimate expectation that the Minister will treat the best interests of children as a primary consideration in the making of the decision.⁸⁶ Once a breach of procedural fairness is established an applicant will ordinarily be entitled to relief unless the Court is persuaded that the breach could not have made a difference to the outcome.⁸⁷

Natural justice can lawfully be excluded by statute in express words.⁸⁸ This is the course Parliament took with regard to the Minister's personal power under s 501(3)⁸⁹ and repeated for s 501A(3).⁹⁰ The exclusion of natural justice is a valid legislative choice in these two sections, and the parallel powers of sub-ss 501A(2) and 501A(3) have created an administrative choice for the Minister to grant or not to grant natural justice in overturning a valid decision of the Administrative Appeals Tribunal (AAT).

Natural justice applies to decisions under s 501A(2), and has been applied with a high level of vigilance given the effect of such decisions on individuals. For s 501A(2) decisions concerned with whether an AAT decision should be set aside, the Federal Court has held that the Minister must put an applicant on notice if he intends to take into account evidence rejected by the AAT.⁹¹ Furthermore, a failure to adequately draw a non-citizen's attention to the 'potential importance' of whether cancellation of his visa was in the national interest was held to constitute a denial of procedural fairness in a s 501A(2) decision because it affected his opportunity to understand the legal and factual issues he needed to address before a decision was made.⁹²

The wide scope of the national interest increases the importance of the Minister specifying issues that he or she as Minister views as relevant to his or her considerations so that a visa holder/visa applicant may address those matters in submissions to the Minister. In *Durani*⁹³, Dr Durani had his visa cancelled after committing sexual offences against patients. The Minister cited the repugnance of those offences to the Australian community and the need to preserve public confidence in the health system and the skilled migration program as relevant to his consideration of the national interest. The Court allowed the appeal on the basis that it was not obvious that the Minister would take the view that because Dr Durani came to Australia as a skilled migrant his commission of crimes in the course of his work as a doctor would bring Australia's skilled migration program into disrepute and undermine public confidence in the skilled migration program and that this matter was relevant to the national interest.

Section 501C provides a limited opportunity for a person subject to visa cancellation under s 501(3) or s 501A(3) 'to make representations to the Minister...about revocation of the original decision.'⁹⁴ The Minister is only given power to revoke the decision if 'the person satisfies the Minister that the person passes the character test.'⁹⁵ This cannot be said to equate to natural justice – even belatedly – because the person does not have an opportunity to respond to matters that the Minister considered in exercising his/her discretion. It only allows the person to challenge the Minister's reasonable suspicion that the person did not pass the character test, negating the existence of the jurisdictional fact. In *Re Patterson* a majority of the High Court found a s 501(3) decision had been invalidly made where the decision-maker had cancelled a visa on the erroneous understanding that the visa holder would be given an opportunity to make representations seeking revocation of the decision. Since the visa holder had a 'substantial criminal record' there was, in effect, no

opportunity for him to seek revocation and an invitation to make representations in relation to revocation was a futile exercise.⁹⁶

Failure to consider a relevant factor

The leading case for a failure to consider a relevant factor is *Peko-Wallsend*.⁹⁷ Failure to consider relevant factors, like other grounds of judicial review, depends on the nature of the power, and this form of review only extends to matters which the decision-maker was bound to take into account.⁹⁸ For a decision under s 501(3) or s 501A the Minister is bound to consider the jurisdictional facts discussed above (whether a person passes the character test and whether it is in the national interest for a non-citizen's visa to be refused or cancelled) and material critical to determining whether these facts are in existence, but given that the Minister can form a view that the national interest is enlivened because of the nature of a non-citizen's criminal record, the material that the Minister is bound to take into account for a s 501(3) decision may be no more than material establishing their immigration status⁹⁹ and their criminal record.¹⁰⁰ If Australia owes non-refoulement obligations to the non-citizen, legal consequences of indefinite detention must be taken into account but this does not arise from the national interest requirement.¹⁰¹

The absence of any criteria for the exercise of discretion under s 501 means that, prima facie, there are no factors which the Minister is required to take into account. As Deane J elucidated in *Sean Investments v MacKellar*:

...where relevant considerations are not specified, it is largely for the decision-maker, in the light of matters placed before him by the parties, to determine which matters he regards as relevant and the comparative importance to be accorded to matters which he so regards.¹⁰²

The approach to relevant considerations for the exercise of national interest character powers is the approach generally taken to unfettered discretionary powers, both at the stage of considering the national interest requirement and at the stage of the exercise of discretion. In *Gbojueh*, Bromberg J, stated that 'the authorities which have considered s 501A(2) (and in a similar context the reference to the national interest in s 501(3)), make it clear that the matters that the minister may take into account in determining the national interest are largely matters for the minister.'¹⁰³ His Honour added that 'the Minister is left largely unrestrained to determine for himself or herself what factors are to be regarded as relevant when determining whether the cancellation or refusal of a visa is in the national interest.'¹⁰⁴ Under s 501(3), the absence of natural justice means that a person may not be able to place relevant matters before the Minister and the Minister determines the relevant matters without input from the person subject to the decision.

In *Gbojueh*, Bromberg J identified a relevant mandatory consideration that the minister is bound to take into account both when determining the national interest in character cases and in the subsequent exercise of discretion. This consideration is 'the potential for harm to the Australian community'.¹⁰⁵ His Honour found it arose from 'the subject-matter, scope and purpose'¹⁰⁶ of the character provisions within the *Act*. It is relevant to note that constitutional constraints also require the s 501 powers be used for the protection of the Australian community and not for the purpose of punishment.¹⁰⁷

Bromberg J explained that factors relevant to the mandatory consideration of potential harm to the Australian community include the seriousness of the conduct leading to the failure to pass the character test and the extent of the non-citizen's rehabilitation.¹⁰⁸

With respect to the national interest determination, Bromberg J held that this consideration may be evaluated on a broad view by reference to the type of offences committed without

the Minister looking into the specific circumstances in which the offence occurred or details of the non-citizen's rehabilitation.¹⁰⁹ Therefore, in that case, the Minister's failure to take into account the correct circumstances in which the offence occurred and the rehabilitation efforts of the non-citizen did not constitute a failure to take into account 'the potential for harm to the Australian community' in the manner required when determining the question of the national interest. This arose from the 'broad-based and impersonal perspective from which the national interest is to be considered.'¹¹⁰ However, if the Minister looks at circumstances specific to the non-citizen in considering the national interest that will not constitute an impermissible irrelevant consideration.¹¹¹

What it does suggest is that for character decisions, the national interest must have some rational connection to removing a risk of criminal behaviour, security threat or societal discord. It seems to exclude, for example, a national interest only concerned with economic benefits to Australia.

With respect to the exercise of discretion Bromberg J held that the obligation to consider 'the potential for harm to the Australian community' required a different consideration including the circumstances of the offending as are relevant to the assessment of potential risk to the Australian community.¹¹² As His Honour noted, two persons may be convicted of the same offence, but pose a completely different risk to the Australian community.¹¹³ The level of abhorrence of an offence is a different matter to a risk of reoffending.¹¹⁴ However, in *Gbojueh* the applicant was refused relief even though the Minister failed to properly take into account the mandatory consideration of his risk of reoffending by relying upon inaccurate information about his participation in rehabilitation programs. The relief was refused because the correct information could not have made a difference to the outcome of the case – since the Minister had decided that he had to be satisfied that there was no risk of the non-citizen reoffending.¹¹⁵

Approach to decision making

In exercising s 501 powers in the national interest the Minister must act in good faith,¹¹⁶ not arbitrarily or capriciously.¹¹⁷ He or she must not act for an improper purpose.¹¹⁸ He or she must not fetter his/her discretion or display bias (either actual or apprehended), but instead must have a mind 'open to persuasion'¹¹⁹ and must not act unreasonably or irrationally.¹²⁰ The 'implication of reasonableness...as a condition of an opinion or state of satisfaction required by statute as a prerequisite to an exercise of a statutory power...is a manifestation of the general and deeply rooted common law principle of construction that such decision-making authority as is conferred by statute must be exercised according to law and to reason.'¹²¹

These are significant restraints upon the exercise of statutory power arising from the nature of statutory power within our system of government. They are also grounds that are very difficult to establish and judges do not lightly draw the conclusion that a Minister of Parliament has acted improperly, unreasonably or irrationally or without a mind open to persuasion.

The breadth and subjectivity of the requirement that the Minister be satisfied that refusal/cancellation is in the national interest incorporates a wide range of views and judges are careful to ensure that they do not substitute their view for that of a legally permissible view formed by the Minister. Nevertheless, the provision must be read in its legislative context, which was critical to Kirby J's conclusion in *Re Patterson* (discussed above) that there was no reasonable or rational foundation for the decision in that case.¹²² That case concerned a long-term resident of Australia who had been sentenced to a minimum term of three and a half years for sexual assault and sexual intercourse against children and was on

parole at the time of cancellation of his visa.¹²³ Kirby J stated that 'while it might be said that the general problem of paedophilia and criminal offences against children is one involving 'the national interest', the decision to be made by the minister under s 501(3) of the Migration Act is not made at such a level of abstraction. It was one personal to the visa holder.'¹²⁴ By contrast, in *Leiatua*, Jessup J approached the national interest as authorising an approach in which satisfaction by the Minister could rest alone on serious criminal offences (discussed above) and in this context stated that 'most certainly in cases of sexual offences committed against minors – there will be the 'something' referred to by Gaudron J.'¹²⁵ For one judge convictions for sexual offences against minors without more could not reasonably give rise to satisfaction of the national interest, whereas for another they most certainly would. While this difference demonstrates that it is very difficult for judges not to bring their own view of what is reasonable to a case of unreasonableness, in our view it also demonstrates how grounds of review can overlap and how understandings of reasonableness are shaped by statutory interpretation. It was not just the end point, but also the starting point that differed between Kirby J and Jessup J. Whether a decision-maker has unreasonably come to a state of satisfaction about a matter depends upon how the matter is defined – or, in other words, the legal test she or he was required to be satisfied about.

Conclusion

In the context of the character provisions 'the national interest' operates as a very wide term supporting a diversity of views – so long as they are held by the Minister. Apart from the necessity for the Minister to act rationally and with the propriety expected of a minister of parliament, and taking into account the requirements of natural justice when the Minister elects it to apply, the only limitation arising from the case law in relation to the national interest requirement is a requirement to consider potential harm to the Australian community. This may be evaluated at a broad level, without the necessity of consideration of the specific circumstances of the person who will be potentially subject to refusal or cancellation, but it does not require a harm faced by the nation as a whole.

Our concern is that insufficient attention has been given to the specific legislative context of the national interest requirement as an additional pre-condition to the exercise of a broad discretionary power used in relation to individuals. The national interest pre-condition was to distinguish situations in which character decisions could be made without natural justice and merits review or to overturn the decision of a merits review tribunal. Moreover, this precondition is prior to and distinct from the discretion.

Being a precondition to the exercise of a statutory power that interferes with the rights and freedoms of an individual, the 'national interest' requirement should be closely scrutinised by the courts. It would be consistent with the principle of legality for the 'national interest' to be construed narrowly to limit the cases in which the Minister may overturn valid decisions of the AAT and/or deny natural justice to a visa holder subject to a cancellation or refusal decision.

Following Kirby J's approach to the national interest requirement would mean that the cases in which the Minister may cancel or refuse a visa under ss 501(3) and 501A are limited to those affecting the interests of the nation as a whole, rather than those where matters of public interest are present. It would limit the operation of these powers in a manner that is consistent with the terms of the legislation, the principle of legality, the structure of the *Act* (which provides for several different character powers) and the purpose for which the powers were provided.

Postscript

The Migration Amendment (Character and General Visa Cancellation) Bill 2014, before the Parliament at the time of writing (October 2014), would lower the bar for cancellations under s 501. The Bill includes new powers proposed as ss 501(3A), 501BA and 501CA. Section 501(3A) would make cancellation mandatory for some people with substantial criminal records, but would also grant a broad discretion to reverse such a decision under s 501CA(4). Section 501BA provides a mechanism for the Minister to overturn decisions under s 501CA in similar terms to the existing s 501A, to which natural justice would not apply. The Bill also proposes to amend the character test, including lowering the bar of the substantial criminal record for persons sentenced to two or more terms of imprisonment, from a total of 2 years to a total of 12 months, adding a new section for sexually based offences involving a child, amending provisions relating to memberships of groups or organisations and requiring only a risk, rather than a significant risk, of a person engaging in criminal conduct.¹²⁶

Endnotes

- 1 (2001) 207 CLR 391.
- 2 Amy Nethery, 'Partialism, Executive Control, and the Deportation of Permanent Residents from Australia' (2012) 18 *Population, Space and Place* 729.
- 3 *Migration Act* 1958 s 4(1).
- 4 Examples include the Minister's power to declare regional processing countries for asylum seekers arriving in Australia by boat (s 198AB), the Minister's power to decide that a non-citizen be declared an 'excluded person' (s 502) and the Minister's power to issue a conclusive certificate to prevent a non-citizen obtaining merits review of a visa decision (s 339 and s411).
- 5 See s 500(1)(b) of the *Act* which allows for review of s 501 decisions before the AAT, but only if the decision is made by a delegate of the Minister.
- 6 Sections 501(4) and 501A(5).
- 7 Section 501(5).
- 8 See s 501A(2) and s 501A(3) which provides two alternative powers. Section 501A(6) states that the Minister does not have a duty to consider which power would be the more appropriate power to use.
- 9 See to s 500(1)(b) of the *Act* which allows for review of s 501 decisions before the AAT, but only if the decision is made by a delegate of the Minister.
- 10 Refer to s 501(1) and s 501(2) of the *Act*.
- 11 See *Shaw v Minister for Immigration and Multicultural Affairs* (2003) 218 CLR 28; *Singh v Commonwealth and Another* (2004) 222 CLR 322.
- 12 Section 501(6)(b).
- 13 Section 501(6)(d).
- 14 Section 501(6)(a).
- 15 Section 501(7)(c).
- 16 Section 501(7)(d). 'Sentence' refers to head sentence imposed, not sentence served, so it is not reduced by a parole period.
- 17 Senator Dee Margetts raised the example of Nelson Mandela (*Parliamentary Debates*, Senate, 25 November 1998, 662). His high moral standing on the international stage does not change the fact that he did not pass the 501(6) character test.
Where the terms of the character test have permitted the courts have insisted upon a link between the conduct described in the character test and a person's character or morals. See, for example, *Haneef v Minister for Immigration and Citizenship* (2007) 161 FCR 40, upheld on appeal *Minister for Immigration and Citizenship v Haneef* (2007) 163 FCR 414.
- 18 Commonwealth, *Parliamentary Debates*, House of Representatives, 2 December 1998, 1231 (Phillip Ruddock, Minister for Immigration and Multicultural Affairs); Nethery, above note 2.
- 19 Commonwealth, *Parliamentary Debates*, House of Representatives, 2 December 1998, 1244-5.
- 20 (2001) 207 CLR 391 ('*Re Patterson*').
- 21 The parliamentary secretary made the decision in the case, acting as the minister.
- 22 *Re Patterson* (2001) 207 CLR 391, 418 [78].
- 23 *Ibid*, 419 [78].
- 24 *Ibid*, 419 [79].
- 25 *Ibid*, 502 [330]-[331].
- 26 *Ibid*, 503 [332].
- 27 *Ibid* 504-505 [336] and [338].
- 28 Gaudron J did not define the 'something' that must be in the nature or the seriousness of the conduct or circumstances surrounding it to found a satisfaction that the national interest arises.

- 29 *Madafferi v Minister for Immigration and Multicultural Affairs* (2002) 118 FCR 326 (*Madafferi*). The case concerned an exercise of power under s 501A.
- 30 *Ibid*, 352-353 [88]-[89].
- 31 The principle requires that, in the absence of clear words to the contrary, and to the extent consistent with the words of a statute, it will be read to avoid interference with individual rights and freedoms. See *Coco v The Queen* (1994) 179 CLR 427, 437 and *Potter v Minahan* [1908] HCA 63 in *Minister for Immigration and Citizenship v Haneef* (2007) 163 FCR 414.
- 32 *Minister for Immigration and Citizenship v Haneef* (2007) 163 FCR 414.
- 33 *Ibid*, 443 [110].
- 34 *Ibid*, see 442-444 [105]-[113].
- 35 *Madafferi* (2002) 118 FCR 326, 353 [89].
- 36 (2012) 200 FCR 191. The decision was in relation to s 501A(2).
- 37 *Ibid*, 202 [65]. Emphasis added.
- 38 *Ibid*, 203 [69].
- 39 See *Lu v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 141 FCR 346.
- 40 *Plaintiff S156-2013 v Minister for Immigration and Border Protection* [2014] HCA 22 (18 June 2014).
- 41 *Ibid*, [40].
- 42 Sections 501A and 501B also operate as broad discretions.
- 43 *Lu v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 141 FCR 346, 357 [54] (Sackville J).
- 44 *Klein v Domus Pty Ltd* (1963) 109 CLR 467, 473. Emphasis added.
- 45 For example, see Senator Kay Patterson's address to the Senate in which she said, 'Senator Cooney pointed out that the power under section 501 is a discretionary power which allows the minister or delegate to exercise their discretion to refuse or cancel a visa. This means that, even if people like Anwar Ibrahim did not meet the requirements of a character test, they could still be granted a visa.' *Parliamentary Debates*, Senate, 25 November 1998, 667.
- 46 (2013) 87 ALJR 681, 629 [23], 630 [26].
- 47 (1945) 69 CLR 613, 629-630; *Minister for Immigration and Citizenship v Li* (2013) 87 ALJR 681, 629 [23].
- 48 *Annetts v McCann* (1990) 170 CLR 596, 604-5 (Brennan J).
- 49 See *R v Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82, 139 [156] (Hayne J).
- 50 *Plaintiff S157/2002 v Commonwealth* (2002) 211 CLR 476 ('S157'), 493 [34] (Gleeson CJ).
- 51 *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332, 363 [65] (Hayne J, Kiefel J and Bell J).
- 52 *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597, 615; *S157* (2002) 211 CLR 476.
- 53 For lists of grounds of jurisdictional error, see *Craig v South Australia* (1990) 184 CLR 163; Mark Aronson, 'Jurisdictional Error Without the Tears' in Matthew Groves and HP Lee, *Australian Administrative Law: Fundamentals, Principles and Doctrines* (Cambridge University Press, 2007), 335-6.
- 54 See *Plaintiff M70 v Minister for Immigration and Citizenship* (2011) 244 CLR 144 (*M70*), 179 [107] (Gummow, Hayne, Crennan and Bell JJ). The Court cites with approval the plurality in *Enfield City Corporation v Development Assessment Commission* (2000) 199 CLR 135, 148 [28].
- 55 Given the High Court's approach to the aliens power this is no longer a contentious issue and is determined as an objective fact as to whether or not the person is an Australian citizen.
- 56 Aronson and Groves call a power subject to such jurisdictional facts a 'subjective power', the exercise of which is reviewed on the basis that 'the decision had been made in good faith, upon a proper view of the law, with a consideration of factors required to be taken into account,' and distinguish it from 'hard' jurisdictional facts: Mark Aronson and Matthew Groves, *Judicial Review of Administrative Action* (Lawbook Co, 5th ed, 2013) 237.
- 57 For a decision made under s 501A(2) there is an additional step that the person does not satisfy the Minister that she or he passes the character test, but this adds nothing to the requirements because the Minister could not reasonably suspect that the person does not pass the character test if the person satisfied the Minister that they pass the character test. It merely reflects the fact that 501A(2) provides for natural justice and, in consequence, an opportunity for the person to satisfy the Minister that she or he passes the character test.
- 58 *Avon Downs Proprietary Limited v Federal Commissioner of Taxation* (1949) 78 CLR 353, 360.
- 59 *Ibid*.
- 60 *Queensland Bacon Pty Ltd v Rees* (1966) 115 CLR 266, 303.
- 61 *Goldie v Commonwealth* (2002) 117 FCR 566, 569 (*Goldie*).
- 62 See *Godley v Minister for Immigration and Citizenship* (2004) 83 ALD 411, 426; *Minister for Immigration & Multicultural & Indigenous Affairs v Godley* [2005] FCAFC 10.
- 63 Sections 501(6)(a) and (7).
- 64 *Minister for Immigration & Multicultural & indigenous Affairs v Godley* [2005] FCAFC 10, [48].
- 65 Section 501(6)(b).
- 66 Section 501(6)(c).
- 67 Section 501(6)(d).
- 68 See for example *Haneef* in which the Minister applied the wrong test on account of his incorrect understanding of 'association' in s 501(b): *Haneef v Minister for Immigration and Citizenship* (2007) 163 FCR 414.

- 69 *R v Australian Stevedoring Industry Board and Another; Ex parte Melbourne Stevedoring Company Proprietary Limited* (1953) 88 CLR 100. In the context of the character test, see *Godley v Minister for Immigration and Citizenship* (2004) 83 ALD 411 upheld on appeal: *Minister for Immigration & Multicultural & Indigenous Affairs v Godley* [2005] FCAFC 10, [54] where the Court found that 'absent any decision by the Minister that the person is not of good character, then the person has passed the character test.'
- 70 See *Ruddock v Taylor* (2005) 222 CLR 612. In that case the High Court held that an officer could 'reasonably suspect' that a person was an unlawful non-citizen where the person was not in fact an unlawful non-citizen. In such a case of mistaken belief, whether there was a reasonable suspicion will depend upon whether the officer's subjective state of mind and whether that subjective state of mind was reasonably based having regard to the circumstances present at the time the belief was formed.
- 71 [1977] AC 1014, 1047.
- 72 *Gbojueh v Minister for Immigration and Citizenship* (2012) 202 FCR 417 (*Gbojueh*), 427 [49].
- 73 *Gbojueh* (2012) 202 FCR 417 [44].
- 74 *Tewao v Minister for Immigration and Citizenship* [2012] FCAFC 39 [41-44].
- 75 *S157* (2002) 211 CLR 476.
- 76 [1944] 69 CLR 407, 432.
- 77 See *Gbojueh* (2012) 202 FCR 417, 426 [14]. In particular, Bromberg J's statement: 'The question whether the discretion should be exercised does not arise until the minister is satisfied that each of the preconditions are met, including that cancellation would be in the national interest.'
- 78 See *Maurangi* (2012) 200 FCR 191, 203 [69].
- 79 *Minister for Immigration and Multicultural and Indigenous Affairs v Huynh* (2004) 139 FCR 505, 523 [74]. Emphasis added.
- 80 See for example *Tewao v Minister for Immigration and Citizenship* [2012] FCAFC 39.
- 81 [2012] FCA 1427. The matter concerned a decision of the Minister under s 501A(2) to set aside a decision of the AAT and cancel the applicant's visa.
- 82 *Ibid*, [11], [13].
- 83 *Ibid*, [13]-[14]. Emphasis added.
- 84 (1985) 159 CLR 550, 582.
- 85 *Kioa v West* (1985) 159 CLR 550; *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82; *Dagli v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 133 FCR 541 (*Dagli*).
- 86 See *Nweke v Minister for Immigration and Citizenship* [2012] FCA 266, particularly paragraph 16. While the impact of *Minister of Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 has become limited it still applies to give effect to Article of CROC absent a clear statement to the contrary.
- 87 *Dagli* (2003) 133 FCR 541, 558. As discussed in that case, a statement by the Minister that he had did not take the material into account will not alone be sufficient to show that the material had no impact upon the decision.
- 88 *Minister for Immigration and Ethnic Affairs v Haoucher* (1990) 169 CLR 648; *Plaintiff M61/2010E v Commonwealth* (2010) 243 CLR 319; *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252, 259.
- 89 Section 501(4).
- 90 Section 501A(4). Both common law and statutory rights of natural justice are excluded, as ss 501(5) and 501A(4) state that Subdiv AB of the *Act*, containing a code of procedure, is excluded in addition to common law rules of natural justice.
- 91 *Gbojueh* (2012) 202 FCR 417. See especially p 435 [89]-[91].
- 92 *Ruatita v Minister for Immigration and Citizenship* [2013] FCA 542 (5 June 2013). See especially [46].
- 93 *Durani v Minister for Immigration and Border Protection* [2014] FCAFC 79 (4 July 2014) (*Durani*).
- 94 Section 501C(3)(b).
- 95 Section 501C(4).
- 96 *Re Patterson* (2001) 207 CLR 391. See especially 398 [1], 419-420 [83] and 453-456 [189]-[197].
- 97 *Minister for Aboriginal Affairs and Another v Peko-Wallsend Ltd and Others* (1986) 162 CLR 24 (*Peko-Wallsend*).
- 98 *Ibid*.
- 99 See *Minister for Immigration, Multicultural and Indigenous Affairs v Schwart* [2003] FCAFC 229.
- 100 With respect to matters that are not mandatory relevant considerations we note that it has been held that obligations owed to non-citizens under international conventions are not mandatory relevant considerations: *Nweke v Minister for Immigration and Citizenship* [2013] FCA 456. See also *Minister for Immigration and Multicultural & Indigenous Affairs v Huynh* (2004) 139 FCR 505 and discussion of relevant considerations by Madgwick J in *Chai v Minister for Immigration & Multicultural & Indigenous Affairs* [2005] FCA 1460 from [49]; *Lu v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 141 FCR 346.
- 101 See *NBMZ v Minister for Immigration and Border Protection* [2014] FCAFC 38.
- 102 (1981) 38 ALR 363, 375.
- 103 *Gbojueh* (2012) 202 FCR 417, 426 [43]. His Honour goes on to provide references to a number of judgments.
- 104 *Gbojueh* (2012) 202 FCR 417, 426 [44].
- 105 *Ibid*, 427 [45]. The Full Federal Court endorsed this in *Durani* [2014] FCAFC 79, [27].

- 106 A mandatorily relevant consideration must be expressly stated by legislation or implied from the subject-matter, scope and purpose of the *Act* conferring the power. This arises from *Peko-Wallsend* (1986) 162 CLR 24. It is sufficient to refer to the discussion in *Gbojueh* (2012) 202 FCR 417, 425 [36].
- 107 See, discussion in *NBMZ v Minister for Immigration and Border Protection* [2014] FCAFC 38, [28].
- 108 *Gbojueh* (2012) 202 FCR 417, 427 [46].
- 109 *Ibid*, 427-428 [50].
- 110 *Gbojueh* (2012) 202 FCR 417, 427 [50].
- 111 Refer to discussion *Gbojueh* (2012) 202 FCR 417, 427 [50].
- 112 In coming to this conclusion His Honour discussed the tension between the reasoning of *Huynh* and *Lu* on this matter. See *Gbojueh* (2012) 202 FCR 417, 428-429 [51]-[58].
- 113 *Gbojueh* (2012) 202 FCR 417, 429 [57]-[58].
- 114 *Ibid*, 429 [61].
- 115 *Gbojueh* (2012) 202 FCR 417, 430-431 [68].
- 116 *S157* (2002) 211 CLR 476, 527 [137].
- 117 *Miller v Minister for Immigration and Citizenship* [2013] FCA 590, [8].
- 118 See *Haneef v Minister for Immigration and Citizenship* (2007) 163 FCR 414. In this case the applicant argued (unsuccessfully) that the Minister had acted for an improper purpose in purporting to exercise s 501(3) power because in so doing the Minister was not seeking to facilitate the removal of the applicant from Australia (being the proper purpose of the provision).
- 119 It was argued that the Minister was affected by bias in *Minister for Immigration and Multicultural Affairs v Jia Legeng* (2001) 205 CLR 507. The Court accepted bias as a ground of review applicable to Ministers of Parliament and considered differences in terms of the conduct expected of judicial officers and Ministers. With respect to having a mind open to persuasion, see *Gbojueh v Minister for Immigration and Border Protection* [2014] FCA 883, [40].
- 120 See discussion of these grounds generally in Brian Preston, 'Judicial Review of Illegality and Irrationality of Administrative Decisions in Australia' (2006) 28 *Australian Bar Review* 17, 18.
- 121 *Minister for Immigration and Citizenship v Li & Anor* (2013) 249 CLR 332, 370-371 [90] (Gageler J).
- 122 *Re Patterson* (2001) 207 CLR 391, 505 [338].
- 123 *Ibid*, 446 [164] (Gummow and Hayne JJ).
- 124 *Ibid*, 505[338].
- 125 *Leiataua v Minister for Immigration and Citizenship* [2012] FCA 1427, [14].
- 126 Proposed ss 501(7)(d), 501(6)(d), 501(6)(e) and 501(6)(b) respectively.

ACHIEVING TRANSPARENCY WITH BLURRED GOVERNMENT BOUNDARIES

*Sven Bluemmel**

All Australian jurisdictions have legislation that aims to strengthen democracy by ensuring that public sector information is broadly available, subject only to a limited number of exemptions. Increasingly, the private and not-for-profit sectors are used to provide services and infrastructure that were traditionally provided by the public sector. This is done through a variety of mechanisms, including various types of public-private partnership as well as through other contracts for services.

In this paper, I examine the impact of these changing boundaries on existing measures to achieve accountability and transparency in the delivery of public services and infrastructure. While I focus predominantly on the legislative landscape in Western Australia, many of the issues are equally applicable elsewhere.

The changing face of public service delivery

In October 2009, the final report of the Economic Audit Committee to the Western Australian Treasurer (the EAC Report) articulated the following vision:

The public sector will increasingly act as a facilitator of services, rather than a direct provider, with all areas of service delivery opened to competition. Citizens in need of services will exercise control over the range of services they access and the means by which they are delivered.¹

This statement clearly envisages a continuation of a long term trend, in Western Australia and elsewhere, to move away from the rigid, traditional model of public services being solely delivered by public servants. Western Australia, in particular, has for some years been at the forefront of working with the not-for-profit sector in providing services to people with disability. This service delivery model was a significant factor in the State being the last jurisdiction to sign up to the National Disability Insurance Scheme.²

Another example of this trend is the provision of public patient health services. The major tertiary hospitals in Western Australia currently operate a traditional public sector model. However, some health campuses providing public patient services are operated by non-government entities, including the Peel Health Campus and the Joondalup Health Campus. In both cases, the State government has contracted with private sector providers to deliver health services to public patients, alongside the delivery of other health services to private patients, in return for payment from the State. In another model, the flagship Fiona Stanley Hospital will be operated as a public hospital, but will have most non-clinical services outsourced to the private sector.³

In addition, a private company operates two correctional facilities in Western Australia, the Acacia Prison and the Wandoo Reintegration Facility.⁴ These are managed under a contract between the State and the private operator Serco.

* *Sven Bluemmel is Western Australian Information Commissioner. This paper was presented at the AIAL 2014 National Administrative Law Conference, Perth WA, 25 July 2014.*

There are many more examples of the increasing use of the non-government sector to deliver public services. These are generally driven by the laudable goals of making the delivery of public services more efficient and flexible. However, this changing face of public sector delivery means that the boundary between the public sector and other sectors is not as clear as it once was. It also means that a person who is receiving a publicly funded service may not be aware that the service is being provided by a private or not-for-profit organisation.

I do not propose to argue for or against the merits of these developments in this paper. I do, however, seek to highlight the ramifications for achieving transparency and accountability. The EAC Report envisages that '...a commitment to performance monitoring and evaluation will ensure transparency and accountability, facilitating ongoing learning and improvement.'⁵ However, this appears largely directed at ensuring that allocation and funding decisions are subject to disclosure and analysis, rather than seeking to make private and not-for-profit service providers subject to the same levels of transparency as the public sector bodies that previously delivered the service. One of the general principles underlying freedom of information legislation is that any person has a right to access whatever government information they wish, for whatever reason they choose, subject only to legislative exemptions. The citizen is no longer reliant on obtaining only such information as government considers important or convenient enough to disclose. While the performance monitoring and evaluation envisaged by the EAC Report is essential to ensuring public value, it falls short of achieving the goals of the *Freedom of Information Act 1992 (WA)* (the *FOI Act*).

How are current Freedom of Information laws coping with the changes?

The *FOI Act* creates a right of access to documents of any State and local government agency, other than an exempt agency, subject only to a limited number of exemptions. The *FOI Act* defines an 'agency' as being a Minister or a public body or office.⁶ The term 'public body or office' is defined in clause 1 of the Glossary as:

- (a) a department of the Public Service;
- (b) an organisation specified in column 2 of Schedule 2 to the *Public Sector Management Act 1994*;
- (c) the Police Force of Western Australia;
- (d) a local government or a regional local government;
- (e) a body or office that is established for a public purpose under a written law;
- (f) a body or office that is established by the Governor or a Minister;
- (g) a body or office that is declared by the regulations to be a public body or office;
or
- (h) a contractor or subcontractor as defined in the *Court Security and Custodial Services Act 1999* or the *Prisons Act 1981*.

For agencies other than Ministers, a reference to a 'document of an agency' includes a reference to a document in the possession or under the control of the agency, including a document which the agency is entitled to access.⁷

Defining the private operator as an agency

One mechanism currently used in the *FOI Act* to ensure transparency in the delivery of services is to define a particular class of service provider as a government agency pursuant to paragraph (h) of the definition of 'public body or office' referred to above. This brings the

provider into all aspects of the FOI regime, including receiving and dealing with access applications, reporting annual statistics and proactively publishing certain information about the provider's functions and services.

In many ways, this is the most comprehensive way of ensuring that public services provided by a private sector provider are subject to transparency and scrutiny. Because it is so comprehensive, this mechanism needs to be used with care to ensure that service providers made subject to the *FOI Act* are identified with precision, and that there is no unintended overreach into unrelated areas of the service provider's business. In the case of private providers of custodial facilities, this is made easier by the fact that those services are provided pursuant to specific legislation. However, this is not always the case.

A further drawback of this approach is that because it relies on legislative change, it is slow and cumbersome. It requires significant effort and oversight to ensure that new or changing models of service delivery are identified, and that the *FOI Act* is amended accordingly. This may not always be compatible with the ideal of flexible, responsive and innovative service delivery which underpins the blurring of government boundaries in the first place, as identified in the EAC Report.

Relying on an agency's entitlements to access documents

Even where a service provider is not deemed to be an agency under the *FOI Act*, a document held by that provider will still be considered to be a document of an agency, and be potentially accessible under the Act, where a government agency is entitled to access that document. Whether an agency is entitled to access a particular document held by a contractor depends on the circumstances of the relationship and the nature of the particular document. Nothing in the *FOI Act* requires agencies to include document access rights in contracts.

An agency's coercive statutory power to compel the production of documents for certain administrative or regulatory purposes is generally not sufficient to make such documents potentially accessible under the *FOI Act*. In *Re Miller and Racing and Wagering Western Australia* [2012] WAICmr 19, I found that documents in the possession of Perth Racing, formerly the Western Australian Turf Club, were not documents in the possession or control of Racing and Wagering Western Australia, the latter being an agency as defined in the *FOI Act*.⁸ While the *Racing and Wagering Western Australia Act 2003* gives Racing and Wagering Western Australia the power to direct a racing club to produce documents relating to the affairs of the club, I did not accept that it was the legislature's intention that an agency should have to take some additional, formal step of exercising that power to take possession of documents in order to respond to an access application under the *FOI Act*. Accordingly, the coercive legislative power was not sufficient to bring the documents 'under the control' of the agency for the purposes of the *FOI Act*.

Express contractual obligations of transparency

Another approach currently in use, which aims to achieve a level of transparency in the provision of public services by the private sector, is to place contractual obligations on the service provider to make certain documents available directly, without an applicant having to apply to the agency.

As noted above, there are several public health facilities operated by private providers in Western Australia. One of these is the Peel Health Campus (PHC). Until recently, PHC was operated by Health Solutions (WA) Pty Ltd, pursuant to an agreement with the Minister for Health. That agreement included a requirement that PHC have a policy permitting access by public patients to their personal information.

Aspects of this arrangement were tested in *Re Pisano and Health Solutions (WA) Pty Ltd trading as Peel Health Campus* [2012] WAICmr 24 (*Pisano*). That case confirmed that PHC was not an agency for the purposes of the *FOI Act*. The case also highlighted that relying on contractual provisions results in privately operated public medical facilities being subject to a weaker level of transparency than medical facilities operated directly by the State in at least three ways. First, public patients treated at such facilities do not have a legally enforceable right under the *FOI Act* to access their medical records but are reliant on the operator honouring its obligations under the agreement. Secondly, any decisions on access to information made by private operators cannot be tested on external review by me. Finally, the relevant agreement only provided for public patients to access their own medical records. No such limit applies to medical facilities operated directly by the State.

Absence of express contractual obligations of transparency

The limitations identified above in relation to the provision of public patient services by private sector health providers also apply in the provision of general services by the private sector. While this occurs in many different areas, two examples should serve to illustrate some of the key issues.

The first example is where government agencies utilise the services of external consultants to investigate workplace conflicts or misconduct. These processes typically involve the consultant interviewing affected staff and witnesses, analysing relevant instruments such as legislation, codes of conduct and the like; and producing a report to the agency. Usually, the consultant also provides the agency with copies of supporting documentation, such as records of interviews. There is little doubt that those copied documents are documents of an agency and thus potentially accessible under the *FOI Act*, even if a consultant were to claim copyright over some or all of those documents. However, the consultant may claim that the report is exempt under the *FOI Act* because its disclosure would reveal the consultant's business processes in a way that would harm his or her commercial affairs. While such claims are often unsuccessful when tested on external review, they may be upheld by an agency in its initial decision. At the very least, they are likely to delay disclosure of documents to an applicant. In any event, they represent an obstacle which would not exist if the investigation had been carried out directly by the agency. There is also the possibility that a consultant may give interviewees an unrealistic expectation of confidentiality, particularly if they are not familiar with the *FOI Act*.

A related scenario occurs where an agency engages a contractor to undertake a process of research and investigation which is intended to inform a public policy or project. Again, a contractor may claim that the resultant report is exempt from disclosure because it contains the consultant's commercial or business information. A consultant who is not as familiar with legislative transparency mechanisms as an experienced public servant may also be more likely to create unrealistic expectations of confidentiality while gathering information from contributors or members of the public.

Evaluating possible approaches to the issue

The developments identified above have the potential to erode transparency. For the purposes of this paper, I take it that an erosion in transparency in this context is undesirable and should either be avoided or expressly and transparently acknowledged.

While any legislative response is ultimately a matter for Parliament, I will now pose some questions that need to be answered, and some principles that should be considered in evaluating any proposed response.

The first question is whether society should accept any overall decrease in transparency in the delivery of what have traditionally been considered public services. It may be argued that improvements in efficiency justify the cost of some decrease in transparency. Perhaps unsurprisingly, I would take a lot of convincing before I accepted such an argument. Making processes subject to greater transparency may well cause some administrative or political inconvenience. However, it is a mistake to equate the absence of any inconvenience with proof that processes are working more efficiently. In my experience, greater transparency has the potential to improve efficiency and effectiveness by subjecting processes to criticism and scrutiny. The short term inconvenience suffered is likely to be a small price to pay.

A related question is whether it is acceptable to have different levels of transparency in individual cases depending on whether the service is provided by a public or a private provider. To illustrate, is it acceptable for a medium security prisoner in a privately operated prison to have weaker rights to access information about their treatment in custody than a medium security prisoner in a publicly operated prison? Similarly, is it acceptable for a patient in a privately operated public health facility (such as Peel Health Campus) to have weaker document access rights than a patient in a publicly operated public health facility? I would expect that most people would consider such differential outcomes to be arbitrary and unacceptable.

By virtue of the definition of ‘contractor’ in the *FOI Act*, a private operator of a Western Australian prison is subject to the same legal obligations under that Act as the Department of Corrective Services, which operates all other prisons. In a legal sense at least, there is no loss of transparency. However, as identified in *Pisano*, the situation in respect of privately operated public patient facilities is less satisfactory.

Another consideration in evaluating potential approaches is the extent to which those approaches rely on an individual decision maker in an outsourcing process turning his or her mind to the issue of transparency. As noted above, the *FOI Act* currently provides that any private provider that provides services under custodial services legislation is deemed to be an agency for the purposes of the Act. This mechanism is broad and automatic. It does not rely on the need for transparency to be identified and established each time a new outsourcing arrangement is contemplated. On the other hand, relying on a specific contractual obligation in an effort to ensure an acceptable level of transparency requires the issue to be identified at an early stage in planning and negotiations. This can easily be overlooked, particularly when the agency is under pressure to deliver a high profile project.

Most Australian Auditors-General have so-called ‘follow the dollar’ powers enshrined in enabling legislation which allow them to audit the spending of public resources even when this is done by non-government entities. While there may be different considerations in the audit context to the freedom of information context, that model and its implementation may nevertheless offer some relevant lessons to the issue of ensuring transparency in the face of the changing public service delivery landscape.

Conclusion

There is no doubt that the way in which public services are delivered will continue to change. The private and not-for-profit sectors will continue to play a bigger role and the boundaries will continue to blur. These developments have already demonstrated the potential to improve quality and efficiency. Achieving such benefits is not incompatible with maintaining high levels of transparency. However, current mechanisms such as those in the *FOI Act* will need to be critically examined to determine whether they are able to provide the level of transparency and accountability which the public rightly demands.

Endnotes

- 1 WA Government 'Putting the Public First - Partnering with the Community and Business to Deliver Outcomes' Final Report 2009 page (i), accessed by the author on 23 July 2014 at the following address:
http://www.dpc.wa.gov.au/Publications/EconomicAuditReport/Documents/eac_final_report.pdf.
- 2 <http://www.abc.net.au/news/2014-03-31/western-australia-signs-up-to-the-ndis-trials/5356978>.
- 3 <http://www.abc.net.au/news/2012-08-28/unions-oppose-hospital-workers-privatisation-plans/4228670>.
- 4 <http://www.correctiveservices.wa.gov.au/prisons/prison-locations/default.aspx>.
- 5 Above, n 1.
- 6 *Freedom of Information Act 1992* (WA) Glossary, clause 1.
- 7 *Ibid* clause 4.
- 8 See also *Re Ninan and Department of Commerce* [2013] WAICmr 31.

WAR-FIGHTING AND ADMINISTRATIVE LAW: DEVELOPING A RISK-BASED APPROACH TO PROCESS IN COMMAND DECISION-MAKING

*Bronwyn Worswick**

In June 2013, the Chief of Army, Lieutenant General David Morrison, AO, addressed the ranks of the Australian Army on YouTube, expressing anger and disappointment at the actions of a group of officers and non-commissioned officers – the so-called ‘Jedi Council’. The allegations centred on the production and distribution of highly inappropriate material demeaning women across both Defence computer systems and the internet. Lieutenant General Morrison used strong language in his warning – there was ‘*no place*’ in the Army for members who ‘*exploit and demean*’ their colleagues. He stated that he ‘*would be ruthless in ridding the army of people who cannot live up to its values*’. At the time, three individuals had been suspended from duty pending an ongoing investigation, and another 14 individuals were directly implicated. A further 90 members of the Australian Defence Force (ADF) were considered to be on the periphery of the group.¹

In November 2013, Army announced that the service of six members had been terminated as a result of these allegations. Three more terminations followed by the end of the year. Eight others were retained in the Army but received administrative sanctions.

Press coverage questioned the amount of time taken to take action in relation to these individuals.² Lieutenant General Morrison highlighted the difficulties he faced dealing with these cases expeditiously. In a speech in October 2013, Lieutenant General Morrison said in respect of the Jedi Council, that he ‘*bridled against legal restrictions and complicated processes that constrained his ability to protect both the victims of bad behaviour and the reputation of our Army*’.³ Lieutenant General Morrison reiterated the same concerns a fortnight ago in a speech to the Supreme and Federal Court Judges Conference in Darwin, not to reject the proper application of law to the military, which is fundamental to the rule of law, but to highlight the conflict between trends towards greater regulation of process on the community’s expectations of accountability and timeliness of decisions.

Lieutenant General Morrison’s intention with respect to the individuals who engaged in serious misconduct in the Jedi cases was always clear. He sought to take action against them to end their military service. He made a conscious choice to pursue action via an administrative route rather than lay charges under the *Defence Force Discipline Act 1982*.⁴ However, the process of investigating, initiating action, making decisions to terminate the service of nine members and waiting for these personnel to exhaust their internal merits review options took many months, consuming time and resources, including legal resources within the Department and also externally engaged advisors. The question is: How can there be such a difference between command intent, and what actually occurred?

Defence has recently emerged from a lengthy period of rolling reviews of a range of topics including ADF culture and military justice arrangements. This process has been more or less continuous since the Burchett review in 2001.⁵ Each review introduced new measures

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and processes intended to guide command decision-making. However, after over a decade of piecemeal reform, commanders in the ADF face a labyrinth of instructions, policy and guidance on how to act and what to do in response to issues and incidents, much of it overlapping and not all of it consistent. The outcome has been layer upon layer of complexity and process as highlighted by Lieutenant General Morrison's response to the Jedi Council cases.

Defence is now re-writing its policy guidance for decision-making processes. The new approach will encourage commanders to make values-based decisions, and to adapt processes to the circumstances of a particular decision. Commanders will be asked to apply judgment and consider risks to both the organisation and individual ADF members when making decisions, and to apply processes that are adapted to those risks. The intent is to spend time and resources that are proportionate to the risks of any particular decision.

This paper will discuss some of the problems associated with Defence's history of cultural, organisational and legal change to command authority, and will outline how a risk-based approach to decision-making can balance concerns about abuse of power and unfair outcomes with flexible and proportionate processes.

Role and function of the Australian Defence Force

The mission of the ADF is to defend Australia and its national interests. The ADF serves the Government of the day and is accountable to the Commonwealth Parliament to efficiently and effectively carry out the Government's defence policy. The ADF is comprised of the Navy, Army and Air Force and its primary role is to defend Australia against armed attack. To fulfil this role the ADF must generate combat capability, not only for the direct defence of Australia, but also with a capacity to do more where there are shared interests with partners and allies,⁶ and to support peacekeeping, humanitarian assistance and disaster relief operations worldwide.

Military service is unique. The breadth of the tasks and the authority to use armed force to achieve them demands that military service be understood for what it is: a non-contractual and unlimited liability on members to serve, to their deaths if necessary. It permits no union support or any real mechanism for industrial negotiation in relation to terms and conditions of employment. At its heart is the system of command, and the corresponding requirement to follow all lawful orders, which is the means by which the ADF instils the self-discipline in members to meet this liability of service at all times. Flowing from this is a statutory military disciplinary system to enforce compliance, which can include civilian incarceration as a punishment in the event of the most serious forms of misconduct or disobedience.

This command authority has its statutory basis within the *Defence Act 1903* (Cth). Decisions regarding appointment, promotion and employment within the ADF are also guided by extensive regulations made under that Act.⁷ Understanding the scale of the Defence organisation in which these decisions are made is also important – in the most recent Defence Annual Report for 2012-13, the average full time funded strength of the ADF was around 56,600, plus 20,700 individuals in the Reserve who undertook paid work, plus 21,500 Australian Public Service personnel, including those employed within the Defence Materiel Organisation, and another 400 full-time equivalent contractors.⁸ Personnel are deployed on 17 operations around the world,⁹ including, until recently, combat operations in Uruzgan, Afghanistan. Importantly, all of these people are engaged in providing a service to the Australian public as a whole, which is quite a different thing from the model of service delivery to individuals in the community common to many other government agencies. This is the context within which military commanders make decisions.

Commanders do not eschew the role of law in the modern military. They are comfortable with the need to follow process and adhere to legal obligations across the spectrum of military decision-making, which stretches from the planning and conduct of operations around the world to the management of personnel in day to day duties on an Australian base. All of these decisions are assisted today by timely, relevant legal advice, often as an obligatory precursor to action as opposed to simply being an 'optional extra'. This is so even in the strictly operational realm of targeting and the use of force, and detention and interrogation of prisoners, in all of which detailed processes are followed before any decision to proceed is made, usually in highly compressed timeframes. The targeting decision-cycle, for example, involves complex assessments of casualty avoidance and collateral damage and incorporates a regime for executive / government approval in certain circumstances, although decisions may be required immediately. The process is demonstrably adjusted to the urgency of each decision.

In dramatic contrast, the Jedi Council cases highlight the protracted timelines prescribed in the process to obtain the involuntary discharge of an ADF member in the face of overwhelming evidence of misconduct. In these circumstances, an organisation that must, by definition, be agile and adaptable in the face of threat, has been encumbered with processes which are protracted and complex for commanders to navigate, and have given rise to hesitation and reluctance on the part of some to take action, because it is easier not to or because they fear disproportionately adverse consequences for making the 'wrong' decision, including the risk of legal challenge.

So what has led Lieutenant General Morrison to make these surprising public statements, and, for our purposes, what does this have to do with administrative law?

Command

As a basis for decision-making, command is *sui generis*. The ADF defines command as:

The authority that a commander in the military service lawfully exercises over subordinates by virtue of rank or assignment. Command includes the authority and responsibility for effectively using available resources and for planning the employment of organising, directing, coordinating and controlling military forces for the accomplishment of assigned missions. It also includes responsibility for health, welfare, morale and discipline of assigned personnel.¹⁰

Therefore, in military doctrine, commanders have an onerous responsibility and are held accountable for their actions and their inaction.¹¹

Historically, the prerogative of command was largely unfettered and included power to dismiss at pleasure.¹² However, the reality for military forces around the world is that command authority has been increasingly limited by the introduction of policy and legislation. In Great Britain, military discipline arrangements were radically reformed during the 19th century. A series of acts was implemented in order to provide military personnel with a wider range of procedural protections and to align military discipline more closely with the societal standards of the day for criminal justice processes. The ADF inherited this as the basis for its military law in the early 20th century.¹³

The trend of limiting the absolute nature of command power continued, with the emergence of fetters on other elements of command decision-making beyond disciplinary processes. These limits have imported concepts and policy approaches that reflect growth in administrative law and the exercise of public power more broadly in Australia, particularly since the 1970s. These have now permeated much of the operational as well as the peacetime sphere of Defence activities. For example, the highly risk averse decision to remove soldiers from Afghanistan when they have engaged in misconduct or they present

an operational risk because they are ineffective, involves notice periods, written submissions (usually with the benefit of legal assistance to the soldier), written decisions and, more often than not, opportunities for review before they are returned to Australia. After their return, they are able to seek review through a range of internal and external channels, even though the decisions may have no implications for their careers, other than to deprive them of some deployment allowances. The only adjustment to circumstances is that the initial process can be (but will not always be) completed more quickly than it would be at home.

The curtailment of command discretion on operations reflects the trend of the last ten years in command decision-making generally. A number of high profile incidents, followed by external reviews, has fostered this trend, along with a community and Parliamentary desire to ensure that command authority is tempered by safe-guarding the reasonable expectations of individual members.

History of Defence review and reform

The starting point for the continuous cycle of review and procedural reform in military justice and decision-making is difficult to identify. In 1998, the Defence Force Ombudsman undertook an own motion investigation into ADF responses to serious sexual offences.¹⁴ In 1999, the Joint Standing Committee inquired into the conduct of military inquiries and ADF discipline processes.¹⁵ Taken together, the effect of these two reviews was to introduce the principles of procedural fairness into ADF decision-making, and to start an organisational move towards standard use of formal inquiry processes.

The Burchett inquiry,¹⁶ as well as a Joint Standing Committee report,¹⁷ followed allegations of brutality and 'rough justice' within the Army's parachute battalion (3 RAR) in 2001, which focused on the use of bastardisation, mistreatment and intimidation as a means of disciplining subordinates during the period 1996 to 1999. Mr Burchett made many recommendations, among them the appointment of a Military Inspector General, with broad powers to oversee military justice. This was implemented with the creation of the statutory office of Inspector General ADF.¹⁸

The Burchett report also expressed the opinion that the exercise of command power by a superior commander to remove an officer from a position of command could hardly be thought to exist for everyday use. Where there was no true urgency, Mr Burchett considered that the principle of procedural fairness should have priority over the prerogative of command.¹⁹ Mr Burchett's approach is evident in the 2003 introduction of the '*Guide to Administrative Decision-Making*'.²⁰ This manual applied, for the first time, the general concept of procedural fairness to command decisions in Defence. It also explicitly acknowledged that, in many cases, the standards and procedures it prescribed were *more* onerous than those imposed by law.²¹ This makes the *Guide* unusual even in the context of a general trend towards increasing administrative guidance across the public sector aimed at mitigating risk.

Defence had earlier published the '*Administrative Inquiries Manual*'.²² This *Manual* is the archetypal risk averse approach. The guidance includes a table illustrating the types of incidents where a commander should consider initiating an inquiry, and detailed guidance on setting up inquiries ranging from a simple, non-statutory fact-finding exercise through to a Board of Inquiry, which would exercise Royal Commission type powers. While the guidance was practical, easy to read and included templates and examples, it also led to a culture of 'templated' responses. The tendency has been to conduct an inquiry in response to incidents, without any real analysis of what the information requirements actually are, in order to support the kinds of decisions that might need to be made.

The culture of templating and prescriptive guidance was complemented by the creation of a myriad of Defence-specific complaint-handling mechanisms. This particular feature of Defence reform has been highlighted in a review of the ADF Redress of Grievance System, conducted jointly by the Department of Defence and the Defence Force Ombudsman in 2005.²³ The review commented that this rapid increase in complaint avenues vastly added to the complexity of managing and administering complaints in Defence. The effect has been that very few complainants and managers appear to understand all of the available avenues, and many of the processes have the mandate to examine similar issues.

In summary, the procedures canvassed by the Ombudsman's review included the Defence Equity Organisation (1997), Complaint Resolution Agency (1997), the Army Fair Go Hotline (2001), the Defence Whistleblower Scheme (2002) and the Inspector-General ADF (2003). These were all established in addition to the statutory ADF complaint mechanism, redress of grievance, in Part 15 of the *Defence Force Regulations 1952*, which is based on the historic position that military members can complain to the Crown.²⁴ Additional avenues for complaint and investigation have since been created. Most recently, the Sexual Misconduct Prevention and Response Office (SeMPRO) was established in 2013, after Ms Broderick's report into the treatment of women in the ADF.²⁵ While not permanent, the Defence Abuse Response Taskforce has been established to assess and respond to historical allegations of abuse in Defence.²⁶

Defence's review and reform, and the proliferation of subject specific complaint processes, has also been accompanied by broader whole of government efforts, such as the introduction of the *Public Interest Disclosure Act 2013* and amendments to the *Freedom of Information Act 1982* (Cth), the *Privacy Act 1998* (Cth), and the *Work Health and Safety Act 2011* (Cth). Meanwhile, judicial review in a range of contexts has continued to develop administrative law principles, the most expansive interpretations of which are, in turn, integrated into Defence policy. All of this has added multiple layers of complexity to Defence internal procedures.

Cumulative effect of review and reform: HMAS Success Commission of Inquiry and the ADFA Skype Incident

What this lengthy history shows is the cumulative effect of single issue military justice reviews on the coherence and complexity of decision-making processes across the ADF. The result is a system which has been subject to well-intentioned but piecemeal adjustments in response to high profile incidents, to such an extent that it has lost internal coherence and 'stovepipes' information and complaints by subject matter without consideration of the effects on individuals and the organisation.

This was the problem confronted by Mr Gyles in his 2011 Commission of Inquiry in relation to HMAS Success' Asian deployment from March to May 2009.²⁷ The allegations of misconduct were numerous, but focussed on complaints about sexual targeting, a reported ledger of sexual exploits and impunity onboard the ship. The Commanding Officer landed three sailors at Singapore and sent them home to Australia. In part three of his report, Mr Gyles questioned whether the many reforms connected with military decision making in the last 10 to 15 years had over-reached their mark, asking the question 'has the pendulum swung too far towards individual rights?' He reflected that the failure by individuals in the command structure could reflect a more general breakdown in respect for rank and command, accompanied by reluctance on the part of those in command to exercise that command.²⁸

In particular, Mr Gyles suggested that ADF policy required too much natural justice to be afforded in some administrative inquiries, noting that procedures that expand or apply

natural justice rights for individuals come ‘at considerable cost. It ties up the time of those in command and affects their ability to act decisively’.²⁹ Somewhat controversially, he adopted an expansive view of the extent to which he believed that ADF command decisions were immune from administrative law review.³⁰ In essence, he asserted that command decisions (based as they are on prerogative power) are not subject to judicial review. Finally, he observed that the existence of multiple internal merits review avenues for ADF personnel is ‘resource intensive and presents an opportunity for “gaming” the system and for vexation of the target’.³¹

Mr Gyles’ report was a significant turning point for Defence. His observations and recommendations turned attention to the need for a comprehensive overhaul of ADF and Defence systems. However, before significant work could be done, the revelation of the so-called ‘Skype’ scandal brought the issues Mr Gyles had identified into sharp relief.

The 2011 Skype case attracted national media attention and resulted in criminal convictions for two cadets who had broadcast footage of a sexual encounter over Skype to other cadets. The Government’s response was the initiation of six cultural reviews into various issues as well as the DLA Piper Review to examine historical allegations of abuse.³² The Defence response to these reviews was the *Pathway to Change* strategy.³³ One of the more significant goals was the commitment to simpler and more effective processes, with the broader aim of improving accountability for both unacceptable behaviour by individuals and for those who manage and respond to unacceptable behaviour. Moreover, the report emphasised the need for Defence to accept that Defence personnel, in light of the heavy responsibilities they carry, be held to the highest standards of behaviour.³⁴

Framing the issues post-Skype and *Pathway to Change*: The Re-thinking Systems Review

Therefore, in framing the challenge for Defence administrative law in 2014, the views of Lieutenant General Morrison, Chief of Army, carry significant weight.

I have been struck at how legalistic our culture has become. This of course reflects a wider societal trend. But we have reached the point where it may be about to seriously impede the effectiveness, cohesion and discipline of the Armed Forces.

Quite frankly, as Chief of the Army, I have been restrained from removing some people from the Army whose conduct, if replicated in any reputable civilian organisation, would have seen them removed from their office and walked to the door by a security guard. That is no exaggeration.

I have little doubt that the cumulative effect of legal change incrementally introduced by Parliament in circumscribing my ability to respond to these incidents would astonish the public, if they understood that generally the delays and diluted responses are forced by process rather than lack of command will. I suspect many Parliamentary representatives would be equally surprised at the effects, in some respects unintended, of their reform.³⁵

We have now reached the point where a Service Chief does not feel he can command effectively and meet public and government expectations about how he should deliver Army’s combat capability, because of the regulatory and legal policy framework that the same public and government has imposed or expects him to follow.

Not long after the Skype scandal, Duncan Lewis, the then Secretary of Defence, and General David Hurley, AC, DSC, the then Chief of the Defence Force, commissioned a review of all investigation, inquiry, review and audit systems, processes and structures across Defence. It provided a unique opportunity to address all of these structural issues, rather than having a single issue focus. It differed from the body of earlier reviews carried out since 2001 because it was a holistic examination of fact finding, decision-making and

review for Defence's integrated ADF and APS workforce. The review took account of recommendations from the reviews referred to above, including those that are the basis of the *Pathway to Change* strategy, Mr Gyles' observations in part three of the report of the HMAS *Success* Commission of Inquiry and the recommendations in volume one of the DLA Piper Review of Allegations of Sexual and Other Forms of Abuse in Defence, but it did so with the intent of reconciling the aim of each of those reviews with a single and coherent procedural structure. What was also different about this review was that, for the first time in recent history, it was internally driven.³⁶ This gave it the capacity and the context to respond to command, based on working level military input.

It is pleasing to be able to say that some of the results of what came to be known as the *Re-Thinking Systems Review* are now in the process of being implemented. In the main, the recommendations are focused on simplification, reduced complexity, and change focused on making military command work by having commanders exercise their command responsibilities, make decisions and stand by them. The greatest opportunity offered by these innovations is the chance to re-adjust Defence systems to the context in which Defence makes decisions.

In advocating the adjustment of administrative decision-making according to context, we are not suggesting that the foundational principles of administrative law should not be applied to Defence. Rather, the principles need to be adjusted proportionately to the requirements of a lay decision-maker making day to day decisions. In the past, the Defence policy has been to adopt a purist approach in this respect. However, there is room for greater flexibility. For example, the *Briginshaw* principle³⁷ allows for proportionate adjustment in process to accommodate the relative seriousness of the decision to be made.

In the Defence context, the complex and burdensome process surrounding administrative decision-making has become counter-productive. Processes that are intended to increase fairness for individuals have actually prevented timely and fair decision-making.

Innovations in decision-making arising out of the Re-thinking Systems Review

As part of first-principles systemic reform, Defence is distilling the plethora of policy into innovative guidance that focuses the attention of commanders and other decision-makers on the need to exercise judgment in the circumstances that exist at the time and reduces the emphasis on compliance with rules and formal processes. Commanders will be asked to consider risks to the organisation and individual ADF members when making decisions, and adapt processes to those risks. The goal is to re-empower commanders to command and lead, spending effort proportionate to the risks of any particular decision.

Instead of mandatory requirements or absolute rules, the guidance will outline principles that commanders should consider when making decisions. These include:

Commanders should be trusted to exercise judgment

Decision-makers will make mistakes – this is inevitable. However, in most situations, mistakes can be corrected and most decisions are subject to review processes for this reason. Commanders have considerable training and experience relevant to the decisions they need to make, and should be trusted to exercise judgment and common sense in determining what process to follow in making the decision. While some commanders may, on occasion, exercise poor judgment in decision-making, this is a preferable risk to that posed by overly-prescriptive processes.

In providing commanders with greater flexibility to exercise judgment, in re-empowering commanders to command, there is a risk that some commanders will take advantage and abuse their re-vitalised command authority. Commanders must be held accountable for their actions. However, accountability is not created through onerous process but by trusting commanders to exercise judgment and by requiring them to record and report decisions and the justification for making decisions. This enables review and oversight of command decision-making, including by higher level headquarters and senior leadership in Defence and also by the Inspector-General ADF and external agencies such as the Defence Force Ombudsman.

While commanders must be held accountable, care will be required to encourage the exercise of judgment. For example, poor decision-making should generally be addressed through performance management processes, rather than more severe sanctions. Disciplinary and other sanctions should usually be reserved for egregiously poor or repeated incidents of poor decision-making.

Commanders should manage risk, rather than avoid risk

As administrative lawyers, we tend to focus on the legal risks associated with decision-making, such as the risks associated with failing to provide procedural fairness and the decision being overturned on judicial review. However, decision-making involves many risks, which vary depending on the type of decision in question. Non-legal risks may, ultimately, be more important from an organisational perspective. An obvious risk is making a mistake – getting the decision wrong. Other risks may arise if a decision is delayed. Defence is very sensitive to reputational risks, because of the long term damage these can cause to its relationship with government, its public perception and its recruitment efforts.

It is impossible to avoid risk completely when making decisions and commanders should not be expected to achieve this. Instead, they should be encouraged to manage decision-making risks. To do this, commanders need to understand the various risks that are associated with a particular decision and should consciously assess how to balance those risks when making a decision. Mitigating one risk will often increase another, so it is necessary to exercise judgment to determine how best to balance competing risks.

On the issue of legal risk, it should be noted that the courts have traditionally been quite deferential to command authority in judicial review cases involving the ADF.³⁸ When considering judicial review cases more generally and, in particular, the seminal administrative law cases dealing with issues such as procedural fairness, relevant considerations, duty to inquire, reasonableness and rationality, it should be noted that they typically deal with decisions that have an extremely adverse and long term effect on individuals – such as decisions to refuse protection visas or decisions to refuse or cancel a licence required for a person's livelihood. Judicial review cases therefore tend to represent the extreme of procedural requirements, because of the nature of the decisions under review and their serious consequences. In the ADF, most of the procedural requirements that have been written into Defence internal policy documents are derived directly from these cases with little regard for their context, often out of fear of legal risks that are unlikely to eventuate. While good practice would suggest that, in most cases, a person should not be surprised by a decision, this is not the equivalent of imposing a universal legal requirement to provide absolute procedural fairness, the breach of which would inevitably result in the decision being quashed on judicial review.

Commanders should apply time and resources proportionate to the possible consequences of a decision

This principle is an application of the idea that risks need to be balanced. The risks associated with getting a decision wrong will depend on the seriousness of the potential consequences. In the context of decisions affecting individuals, an assessment of the severity of consequences might require consideration of potential financial detriment, adverse career effects and the availability of mechanisms to ameliorate these effects should the decision prove to be affected by error. Where decisions potentially have a wider impact, it may also be necessary to consider adverse effects on third parties, such as complainants and victims, and on Defence as an organisation. The more severe any adverse consequences are likely to be; the more important it is to get the decision right in the first place. For this reason, time and resources should generally be applied to decision-making activities proportionate to the possible consequences of the decision. This principle applies to all activities associated with decision-making, including fact finding, providing procedural fairness, and developing a statement of reasons. However, we note that high profile incidents tend to be accompanied by high reputational risk, which may warrant a more publicly transparent decision-making process than would ordinarily be adopted, requiring greater resources than might have been required if a matter was not in the media.

The concept of proportionality is the basis of procedural rules that apply only above a certain threshold. An obvious example is the *Commonwealth Procurement Rules*, which impose additional processes for procurements valued above \$80,000.³⁹ While the procurement example is quite simple to apply, difficulties can arise when attempts are made to set hard thresholds in other settings, where there is no readily available quantitative or qualitative value to define the threshold. Under these circumstances, attempting to set hard thresholds may distract decision-makers into focusing on compliance with the threshold at the expense of considering the merits of the decision.

For example, in 2010, following the HMAS *Success* saga, Defence introduced the concept of a 'serious or complex incident' as a means of defining a threshold for when a formal statutory inquiry would be required. Substantial effort was subsequently devoted to either avoiding the initiation of onerous statutory inquiry processes (through creative reinterpretation of the definition of a 'serious or complex incident') or to slavishly applying the formula and initiating costly fact finding processes even when the relevant information was already available. We would prefer commanders and decision-makers to spend their time engaging with the substantive issues, to analyse what their decision-making requirements are and to determine the fact finding requirements based on what they need to know, rather than on an arbitrary threshold prescribed by policy. This might involve, for example, considering what information is required, how difficult it will be to obtain, how important it is, how much time is available, and what the consequences are likely to be if the ultimate decision turns out to be incorrect. Decision-makers should manage risk rather than follow rules.

Commanders may need to trade off certainty that a decision is correct against making a decision quickly

One of the most significant risks associated with decision-making is delay. In many cases, delay in making a decision can be detrimental to affected parties and to Defence as an organisation. It can also cause significant hardship to the decision-maker. In the operational context in particular, delays can have significant consequences. Delay can also be a source of anxiety and can produce concerns for the welfare of staff. Delay often occurs because a decision-maker is attempting to obtain complete information before making a decision, in order to avoid the possibility of making a mistake. Accuracy in decision-making is important

but it must always be balanced against the need to make decisions within an appropriate time frame. Where the balance falls is a matter of judgment, and will depend on the particular circumstances of the decision in question, balancing the possible adverse consequences of a mistake against the possible adverse consequences of delay. In all cases, commanders should remember the law of diminishing returns – there will come a point in all fact finding activities where the value of additional information that may be obtained through further fact finding will be outweighed by costs imposed by the resultant delay. Similar considerations apply when providing procedural fairness or writing a statement of reasons. In decision-making, the perfect is the enemy of the good.

Conclusion

Any reform program necessarily involves a recalibration of risk. Defence is a vast organisation. There needs to be a degree of prescription in order to promote consistency. In the past, the degree of prescription has become disproportionate. However, if the new arrangements don't include some elements of prescription they will be too vague to be useful and may lead to unreasonable or irrational outcomes. What will follow, inevitably, is pressure to revert to a more prescriptive system.

While we talk about these developments in the experience of the ADF, there has clearly been similar regularisation of process across other fields of decision-making and a broader trend towards regulation by governments world-wide. The idea that decision-makers should be bound by procedural expectations is based on very good reasons directed at ensuring better quality, fairer and more consistent decisions, and at improving transparency and accountability of public administration. However, as the Defence experience illustrates, unless the development of process is carefully considered, it can impede organisational goals and result in unintended consequences.

Balanced against the trend towards regulation is the very real issue of trust and accountability. Rather than prioritising broad-brush policy when something goes wrong, we need to emphasise that people are responsible and accountable for their decisions. Errors in decisions should be identified on review, particularly where the error arises from unfairness or bad faith, and the decision-makers held accountable. Mistakes will be made, but they need to be dealt with in a reasoned fashion as mistakes rather than assuming all isolated incidents to be evidence of systemic or policy failings to be addressed through central control. Mere adherence to extensive policy and processes cannot displace the obligation on a decision-maker to make a decision. It is inevitable that decisions will be challenged, particularly in a framework that confers rights on individuals to seek redress. We expect to be tested and probed but equally where no error is found on review, the decision-maker needs the courage, with the backing of Defence, to hold the line.

Ironically, the ADF has traditionally relied on a command philosophy which requires 'decentralised command, freedom and speed of action and initiative, but [which] is responsive to superior command.'⁴⁰ It 'requires a high level of mutual trust at all levels of command,'⁴¹ which has been overtaken by ten years of piecemeal regulatory and policy reform. This is what Defence is currently reintroducing, adjusted to the unique context of military service.

Endnotes

- 1 Lieutenant General David Morrison, AO, 'Chief of Army message regarding unacceptable behaviour', <<http://www.youtube.com/watch?v=QaqpoeVgr8U>> at 16 July 2014.
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- 3 Lieutenant General David Morrison, AO, Chief of Army address to the Australian Army Legal Corps Conference, 3 October 2013, <http://www.army.gov.au/Our-work/Speeches-and-transcripts/~media/Files/Speeches/CA_AALCConference_3OCT2013.pdf> at 16 July 2014.
- 4 The *Defence Force Discipline Act 1982* (Cth) is the primary means by which the ADF enforces a quasi-criminal disciplinary regime. It prescribes offences and provides for both summary trial and trial by service tribunals, including Defence Force Magistrates and Courts Martial. Penalties include detention and imprisonment. It is complemented by a system of administrative sanctions for misconduct, which draw on command authority or are, in some cases, described legislatively, including in the *Defence (Personnel) Regulations 2002* (Cth). Administrative sanctions may include formal counselling, censure, reduction in rank or termination of service. Lieutenant General Morrison has publicly referred to the 'growing complexity of our quasi-criminal investigation and proceedings, in which most of the actors are lay men and women' and the 'significant impact on time taken and resource requirements' in relation to using disciplinary processes.
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- 6 Department of Defence, *Defence Annual Report 2012-13*, <http://www.defence.gov.au/AnnualReports/12-13/part_one/chapter_two.asp> at 14 July 2014.
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- 12 See, for example, *Coutts v Commonwealth* (1985) 157 CLR 91 at 98.
- 13 See, for example, the history summarised in Joint Standing Committee on Foreign Affairs, Defence and Trade, *Military Justice in the Australian Defence Force*, 1999, Chapter 1.
- 14 Defence Force Ombudsman, 'Own motion investigation into how the Australian Defence Force responds to allegations of serious incidents and offences: Review of Practices and Procedures', 1998, <www.ombudsman.gov.au/files/investigation_1998_04.pdf> at 14 July 2014.
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- 17 Joint Standing Committee on Foreign Affairs, Defence and Trade, *Rough Justice? An investigation into allegations of brutality in the Army's Parachute Battalion*, 2001.
- 18 Burchett Inquiry, above n 5, paragraphs 265-76 and recommendation 55. See also Part VIII B of the *Defence Act 1903*.
- 19 Ibid, pp157-9, recommendation 54.
- 20 Department of Defence, Australian Defence Force Publication (ADFP) 06.1.3 Executive Series, *Guide to Administrative Decision-Making*, 2nd edition, 2010.
- 21 For example, Department of Defence, ADFP 06.1.4, *Administrative Inquiries Manual*, states that 'in some cases [this manual] prescribes standards and procedures more onerous than those imposed by the ordinary law' at paragraph 1.6.
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- 23 Joint Report by the Department of Defence and the Defence Force Ombudsman, *Review of the ADF Redress of Grievance System*, 2005.
- 24 In *Millar v Bornholt* [2009] FCA 637, Logan J discussed the history and evolution of formal 'redress of grievance' or complaint mechanisms as a means by which subordinates could properly raise wrongs by, and through, their chain of command: paragraphs 12-32.
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- 35 Lieutenant General David Morrison, AO, Address to the Australian Army Legal Corps Conference, above n 3.
- 36 <www.defence.gov.au/header/documents/StageAreport.pdf> at 17 July 2014.
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JUSTICIABILITY OF NON-STATUTORY EXECUTIVE ACTION: A MESSAGE FOR IMMIGRATION POLICY MAKERS

*Amanda Sapienza**

The non-statutory executive power of the Commonwealth is firmly back on the public law agenda. Far from being neutered by the High Court's decision in *Williams v Commonwealth*,¹ which focused on the non-statutory capacity of the Commonwealth to enter into contracts for the spending of money, the Commonwealth's apparent appetite for exploring the limits of its non-statutory executive power is currently on display again, this time in an immigration context. At the time of writing, the High Court has reserved its judgment in *CPCF v Minister for Immigration and Border Protection and the Commonwealth*, a challenge to events that occurred in June and July 2014 involving the interception by the Commonwealth of a vessel containing 157 Sri Lankan asylum-seekers outside of Australia's migration zone (but inside Australia's contiguous zone), the transfer of the asylum-seekers to an Australian ship and a decision to take them somewhere other than Australia. The Commonwealth parties submitted that, if the power to take that action was not sourced in the *Maritime Powers Act 2013* (Cth) (as was their primary submission), then it was sourced in the non-statutory executive power of the Commonwealth.² They argued that a non-statutory power to take that action is not fettered by an obligation to afford procedural fairness or any notion of proportionality, as was claimed by the plaintiff. The Commonwealth parties also submitted that the exercise of any such non-statutory power would be informed by matters that are not for judicial determination. In light of these submissions, and the submissions of the plaintiff to the contrary, the High Court may be providing more elucidation of limitations on the Commonwealth's non-statutory executive power in the very near future.

The invocation of non-statutory executive power by the Coalition government in the case of the intercepted vessel is not an aberration. In the election campaign for the 2013 Federal election, the then shadow Minister for Immigration announced a number of proposed changes to the review of immigration decisions in respect of people who were living in the Australian community having arrived in Australia by boat without a visa.³ For simplicity in this paper, rather than any attempt to depersonalise or stigmatise them, this group will be referred to as 'boat arrivals'. The proposal that received the most attention, both by the press and academia, was the suggestion that the Coalition might seek to abolish the Refugee Review Tribunal.⁴ But one that slipped more under the radar was the announcement that they would seek to assess any claims to Australia's protection that boat arrivals may make by a 'non-statutory process'. They did not expand on precisely what they meant by a non-statutory process, except to say that it would be 'more streamlined', or how they would seek to achieve it. But the announcement to move to a non-statutory process was made in the context of removing any rights of boat arrivals to seek review of any decision made by the government in respect of them. The suggestion was that if the assessment process is non-statutory, boat arrivals would no longer be able to obtain judicial review of the decision that Australia does not owe them protection obligations under the

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1951 Convention relating to the Status of Refugees as amended by the 1967 Protocol relating to the Status of Refugees (the Refugee Convention).

Why would the Coalition think that? Undergraduate administrative law students could tell the Coalition policy-makers that, following the House of Lords' decision in *Council for Civil Service Unions v Minister for the Civil Service*⁵ (CCSU) and its first reception into Australia by the Full Court of the Federal Court in *Minister for Arts, Heritage and Environment v Peko-Wallsend Ltd*,⁶ (*Arts v Peko-Wallsend*) the non-statutory source of a decision alone is not enough to make a decision non-justiciable, in the sense of not being amenable to judicial review of administrative action. But the High Court has never finally determined the question. Further, the Commonwealth and other Australian governments, and also private parties advised by highly esteemed counsel and reputable solicitors, have continued to make the submission that a non-statutory source renders a decision immune from judicial review, at least on procedural fairness grounds.⁷ The courts, in response, have where possible refused to engage with the submission, deciding the case on other grounds or accepting that the law in this regard is not settled.⁸ Perhaps *CPCF v Minister for Immigration and Border Protection* will be the case in which the High Court determines this question once and for all.

It may also be that the Coalition was given hope by the reasons for judgment of the High Court in *Plaintiff S10/2011 v Minister for Immigration and Citizenship*⁹ (S10), which indicated that lawmakers had finally devised a way to exclude any obligation to afford visa applicants procedural fairness. In that case, the High Court unanimously held that departmental officers were under no obligation to afford an applicant procedural fairness when deciding whether to refer the applicant to the Minister for Immigration for him¹⁰ to consider whether to grant a visa, or allow the applicant to make a visa application, in circumstances where prior visa applications had been unsuccessful. The Minister had argued that this was the result of the non-statutory nature of the inquiries being made at that preliminary stage – the department was simply exercising the Commonwealth's executive power under s 61 of the Constitution to make inquiries of a person's circumstances, rather than affecting any legal rights or obligations. Although the joint judgment of Gummow, Hayne, Crennan and Bell JJ found that the power was sufficiently connected to an exercise of statutory authority,¹¹ perhaps the upholding of the 'mere inquiries' scheme was enough for the Coalition to think they had found a window of opportunity: a 'non-statutory' way to exclude procedural fairness and possibly all judicial review of decisions in respect of boat arrivals.

This paper argues that, even if it is possible for the government to make migration-related decisions 'non-statutory', about which there seems to be much doubt, these decisions will be judicially reviewable regardless of that non-statutory source. If the now government is hoping to exclude, so far as is constitutionally possible,¹² judicial review of protection visa decisions in respect of boat arrivals, their policy-makers will need to go back to the drawing board.

Can protection visa inquiries be made on a 'non-statutory' basis?

As alluded to at the beginning of this paper, the High Court has recently cast some doubt on the ease of the invocation of the Commonwealth's non-statutory executive power to authorise government action.¹³ The non-statutory executive power referred to is that authorised by s 61 of the Constitution that is not incidental to an exercise of statutory power: that executive power extending to the execution and maintenance of the Constitution. The High Court has accepted,¹⁴ without closing off the possibility of new categories,¹⁵ the following as categories of non-statutory executive power:

- prerogative power, understood in Blackstone's sense as the powers that the government has by virtue of its sovereign authority that are not shared with the sovereign's subjects,¹⁶ such as the power to enter into a treaty and declare war;
- non-prerogative capacities, being the powers that the government has the nature of which¹⁷ is shared with its subjects, such as the power to enter into contracts¹⁸ and make inquiries;¹⁹ and
- 'nationhood' power, which is the shorthand name generally accepted by academics, and now even the High Court,²⁰ for the power to 'engage in enterprises and activities peculiarly adapted to the government of a nation and which otherwise cannot be carried out for the benefit of the nation'.²¹

In *Plaintiff M61/2010E v Commonwealth*²² (the *Offshore Processing case*), the Commonwealth and another plaintiff, M69, submitted that the power to make inquiries of detainees on Christmas Island for the purpose of determining whether they should be allowed to make applications for visas was a non-statutory power, falling within the non-prerogative capacities. The Commonwealth submitted that, as the inquiries were of this nature, they could not affect the plaintiff's legal rights or obligations so in making the inquiries the departmental officers and reviewers were not obliged to afford the plaintiffs procedural fairness. The High Court delivered a unanimous joint judgment, deciding in accordance with the submissions of plaintiff M61 that the process was actually taken under and for the purposes of the *Migration Act 1958* (Cth).²³ This being the case, and there being no statutory indications that the principles of common law procedural fairness had been excluded from the process, well-established procedural fairness principles applied to the inquiries²⁴ and those principles had been breached.²⁵

Of relevance to the present discussion, however, is the conclusion by the Court that the inquiry process had statutory foundations.²⁶ This was due in large part to the connection of the inquiries to the exercise of a statutory power by the Minister for Immigration. Although there was no explicit statutory authorisation for the inquiries of detainees by the department or independent reviewers, the inquiries were for the purpose of assisting the Minister to decide whether he should consider exercising his statutory powers: his personal and non-compellable power to allow an offshore detainee to make a valid application for a visa where the *Migration Act 1958* (Cth) otherwise precluded it,²⁷ and his further personal and non-compellable power to grant a visa to a person in detention if he thought it was in the public interest.²⁸ The powers being personal and non-compellable meant that the Minister could not delegate their exercise to another person and that the Minister was under no duty to consider exercising the powers and could not be compelled to do so. However, the Minister had made an announcement to the effect that each time an offshore detainee invoked Australia's protection obligations, he would consider whether to exercise either or both of those powers. Inquiries into whether Australia's protection obligations were engaged were therefore necessary for and incidental to an exercise of that statutory power.

A further reason for determining that the process was essentially statutory was the ongoing detention of the plaintiffs.²⁹ If, as the Commonwealth submitted, the process being undertaken while the applicants remained in detention was non-statutory, where was the Commonwealth's authority for keeping the applicants in detention while the inquiries were being conducted? There was no non-statutory executive power to keep a person in the plaintiffs' circumstances in administrative detention.³⁰ The process must have been necessary and incidental to the exercise of the Minister's statutory power to decide whether to lift the bar on a visa application, otherwise the Commonwealth could not keep the applicants in detention during the course of the inquiries.

The consequences for the Commonwealth's detention policy of a non-statutory source of the inquiries meant that the High Court arguably did the Commonwealth a favour by deciding

that case in the way that it did. But their finding that the process was sufficiently connected to statutory power in that case has made it quite difficult for the Commonwealth to develop another scheme in the realm of migration that will be found to have a non-statutory source. In the *Offshore Processing* case, it was the close relationship of the department's and reviewer's inquiries to the exercise of the Minister's statutory power that gave those inquiries a statutory foundation. Given that it is Parliament's intention that the provisions for visas in the *Migration Act 1958* (Cth) be the only source of a right of non-citizens to enter or remain in Australia,³¹ it is difficult to conceive of a scheme for the purpose of informing the exercise of the corresponding power that would not be statutory.

The difficulty of proceeding on a non-statutory basis in migration decision-making was raised again in *S10*. At a broad level, this case presented similar kinds of statutory regimes as that in the *Offshore Processing* case: the personal, non-compellable power that is preliminary to an exercise of statutory power that, if exercised in a beneficial way, confers on an applicant a benefit that he or she would not otherwise have, namely, the capacity to make a valid visa application and be considered for a visa.³² However, as the High Court saw it, there was a crucial difference between the regime in question in the *Offshore Processing* case and the regimes in question in *S10*. This was that the plaintiffs in *S10* were not detainees who were offshore persons (that is, persons who entered Australia at an excised offshore place), as were the plaintiffs in the *Offshore Processing* case.³³ The consequence of this was that the plaintiffs in *S10* had been permitted to apply for visas (and had in fact done so and had sought and obtained merits and judicial review of the visa refusal decisions)³⁴ whereas the plaintiffs in the *Offshore Processing* case were not so permitted unless the Minister lifted the statutory bar on doing so. Whereas the process in question in the *Offshore Processing* case could have been the only opportunity for an offshore detainee to have his or her claims to Australia's protection assessed,³⁵ the powers in question in *S10* were ministerial discretions that only arose for consideration after an applicant had had his or her claims to a visa assessed, refused by a departmental officer, refused by either the Migration Review Tribunal or Refugee Review Tribunal and had an application for judicial review dismissed. Therefore, the discretions in *S10* only arose after an applicant's claims had been well-ventilated. Chief Justice French and Kiefel J identified a second important distinction: unlike in the *Offshore Processing* case, in *S10* the Minister had not decided that he would consider in every case whether to exercise the personal, non-compellable powers.³⁶ Would these differences render the inquiries process in *S10* non-statutory, with the consequence submitted by the Commonwealth: that the inquiries were not required to be attended by obligations of procedural fairness?

In joint reasons, Gummow, Hayne, Crennan and Bell JJ determined, consistently with the approach in the *Offshore Processing* case, that the inquiries were not divorced from the exercise of statutory authority.³⁷ The implication was that the inquiries were conducted pursuant to, or at least incidental to, statutory power. However, unlike in the *Offshore Processing* case, in *S10* the conclusion was that departmental officers conducting the inquiries and assessments were not required to afford applicants procedural fairness. Far from the clear and express words that previously had been required to exclude procedural fairness, Gummow, Hayne, Crennan and Bell JJ relied on certain aspects of the statutory scheme to imply an exclusion of an obligation to afford procedural fairness. These aspects included the personal and non-compellable nature of the powers, the accountability to Parliament for exercise of the powers, the presence of 'the public interest' as a relevant consideration if the Minister decides to consider exercising the powers, personal circumstances of an applicant not being a mandatory consideration and that the powers only become available after an applicant has exhausted other visa application and review avenues.³⁸

It may be that this conclusion gave the Coalition some hope of reviving a non-statutory preliminary assessment process to exclude procedural fairness requirements, and therefore prevent most judicial review applications. But if it did, the government would need to take care: it was only the statutory scheme that excluded the common law requirements of procedural fairness in *S10*. If the government attempts to further divorce assessments from the statute, there may be no statutory scheme the features of which operate to exclude procedural fairness requirements. If, on the other hand, by 'non-statutory' the Coalition meant that it will simply mimic the *S10* assessment process, it should be aware that a process that will be used, as the media reports suggested, to assess protection visa claims in the first instance will be more akin to the process in the *Offshore Processing case* than *S10*. Even without any announcement by the Minister regarding an intention to consider exercising his powers, a process for assessing protection claims, or for recommending whether even to allow protection claims to be made, in circumstances where no claim has previously been assessed and the consequence of an adverse decision is removal from Australia, is likely to be judicially reviewable in the usual way and attended by procedural fairness obligations.

It thus becomes clear that the government will have a difficult time crafting a process for assessing Australia's protection obligations in respect of boat arrivals that will be 'non-statutory' in the sense of an exercise of non-statutory power under s 61 of the Constitution. But even if it can craft such a non-statutory process, will it achieve the apparent aim of rendering decisions in respect of boat arrivals non-justiciable?

Would a non-statutory assessment of protection obligations be non-justiciable?

The term 'justiciable' is used here in its narrow, administrative law sense of amenability to the administrative law process of judicial review, rather than broader questions encompassing jurisdiction and suitability for determination by a court in other kinds of legal proceedings.³⁹ On the current state of the law of justiciability of non-statutory action, would a court examine a non-statutory assessment of protection obligations for the presence of legal error, or satisfaction of an administrative law ground of judicial review?⁴⁰ Although the High Court has not yet been required to answer this question, other Australian courts, both state and federal, have considered it in the years since *CCSU* and *Arts v Peko-Wallsend*. Based on the cases and previous academic consideration of the subject,⁴¹ there now seem to be four principles relevant to the general question of justiciability of non-statutory executive action. These are the public power principle, the subject matter principle, the affectation principle and the decision-maker principle.

The public power principle

The most recent cases examining the justiciability of exercises of non-statutory power have looked closely at the nature of the power being exercised: is it an exercise of public, as opposed to private or contractual, power? If it is an exercise of public power, then, subject to satisfaction of the subject matter principle, the exercise of power is likely to be justiciable.

The public power principle has risen to prominence largely in cases in which it was argued that a private actor, rather than a government actor, was subject to judicial review.⁴² However, the cases reveal that its relevance extends to justiciability questions arising from government action also. This relevance is reflected in two aspects of modern governance:

1. the distinction between the private and public non-statutory actions of the government and the justiciability conclusions that proceed from that distinction; and
2. the trend of outsourcing various governmental functions, such as the management of facilities and investigation of executive misconduct, to the private sector.

Public v private functions of the government

The leading case here is *Victoria v Master Builders*.⁴³ This is a key case for the justiciability of non-statutory executive action because it extended reviewability beyond the prerogative powers to the non-prerogative capacities. Pursuant to its non-statutory executive power, the executive branch of the Victorian government established a taskforce to examine collusive practices in the building industry. Based on responses by building contractors to its inquiries, the taskforce compiled a 'black list' of building contractors who were not to be used by state or local government agencies. When the taskforce circulated this black list, the Master Builders Association challenged the compilation and circulation of the black list on the basis that the contractors contained on it had been denied procedural fairness.

In determining whether the action of the taskforce in compiling and circulating the black list was justiciable, Tadgell J drew a distinction between 'the exercise of a power in the performance of a public duty' (which would likely be justiciable) and 'the mere exercise of a capacity to make arrangements for the government's internal purposes',⁴⁴ (which would be unlikely to be justiciable).⁴⁵ It seems that for Tadgell J the characterisation of the task force's duty as 'public' was the essential criterion of justiciability. What took the compilation and promulgation of the black list out of the realm of private government action was that it was 'part and parcel of a scheme designed to induce former contractors and tenderers (successful and unsuccessful) to atone for their presumed past misconduct'.⁴⁶

Justice Eames was willing to accept, without finally deciding, that for judicial review of non-statutory action to be permitted the impugned action needed to have a public law element or public law consequences.⁴⁷ In establishing whether this public law element was present, the source of the power would be relevant, but not determinative. More relevant in the present case was the need for a comprehensive analysis of the nature of the power being exercised, the characteristics of the body making the decision, and the effect of determining that the exercise of the power is not amenable to review.⁴⁸ Having conducted that analysis, his Honour decided that the action in question had a clear public law basis. This conclusion was based on considerations such as the fact that 50% of building contracts in Victoria were awarded by State or local government bodies, so the industry's integrity and efficiency were of immense public importance.⁴⁹ Further, he considered the task force to be applying the 'coercive force of the state',⁵⁰ echoing the concern of Tadgell J about the punitive intention of the scheme. Justice Eames also considered that the importance of the well-being of the building industry to the financial stability of the state indicated the presence of public law consequences.⁵¹ It seems that, for Eames J, what made the power being exercised public power was the importance of the integrity of an industry kept afloat by public money.

The relevance of this for a non-statutory assessment process for the protection claims of boat arrivals is that if the assessments can be characterised as exercises of private power, it may be that claims arising out of the assessments are non-justiciable. Since, for present purposes, we are assuming that these assessments are able to be made on a non-statutory basis, we assume that the assessment process is constitutional and falls within one of the established categories of non-statutory executive power. In the *Offshore Processing case* and *S10*, the Commonwealth claimed that the assessments were an exercise of their non-prerogative capacity to make inquiries.⁵² Is this power to make inquiries, since it is shared with private persons, private in nature? Does it fit Tadgell J's category of mere exercise of a capacity to make arrangements for the government's internal purposes? It is argued that it does not. While the power is of a kind that is shared with private individuals, its exercise in these circumstances is not private in nature because it has coercive consequences of public law significance; there is the required 'public law element'.⁵³ The inquiries have the consequence that, if not satisfactorily answered, the applicant may be removed from Australia. The inquiries are not coercive in themselves: applicants are not forced to answer

the inquiries and indeed many would consent to answering the questions asked. But the Commonwealth would be using the consensual inquiries as the basis from which to exercise their very public power of deciding who gets to remain in Australia and who does not. It seems very similar to the nature of the inquiries made of the building contractors in *Master Builders* but the public law power and consequences are more obvious.

The cases discussing public power reveal several different factors, the presence of one or more of which indicates the presence of public power:

- interpreting and applying a regulatory framework (not necessarily devised by the government) and thereby having an effect on, or capacity to affect, the public or section of the public that it regulates;⁵⁴
- such effect or consequences being significant;⁵⁵
- a capacity to affect those who must abide by the rules of the decision-maker simply because they are going about their lawful business, rather than entering into a voluntary scheme;⁵⁶ and
- the importance to the state of the industry or section of the public being regulated.⁵⁷

While it is possible to argue that the assessment of protection obligations comes within each of those factors, it suffices to point out that the first two seem to be the most easily satisfied: the assessors will be applying some kind of guidance, whether from the Refugee Convention or some guidelines issued by the Minister, to decide whether a particular applicant should be recommended for a protection visa. Justices Gummow, Hayne, Crennan and Bell JJ in *S10* articulated the effect that this has on a particular applicant: it would allow them to apply to stay in Australia when they otherwise would not be able to.⁵⁸ That would seem to be a significant effect or consequence. It seems that, regardless of whether it is done pursuant to statutory power or non-statutory power, the making of inquiries to determine whether a person can apply to stay in Australia, or engages Australia's protection obligations, is an exercise of public power.

Outsourcing of government functions

The other aspect of government that warrants attention to the public power principle is the trend of outsourcing various government functions. This is of particular relevance to the question of the justiciability of the boat arrival assessments as the reviews of such assessments have been outsourced previously, as evidenced in the *Offshore Processing* case.

The justiciability questions that arise from the outsourcing of governmental functions were touched on in *Stewart v Ronalds*.⁵⁹ This was a case arising from misconduct allegations against a New South Wales minister, Tony Stewart, and his subsequent eviction from the ministry and executive council, as permitted by the New South Wales Constitution. The Premier had retained, pursuant to non-statutory executive power, a member of the independent bar to investigate the allegations of misconduct. Thus, although *Stewart v Ronalds* is primarily a case on the justiciability of claims regarding the exercise of statutory power by the executive branch of government, it also hinted at the new frontier in justiciability of non-statutory action: justiciability of claims against private persons retained by the government to perform government functions. Ultimately, the Court of Appeal determined that it would not decide whether the actions of the investigator were amenable to judicial review or, more specifically, whether an independent third party retained by the government to conduct an investigation was required to afford procedural fairness. The issue did not need to be decided to resolve the questions stated for the Court of Appeal.

However, each of the President and Justices of Appeal offered tentative views on the issue. President Allsop noted that the investigator was ‘fulfilling a “private” retainer, though with potential “public consequences” and involving a relationship with the exercise of public power: the choice of the composition of the Ministry and the handling of the complaint otherwise by the Department.’⁶⁰ But the President stopped short of imposing a duty to afford procedural fairness to the plaintiff on this basis, taking the view that to impose procedural fairness requirements on any activity that has the capacity to affect someone’s reputation would be a potentially significant development in the principles of procedural fairness, and it was probably best left for the law of defamation.⁶¹ The distinction between public law causes of action and private law causes of action to remedy certain behaviour of government contractors was relevant.

Justice Hodgson did not exclude the existence of a duty of procedural fairness in the investigator⁶² and was content that the non-statutory basis of the retainer would not be the reason to deny the existence of any obligation.⁶³

Justice Handley appeared to be the most sceptical of imposing a duty to afford procedural fairness on the investigator. The main issue appeared to be the indirectness of any legal effect of the investigator’s actions. The investigation was not authorised by any statute or ‘consensual compact’ to have any effect on Mr Stewart. Rather, the investigation was to form the basis of a report, which in turn would form the basis of a decision by the Premier, which in turn would form the basis of a decision by the Lieutenant-Governor-in-Council. His Honour did not appear to place any weight on the likelihood that the report resulting from the investigation would provide the sole basis of the Premier’s decision and, therefore, that of the Lieutenant-Governor-in-Council, which would demonstrate that the investigator held great power over the plaintiff indeed.

The Court of Appeal was operating without the benefit of any High Court statements on the applicability of judicial review principles, and particularly procedural fairness principles, to the actions of independent people retained by the executive government. Perhaps the potential for executive use of independently retained investigators is what the High Court had in mind when, in the *Offshore Processing case*, it unanimously, and without fanfare, determined that an independent reviewer of offshore protection claim assessments was subject to an obligation to afford procedural fairness when conducting its reviews. The High Court’s reasons are singular for the lack of explicit judicial reasoning dedicated to this point. There was no discussion of the questions left open by the New South Wales Court of Appeal in *Stewart v Ronalds*. This was despite the similarities between the positions of the investigator in that case and the independent reviewers in the *Offshore Processing case*: both were retained pursuant to non-statutory power and in both cases the influence of their reports on exercises of statutory power was extensive. The justiciability of conduct of the independent reviewer was mentioned only tangentially in the *Offshore Processing case* as part of the Court’s explanation for why the assessment and review process was an essentially statutory process as opposed to a non-statutory process. In explaining why the process had statutory foundations, the Court noted that the only function of the reviewer was to make a recommendation about whether Australia owed protection obligations to the asylum-seeker.⁶⁴ From that point on, the Court made no distinction between the Department and the independent reviewers. Rather, the Court appeared to impute the action of the independent reviewers to the Department.⁶⁵

Whether the High Court appreciated the significance of this approach at the time remains to be seen. But its approach to the justiciability of actions of the independent reviewers in the *Offshore Processing case* has great ramifications for the amenability of independent contractors to judicial review for exercises of public power that have been outsourced. To the extent that *Stewart v Ronalds* suggested that outsourcing information-seeking exercises

to independent third parties might shield those exercises from an obligation to afford procedural fairness, and consequently judicial review, the High Court has removed that possibility. This leads to the conceptually satisfying position that, subject to the subject matter principle discussed below, an exercise of public power will be justiciable regardless of whether it is exercised by the executive branch of government or outsourced by that branch to an independent third party.⁶⁶ This means that the hypothetical non-statutory scheme for the assessment of the protection claims of boat arrivals will not evade judicial review simply by outsourcing the assessments, or reviews of the assessments, to independent third parties.

The subject matter principle

Of course, the power being public power will not alone render an exercise of non-statutory executive power justiciable. Given the high-level policy context in which the exercise of prerogative or other non-statutory public power often arises, a crucial question for its justiciability is whether the subject matter of the dispute is one that is resolvable by an application of judicial power. That is, can the dispute be resolved by courts declaring the law and applying legal criteria?⁶⁷ Was the exercise of power attended by 'standards capable of being assessed legally'?⁶⁸ If the answer to these questions is 'no', then the exercise of non-statutory public power will not be justiciable.

Even after it was accepted that the exercise of prerogative powers could be justiciable in an appropriate case, various prerogative powers were carved out as non-justiciable due to their subject matter being considered best left to the executive branch of government, which is politically accountable for the exercise of such powers. In *CCSU*, Lord Roskill included 'the making of treaties, the defence of the realm, the prerogative of mercy, the grant of honours, the dissolution of Parliament and the appointment of ministers'⁶⁹ in his exposition of categories of powers that, in his view, were 'not susceptible to judicial review because their nature and subject matter are such as not to be amenable to the judicial process'.⁷⁰ An Australian example is the broad statement by Wilcox J in *Arts v Peko-Wallsend* that '[i]ssues arising out of international relations have been widely regarded as non-justiciable'.⁷¹ However, to say that a particular power cannot be amenable to judicial review has since been shown to demonstrate too limited a view of justiciability. The modern trend, both in academic writing⁷² and, as will be demonstrated, in the case law, is to view justiciability from an issues perspective, rather than purely from a subject matter perspective. This means that courts seem no longer willing to decide that an applicant's claim is non-justiciable merely because the claim arises in the context of an area traditionally considered off-limits to courts, such as the conduct of international relations or national security. Rather, courts now consider whether the precise arguments made by an applicant actually require 'an extension of the court's true function into a domain that does not belong to it'.⁷³

In Australia, this trend began with the 1988 decision in *Re Diftfort; Ex parte Deputy Commissioner of Taxation*.⁷⁴ In this case, Gummow J was willing to examine the terms of communication between Australia and Germany to establish whether information afforded to Germany was true and complete and whether conduct of the Australian authorities was consistent with the terms of the extradition agreement in respect of Mr Diftfort.⁷⁵ Although the case involved Australia's interactions with a foreign state, neither of the two inquiries engaged in by Gummow J required the Court to make a decision as to the propriety of conduct of a foreign state or as to whether a particular action is suitable in the context of international relations. Rather, they were inquiries of the kind to which judges are well-accustomed – assessing conduct against agreed standards.

A more recent example of the courts examining the precise issues or claims raised is the decision of *Aye v Minister for Immigration and Citizenship*.⁷⁶ The applicant's visa was

cancelled and she sought to challenge that decision by challenging the antecedent policy decision by the Minister of Foreign Affairs to impose sanctions on senior members of the Burmese regime and their immediate families. The applicant was the daughter of a member of the regime. Although the judgments reveal different approaches to the issues by the justices, ultimately they all seem to reach the same point: the applicant's claims were about the policy decision to impose sanctions on family members of the Burmese officers.⁷⁷ She wanted to challenge that policy decision but the court would not allow it as the correctness or otherwise of the policy is not justiciable. If the applicant's claims had related to whether she fell within the terms of the policy; the application of the policy rather than its content; those claims would have been justiciable regardless of the foreign affairs context of the decision.⁷⁸

The High Court can be seen to be supporting this more substantive approach in *Moti v The Queen*.⁷⁹ In this case, the Court was asked to review the conduct of Australian officials in facilitating the deportation of an Australian citizen from the Solomon Islands in circumstances where they knew that the deportation by officials of the Solomon Islands breached Solomon Islands law. In a majority joint judgment, French CJ and Gummow, Hayne, Crennan, Kiefel and Bell JJ examined a rule of international law previously thought to be sacrosanct, that 'the Courts of one country will not sit in judgment on the acts of the government of another done within its own territory'⁸⁰ (also known as the 'Act of State doctrine'). They held that any Act of State doctrine 'must not be permitted to distract attention from the need to identify the issues that arise in each case at a more particular level than is achieved by applying a single, all-embracing formula'.⁸¹ They concluded that 'the fact that the decision of a foreign official is called into question does not of itself prevent the courts from considering the issue'.⁸²

Encompassing those international relations decisions, but extending much wider to capture many domestic questions, are polycentric and political decisions. A polycentric decision is one that is based on a number of different factors, some of which may conflict and compete with others for dominance and many of which may involve questions of policy rather than legal standards.⁸³ The decision in *Arts v Peko-Wallsend* to seek World Heritage listing for Stage 2 of Kakadu National Park was an example of this kind of decision, turning as it did on the Cabinet's evaluation of competing factors such as environmental preservation, international relations, indigenous claims, tourism, interests of miners and other economic factors. Chief Justice Bowen made it clear that such decisions are not suitable for judicial determination.⁸⁴ A political decision, to any extent that it is not polycentric, can be defined, for present purposes, as a decision that involves a choice between different policy outcomes or a choice between different methods of achieving a policy outcome, whether for the public at large or in relation to a class of the public. An obvious current example is the Commonwealth government's position on how to deal with climate change. The basis for non-justiciability of these kinds of decisions is that Australia's system of responsible and representative government commits such decisions not to the judiciary but to the branch of government that is accountable to the people, the legislature, either directly (when such decisions are translated into legislation) or via the decisions and conduct of the executive branch, which must maintain the confidence of the legislature. Their committal for resolution elsewhere leads back to the question of whether there is a lack of judicial standards for assessing the decision or conduct in question.⁸⁵ This was one of the problems facing the Full Court of the Supreme Court of South Australia in *Xenophon v South Australia*, when the Court was asked to review a decision to grant a minister indemnity for damages and costs in a defamation action. Justice Bleby stated that there were simply no criteria by which a court could judge the legal correctness or validity of any decision of that kind and that if a bad decision of that kind was made, it would be a matter for Parliament or the community.⁸⁶

Ultimately, the subject matter principle reflects the separation of powers doctrine. An application of the substantive approach to subject matter justiciability that has found favour

with the courts has the result that each and every claim made in an application for review of non-statutory action is subjected to an analysis of whether the court is being asked to resolve a question that is properly the domain of another branch of government to resolve. If the court is being asked to perform that task, the court would properly conclude that the issue or claim is not justiciable. If, however, the court is being asked to resolve a question that arises in the context of, for example, international relations or some political decision, but does not involve casting judgment on the merits of that decision itself, the issue or claim may well be justiciable.

What does this more substantive approach to subject matter justiciability mean for the hypothetical non-statutory process for the assessment of protection claims? It means that while the policy decisions that the government makes in the field of assessment of protection claims are unlikely to be justiciable, any application of that policy to a specific person is likely to be. Although they occur in the context of Australia's international obligations under the Refugee Convention, there is nothing about the review of protection visa assessments that asks the judiciary to perform a task that the Constitution or Parliament has allocated to the executive. So much is clear because the courts have been reviewing these decisions since the government started making them. Even if it is possible to somehow take away any reference to the *Migration Act 1958* (Cth), what remains is a court looking at how the government has applied standards set out in the Refugee Convention and their own policy considerations to the cases of individual people. That is a classic example of an administrative decision. In the field of protection claim assessments, it seems that there will always be standards against which the exercise of public power can be legally assessed.

The affectation principle

The affectation principle refers to the requirement that a decision have the capacity to affect a person's legal rights, obligations or legitimate expectations before it can be justiciable.⁸⁷ In *Arts v Peko-Wallsend*, one of the bases on which Wilcox J considered the matter to be non-justiciable was that Peko-Wallsend's rights and obligations under its mining leases remained as they had been before the decision to nominate the site for listing; it was simply that they may be less valuable.⁸⁸ Similarly, in *Xenophon v South Australia*, it was held that the decision to grant the indemnities did not adversely affect the rights of any citizen and that this was one of several reasons why the decision was not reviewable by a court.⁸⁹

However, in none of those cases was the failure of the applicant to satisfy the affectation principle the sole reason for the issues being non-justiciable. Rather, non-justiciability was the result of an application of the subject matter principle. In *Arts v Peko-Wallsend*, the polycentricity of the decision and its relationship to matters of international relations made the claims non-justiciable. In *Xenophon v South Australia*, it was the lack of criteria by which a court could judge the legal correctness of the granting of the indemnities. A similar analysis can be applied to two paradigm areas of non-statutory decision-making: entering into treaties and policy-making. The failure of entry into a treaty to create legal rights in an individual has been held to constitute a basis for denying the justiciability of entering into a treaty.⁹⁰ However, the reasons for which a government enters into a treaty or an agreement are matters within the knowledge of and for assessment by the executive branch of government, rather than the judicial branch, so treaty-making could be non-justiciable on this basis.⁹¹ In respect of political decisions, such decisions of themselves will not ordinarily affect a person's rights, obligations or interests until they are implemented by a government scheme.⁹² Adherence to the affectation principle could result in such decisions being non-justiciable on that basis. However, the same result occurs if the decision is looked at through the prism of the subject matter principle: policy-making is a matter for which a government is elected and for which the government is accountable to the electorate through the political process,⁹³ rather than to the courts through an application of judicial power.

Thus, it could be argued that failure to satisfy the affectation principle is an indication that the subject matter of the decision is one that cannot be resolved by an application of judicial power. It is a factor relevant to the subject matter principle, rather than a stand-alone principle of justiciability of non-statutory executive action.

However, in deference to the plethora of cases and commentary that consider the affectation principle to be a crucial justiciability principle in its own right, it will be used here to assess the justiciability of the hypothetical protection claims assessment process. It is clear that the assessment will affect the interest of the applicant in remaining in Australia, or at least the applicant's interest in liberty given that, if the assessment is adverse, the applicant is likely to be taken into detention pending his or her removal from Australia. In *S10*, the plaintiff's interest in obtaining a relaxation of the operation of the visa system would have been a sufficient interest for the implication of an obligation to afford procedural fairness, had the statutory scheme not displaced it.⁹⁴ Thus the applicant would satisfy the test for implication of procedural fairness. Does this also satisfy the affectation principle for justiciability?

Courts have remarked on the similarities between the affectation principle and the test for the implication of procedural fairness, being the making of a decision that will affect a person's rights, interests or legitimate expectations.⁹⁵ There are several examples of appeal court cases in which a judge mentions the affectation principle as going to justiciability but determines justiciability based on either the public power or subject matter principle and only discusses the affectation principle in considering grounds of review, namely, procedural fairness.⁹⁶ At a practical level, does this matter? If a court is engaging in judicial review to work out whether there was a breach of procedural fairness, obviously there is some implicit antecedent decision that there is a justiciable controversy.

In the case of the present hypothetical situation, which will operate at the Commonwealth level, the potential issue lies in reconciling the test for an implication of procedural fairness with the jurisdictional requirement of a 'matter',⁹⁷ being 'some immediate right, duty or liability to be established by the determination of the Court'.⁹⁸ Does this formulation leave any room for non-legal interests such as those of the hypothetical applicant? Once it is appreciated that the interest that attracted procedural fairness need not be the same 'right, duty or liability' that founds the matter, the answer is yes. The 'right, duty or liability' when an administrative decision is challenged could be the right of the decision-maker to act upon or give effect to the decision⁹⁹ or the duty of the applicant to abide by the decision. The legal right, duty or liability required for a 'matter' could be the right, duty or liability settled by the remedy:¹⁰⁰ a declaration of rights or legal position, or an order to re-make a decision that, in law, has not been made. Although the applicant has no legal right to a particular decision, and even perhaps, depending on how this hypothetical scheme works, no right to have an application considered, the applicant's interest in the outcome will be enough to give rise to a matter, and a justiciable controversy, because non-legal interests can still attract legal obligations which, if unperformed, can yield a public law remedy. Accordingly, the applicant would satisfy the affectation principle of justiciability.

It should be noted that even if, as suggested here, the affectation principle no longer plays the crucial role in establishing justiciability of non-statutory executive action that it once did, the principle remains relevant to judicial review. Certainly the impact of a decision on a person's rights, obligations or interests remains central to establishing standing and entitlement to remedies. So far as the present hypothetical scheme is concerned, the High Court has recognised on several occasions that the non-legal interests of the kind at play in visa and deportation decisions are the kind which attract the protection of procedural fairness principles,¹⁰¹ and that the interests that attract the protection of procedural fairness principles are equal to those which confer on an applicant standing to seek a public law

remedy.¹⁰² On this basis, there would be no doubt that the hypothetical applicant would have standing to challenge the legality of the assessment.

The decision-maker principle

The decision-maker principle refers to the status of the decision-maker as being either a determinative or influential factor in establishing justiciability. Historically, there has been reticence to conduct judicial review of decisions of the Crown, which is comprised of the ministers, public servants and statutory corporations and that make up the executive branch of government.¹⁰³ While the courts were willing to examine whether a prerogative power existed and its extent,¹⁰⁴ Crown immunities, steeped in notions that 'the King can do no wrong'¹⁰⁵ and that the counsels of the Crown are secret,¹⁰⁶ precluded a court from considering the motives and deliberations of the Crown when making administrative decisions. As the role of the Crown and government changed, this immunity began to break down. In *Padfield v Minister of Agriculture, Fisheries and Food*,¹⁰⁷ the House of Lords inquired into the motives of the Minister in making an administrative decision and conducted judicial review on the ground of unauthorised purpose,¹⁰⁸ rather than the simple ultra vires question of whether the power existed.¹⁰⁹

This development cleared the way for an important ruling from the High Court of Australia in relation to the justiciability of actions by the Queen's representatives in Australia: the Governor-General, the state Governors and the territory Administrators. In *R v Toohey; Ex parte Northern Land Council*¹¹⁰ all members of the High Court held that an exercise of statutory power by the Administrator of the Northern Territory could be subject to judicial review on grounds of unauthorised purpose and bad faith.¹¹¹ In oft-cited¹¹² obiter, Mason J indicated that he would be willing to extend review to the non-statutory acts of the Queen's representatives, where the representative had acted on the advice of Ministers.¹¹³ His Honour suggested that the proper test for justiciability of an exercise of prerogative power is not who is exercising the power but whether the nature and subject matter of the power make it amenable to judicial review.¹¹⁴

Recently, in *Aye v Minister for Immigration and Citizenship*, Lander J confirmed that a decision of a Minister, whether under statute or the common law, or of Cabinet or of one of the Queen's representatives in Australia could be amenable to judicial review, and that this amenability depended not on the source of the power, in the sense of the identity of the decision-maker, but on the nature and subject matter of the power.¹¹⁵

There is a great deal more that can be said about the declining importance of the decision-maker principle, particularly as it applies to Cabinet decisions.¹¹⁶ But even if the decision-maker principle remains relevant to the justiciability of non-statutory action, this would not assist the government in its quest to avoid judicial review of non-statutory protection assessments. It is extremely unlikely that these decisions, numbering in the tens of thousands as suggested by the Coalition, are going to be made by any officer higher than a Minister. Thus, for present purposes it suffices to say that, although the position in respect of non-statutory power has never been authoritatively stated and applied, the decision-maker principle seems to be no longer a basis on which a claim in respect of non-statutory power will be non-justiciable. The status of the decision-maker may make a claim very difficult to substantiate evidentially. For example, if a person wishes to impugn a decision of the Cabinet,¹¹⁷ there will be great difficulties in obtaining information about Cabinet deliberations.¹¹⁸ Claims of public interest immunity for decisions of high-ranking officials and bodies can also thwart challenges to such decisions. However, it seems that an exercise of non-statutory public power that satisfies the modern, substantive approach to the subject matter principle will not be rendered non-justiciable simply because a high level decision-maker is involved.

Conclusion

It is unclear quite what the Coalition intended to do to implement its announcement that the assessment of protection claims for boat arrivals living in Australia would be non-statutory. However, its aim in attempting to make the assessments non-statutory seemed clear enough: it wanted to exclude or minimise the possibility of the boat arrivals accessing the courts for judicial review of adverse decisions. This paper has attempted to demonstrate two things. First, given that these decisions will be made in the context of granting or refusing visas, which are granted or refused under the *Migration Act 1958* (Cth), it will be very difficult to formulate a process that is both non-statutory and successful at excluding the implication of procedural fairness obligations. Secondly, even if the government could formulate a non-statutory scheme, an application of what it is submitted are the modern principles of justiciability of non-statutory executive action suggests that the assessments will still be justiciable. The exercise of the non-statutory executive power of the government to make inquiries has public law consequences: forcing the movement of the applicant. There is nothing in the subject matter of these assessments that suggests that judicial review is not appropriate: bureaucrats, or contractors, will be making assessments based on, one assumes, criteria for being a refugee or other criteria devised by the government, and applying those criteria to individuals. Judicial power is exercised in respect of those kinds of decisions every day. If the government is looking for a way to make these 30,000 boat arrivals go away quietly, attempting to go 'non-statutory' is not the way to do it.

Endnotes

- 1 *Williams v Commonwealth* (2012) 248 CLR 156 (*Williams No. 1*).
- 2 The questions stated for the Full Court and the written submissions of the parties are currently available on the High Court's website at http://www.hcourt.gov.au/cases/case_s169-2014. For a more detailed summary of the written submissions made to the Full Court in respect of non-statutory executive power, see Amanda Sapienza, 'CPCF: Will Tampa Finally Get its Day in the High Court?', Constitutional Critique, 11 October 2014, (Constitutional Reform Unit Blog, University of Sydney, http://blogs.usyd.edu.au/cru/2014/10/cpcf_will_tampa_finally_get_it_1.html).
- 3 Bianca Hall and Judith Ireland, 'Tony Abbott Evokes John Howard in Slamming Doors on Asylum Seekers', *The Sydney Morning Herald* (online), 15 August 2013 <http://www.smh.com.au/federal-politics/federal-election-2013/tony-abbott-evokes-john-howard-in-slamming-doors-on-asylum-seekers-20130815-2rzzv.html>.
- 4 See, for example, George Williams, 'Asylum Processing Plan Fails on Two Fronts', *UNSW Newsroom* (online), 27 August 2013 <http://newsroom.unsw.edu.au/news/law/asylum-processing-plan-fails-two-fronts>.
- 5 *Council of Civil Service Unions v Minister for the Civil Service* [1985] 1 AC 374 (CCSU case).
- 6 *Minister for Arts, Heritage and Environment v Peko-Wallsend Ltd* (1987) 15 FCR 274 (*Arts v Peko-Wallsend*).
- 7 See, for example, *Plaintiff M61/2010E v Commonwealth of Australia* (2010) 243 CLR 319 (the *Offshore Processing case*), 328-330 (defendants submissions); *Victoria v Master Builders Association* [1995] 2 VR 121, 132-133 (Tadgell J), 147 (Ormiston J), 152 (Eames J); *Sweetwater Action Group Inc v Minister for Planning* [2011] NSWLEC 106 (7 July 2011) [101]; *Huntlee Pty Ltd v Sweetwater Action Group Inc* (2011) 185 LGERA 429, 450 [94].
- 8 See, for example, *Offshore Processing case* (2010) 243 CLR 319, 351 [73]; *Stewart v Ronalds* (2009) 76 NSWLR 99, 112 [41]; *Huntlee v Sweetwater* (2011) 185 LGERA 429, 450 [94] (Sackville AJA).
- 9 *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636 (*S10*).
- 10 The male pronoun is used in this paper as at all relevant times the Minister for Immigration has been male.
- 11 *S10* (2012) 246 CLR 636, 665 [93] (Gummow, Hayne, Crennan and Bell JJ).
- 12 It is now well-accepted that the High Court's jurisdiction to conduct judicial review, insofar as a claim falls within s 75(v) of the Constitution, cannot be excluded (see generally *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476) but that does not mean that all claims made in a s 75(v) application are justiciable.
- 13 See *Williams No. 1* (2012) 248 CLR 156.
- 14 See, for example, *Davis v Commonwealth* (1988) 166 CLR 79, 108-109 (Brennan J).
- 15 *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1, 127 [60] (French CJ).
- 16 William Blackstone, *Commentaries on the Laws of England* (Garland Publishing, 1765), vol 1, 232.
- 17 Though not necessarily the extent: see *Williams No. 1* (2012) 248 CLR 156 for an example of the High Court enforcing limits on the power of the Commonwealth to enter into contracts for the spending of money insofar as the power is derived from s 61 of the Constitution.
- 18 See *Williams No. 1* (2012) 248 CLR 156.

- 19 See *Clough v Leahy* (1904) 2 CLR 139; *Lockwood v Commonwealth* (1954) 90 CLR 177.
- 20 See *Williams v Commonwealth* [2014] HCA 23 (*Williams No. 2*) [23] (French CJ, Hayne, Kiefel, Bell and Keane JJ). Until this case, recent High Court judgments had avoided the use of the label 'nationhood power': see Anne Twomey, 'Pushing the Boundaries of Executive Power: Pape, the Prerogative and Nationhood Powers' (2010) 34(1) *Melbourne University Law Review* 313, 317.
- 21 *Victoria v Commonwealth* (1975) 134 CLR 338 (*AAP case*), 397 (Mason J).
- 22 *Offshore Processing case* (2010) 243 CLR 319.
- 23 *Ibid* 334 [9].
- 24 *Ibid* 351-352 [73].
- 25 *Ibid* 334-335 [8]-[9].
- 26 See *ibid* 349-351 [65]-[70].
- 27 See *Migration Act 1958* (Cth) s 46A(2), (3), (7).
- 28 See *Migration Act 1958* (Cth) s 195A(2), (4), (5).
- 29 See *Offshore Processing case* (2010) 243 CLR 319, 337-338 [21], 341-342 [35] and 348 [62].
- 30 Such can be implied from *ibid* 337-338 [21] and 348-349 [62]-[65]. The extent of a non-statutory power to keep a person in administrative detention in other circumstances is another matter that may be determined in *CPCF v Minister for Immigration and Border Protection*.
- 31 *S10* (2012) 246 CLR 636, 657-658 [63] (Gummow, Hayne, Crennan and Bell JJ).
- 32 The sections in question in *S10* (2012) 246 CLR 636 were *Migration Act 1958* (Cth) ss 48B, 195A, 351 and 417.
- 33 *S10* (2012) 246 CLR 636, 652 [42] (French CJ and Kiefel J), 662 [79]-[80] (Gummow, Hayne, Crennan and Bell JJ), 673 [121] (Heydon J).
- 34 *Ibid* 642 [5] (French CJ and Kiefel J), 674 [121] (Heydon J).
- 35 A submission also made in respect of the plaintiff in *CPCF v Minister for Immigration and Border Protection*.
- 36 *Ibid* 652-653 [41], [43]-[46] (French CJ and Kiefel J).
- 37 *Ibid* 665 [93] (Gummow, Hayne, Crennan and Bell JJ).
- 38 *Ibid* 667-668 [99] (Gummow, Hayne, Crennan and Bell JJ).
- 39 Sir Anthony Mason, 'The High Court as Gatekeeper' (2000) 24 *Melbourne University Law Review* 784, 788. For a discussion of the different meanings of 'justiciability', see Geoffrey Lindell, 'The Justiciability of Political Questions: Recent Developments' in HP Lee and G Winterton (eds), *Australian Constitutional Perspectives* (Law Book Company Ltd, 1992) 180, 183-191. The focus in this paper would fall within Lindell's third conception of 'justiciability', although it is noted that Lindell questions whether use of the term 'non-justiciable' serves a useful purpose when used in this context because 'the lack of authority to deal with the issue classified as "non-justiciable" stems from the facts that as a result of exercising its jurisdiction and applying all relevant principles of law, the court finds that the facts raised do not give rise to any legal grounds for complaint' (p 188). For a similar argument regarding this conception of justiciability, see Chris Finn, 'The Justiciability of Administrative Decisions: A Redundant Concept?' (2002) 30 *Federal Law Review* 239.
- 40 It is this examination of administrative action for legal error that I refer to as 'judicial review', rather than the narrower process of reviewing administrative action for the purpose of issuing prerogative relief. For an example of the narrower conception of 'judicial review' see *CECA Institute Pty Ltd v Australian Council for Private Education and Training* (2010) 30 VR 555.
- 41 See, for example, Margaret Allars, 'Public Administration in Private Hands' (2005) 12(2) *Australian Journal of Administrative Law* 126.
- 42 See, for example, *Forbes v New South Wales Trotting Club Ltd* (1979) 143 CLR 242 (*Forbes*), 264, 268-269 (Gibbs J), 274-275 (Murphy J); *Typing Centre of New South Wales v Toose* (unreported, Supreme Court of New South Wales, Mathews J, 15 December 1988); *Masu Financial Management Pty Ltd v Financial Industry Complaints Service Ltd (No 2)* (2004) 50 ACSR 554; [2004] NSWSC 829 and *Mickovski v Financial Ombudsman Service Ltd* (2012) 91 ACSR 106.
- 43 *Victoria v Master Builders Association* [1995] 2 VR 121.
- 44 *Ibid* 138 (Tadgell J).
- 45 *Ibid* 137 (Tadgell J).
- 46 *Ibid* 137 (Tadgell J).
- 47 *Ibid* 162 (Eames J), following the approach of Lord Diplock in *CCSU case* [1985] 1 AC 374, 409.
- 48 *Victoria v Master Builders Association* [1995] 2 VR 121 163 (Eames J).
- 49 *Ibid* 164 (Eames J).
- 50 *Ibid* 164 (Eames J).
- 51 *Ibid* 164 (Eames J).
- 52 *Offshore Processing case* (2010) 243 CLR 319, 328 (first and second defendants' submissions); *S10* (2012) 246 CLR 636, 640 (defendants' submissions) citing *Clough v Leahy* (1904) 2 CLR 139, 156-157; *A v Hayden* (1984) 156 CLR 532; [1984] HCA 67, 580-581 and *Commonwealth v Mewett* (1997) 191 CLR 471, 546-551.
- 53 See also (in a more general context) Chris Finn, 'The Public/Private Distinction and the Reach of Administrative Law' in Matthew Groves (ed), *Modern Administrative Law in Australia: Concepts and Context* (Cambridge University Press, 2014) 49, 52.

- 54 *Forbes* (1979) 143 CLR 242, 268-269 (Gibbs J), 275 (Murphy J); *R v Panel on Takeovers and Mergers; Ex parte Datafin Plc* [1987] 1 QB 815 (*Datafin*), 826, 838 (Donaldson MR); *Typing Centre* (unreported, Supreme Court of New South Wales, Mathews J, 15 December 1988) (*Typing Centre*) 19-20.
- 55 *Victoria v Master Builders Association* [1995] 2 VR 121, 137-138 (Tadgell J), 163 (Eames J); *Masu Financial (No 2)* (2004) 50 ACSR 554; [2004] NSWSC 829, 560 [7].
- 56 *Datafin* [1987] 1 QB 815, 845-846 (Lloyd LJ); *Typing Centre* (unreported, Supreme Court of New South Wales, Mathews J, 15 December 1988) 20.
- 57 *Victoria v Master Builders Association* [1995] 2 VR 121, 138 (Tadgell JA), 164 (Eames JA). See also *Typing Centre* (unreported, Supreme Court of New South Wales, Mathews J, 15 December 1988) 20.
- 58 *S10* (2012) 246 CLR 636, 659 [69] (Gummow, Hayne, Crennan and Bell JJ).
- 59 *Stewart v Ronalds* (2009) 76 NSWLR 99.
- 60 *Ibid* 116 [71] (Allsop P).
- 61 *Ibid* 116 [71] (Allsop P).
- 62 *Ibid* 121 [108] (Hodgson JA).
- 63 *Ibid* 122 [113] (Hodgson JA).
- 64 *Offshore Processing case* (2010) 243 CLR 319, 344 [50].
- 65 See *ibid* 350 [69]. It should be noted, however, that the Court did not feel obliged to determine whether the independent reviewer was an 'officer of the Commonwealth' such as to ground the High Court's jurisdiction in s 75(v) of the Constitution because other bases of jurisdiction were available: 345 [51].
- 66 Though see Lisa Burton, 'Section 75(iii) of the Commonwealth Constitution and the outsourcing of public power' (paper presented at the 2014 AIAL National Administrative Law Conference, University Club, University of Western Australia, 25 July 2014) for an explanation of why it may be that not all outsourced public power falls within the High Court's jurisdiction to conduct judicial review.
- 67 Mason, above n 39, 796.
- 68 *Stewart v Ronalds* (2009) 76 NSWLR 99, 112 [43] (Allsop P).
- 69 *CCSU case* [1985] 1 AC 374 418 (Lord Roskill). In relation to the prerogative of mercy, at least, this statement has proven not to be authoritative, at least in the United Kingdom, as can be seen in *R v Secretary of State for the Home Department; Ex parte Bentley* [1994] QB 349 and *Lewis v Attorney General of Jamaica* [2001] 2 AC 50: see Mark Elliott, *Beatson, Matthews, and Elliott's Administrative Law: Text and Materials* (Oxford University Press, 4th ed, 2011) 124-126 [5.3.3]. In Australia, the High Court held in 1908 that 'no court has jurisdiction to review the discretion of the Governor in Council in the exercise of the prerogative of mercy' (*Horwitz v Connor* (1908) 6 CLR 38, 40, recently applied and extended to include ancillary statutory powers of the Attorney-General in *von Einem v Griffin* (1998) 72 SASR 110). However, the High Court recently left argument on the question open (see *Osland v Secretary, Department of Justice* (2008) 234 CLR 275, 297-298 [47] (Gleeson CJ, Gummow, Heydon and Kiefel JJ), 307 [80] (Kirby J)).
- 70 *CCSU case* [1985] 1 AC 374 418 (Lord Roskill).
- 71 *Arts v Peko-Wallsend* (1987) 15 FCR 274, 307 (Wilcox J).
- 72 See, for example, Elliott, above n 69, 123-129 [5.3.3]; Alan Robertson, 'The Boundaries of Judicial Review and Justiciability; Comparing Perspectives from Australia and Canada' (Seminar sponsored by the Australian Institute of Administrative Law (NSW Chapter) in conjunction with the Constitutional and Administrative Law Section of the New South Wales Bar Association and the Australian Association of Constitutional Law, Supreme Court of New South Wales, 22 July 2013); Alan Robertson, 'The Relationship between the Crown and the Subject' (1998) 17(3) *Australian Bar Review* 209.
- 73 *Re Diftort; Ex parte Deputy Commissioner of Taxation* (1988) 19 FCR 347, 370.
- 74 *Ibid*, particularly at 369-370.
- 75 *Ibid* 374-376.
- 76 *Aye v Minister for Immigration and Citizenship* (2010) 187 FCR 449.
- 77 *Ibid* 452 [9], [12] (Spender J), 474-475 [127] (McKerracher J). Justice Lander considered that the applicant's claims related to the narrower determination that the applicant fell within the class of people targeted by the sanctions, which was justiciable (471-472 [108]), rather than the decision to actually impose the sanctions, which was not justiciable (470 [99]).
- 78 *Ibid* 452-453 [13]-[14] (Spender J), 473 [115] (Lander J), 475 [128] (McKerracher J).
- 79 *Moti v The Queen* (2011) 245 CLR 456.
- 80 *Ibid* 474-475 [46]-[49] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).
- 81 *Ibid* 475 [52] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).
- 82 *Ibid* 476 [52] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).
- 83 See, for example, the discussion of the legislative scheme for allocating water entitlements in *Tubbo Pty Ltd v Minister Administering the Water Management Act 2000* (2009) 302 ALR 299, 314 [69]-316 [77] (Spigelman CJ).
- 84 *Arts v Peko-Wallsend* (1987) 15 FCR 274, 279 (Bowen CJ).
- 85 See, for example, *Petrotimor Companhia De Petroleos SARL v Commonwealth* (2003) 126 FCR 354, 369 [47] (Black CJ and Hill J) in the context of adjudicating on the acts of foreign states, citing *Buttes Gas and Oil Company v Hammer* [1982] AC 888, 938 (Lord Wilberforce) and 427-429 [228]-[234] (Beaumont J in the context of a discussion of America's 'political question' doctrine); and *Xenophon v South Australia* (2000) 78 SASR 251, 264 [60] (Bleby J).
- 86 *Xenophon v South Australia* (2000) 78 SASR 251, 264 [60] (Bleby J).
- 87 See *CCSU case* [1985] 1 AC 374, 408-409 (Lord Diplock).

- 88 *Arts v Peko-Wallsend* (1987) 15 FCR 274, 306 (Wilcox J).
- 89 *Xenophon v South Australia* (2000) 78 SASR 251 264 [60] (Bleby J).
- 90 See, for example, *Re East; Ex parte Nguyen* (1998) 196 CLR 354, 362 [18]-[19] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan J), *Minogue v Human Rights and Equal Opportunity Commission* (1999) 84 FCR 438, 447 [36].
- 91 See *Thorpe v Commonwealth of Australia (No 3)* (1997) 144 ALR 677, 693 for an example relating to other decision-making in the international sphere rather than treaty-making.
- 92 For an example of the application of a non-statutory high level policy decision to a particular person being justiciable on natural justice grounds, see *Blyth District Hospital Inc v South Australian Health Commission* (1988) 49 SASR 501, 509 (King CJ).
- 93 See *Arts v Peko-Wallsend* (1987) 15 FCR 274, 279 (Bowen CJ).
- 94 *S10* (2012) 246 CLR 636, 659 [69], 666 [96] (Gummow, Hayne, Crennan and Bell JJ).
- 95 See, for example, *Arts v Peko-Wallsend* (1987) 15 FCR 274, 304 (Wilcox J). In relation to legitimate expectations, however, in deciding in *S10* that the inquiries were not attended by an obligation to afford procedural fairness, Gummow, Hayne, Crennan and Bell JJ sounded the final death knell for the affectation of 'legitimate expectations' as a basis for implying procedural fairness obligations, stating that the term 'either adds nothing or poses more questions than it answers and thus is an unfortunate expression which should be disregarded': 658 [65].
- 96 See, for example, *Xenophon v South Australia* (2000) 78 SASR 251, 253-254 [8], [11] (Prior J) and *Victoria v Master Builders Association* [1995] 2 VR 121, 160-161, 164 (Eames J).
- 97 See *Commonwealth Constitution* ss 75 and 76; *Judiciary Act 1903* (Cth) s 39B(1).
- 98 *Re Judiciary Act 1903-1920 and Navigation Act 1912-1920* (1921) 29 CLR 257, 265 (Knox CJ, Gavan Duffy, Powers, Rich and Starke JJ).
- 99 See *Abebe v Commonwealth* (1999) 197 CLR 510, 555 [118] (Gaudron J, Gummow J (at 561 [139]) and Hayne J (at 574 [176]) agreeing).
- 100 See *ibid* 527-528 [31]-[32] (Gleeson CJ and McHugh JJ).
- 101 *S10* (2012) 245 CLR 636, 659 [66] (Gummow, Hayne, Crennan and Bell JJ) citing *Kioa v West* (1985) 159 CLR 550, 622 (Brennan J), 632 (Deane J).
- 102 See, most recently, *S10* 659 [68] (Gummow, Hayne, Crennan and Bell JJ), referring to *Kioa v West* (1985) 159 CLR 550, 621 (Brennan J).
- 103 Robertson, above n 72 (1998), 209.
- 104 See, for example, *Case of Proclamations* (1611) 12 Co Rep 74; 77 ER 1352; *CCSU case* [1985] 1 AC 374, 398 (Lord Fraser of Tullybelton), 407 (Lord Scarman).
- 105 *R v Toohey; Ex parte Northern Land Council* (1981) 151 CLR 170 (*R v Toohey*), 217-218 (Mason J).
- 106 *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 179 (Dixon J).
- 107 [1968] AC 997.
- 108 Although the more common name for this ground of review is 'improper purpose', I prefer the term 'unauthorised purpose' for the reasons given by Robin Creyke and John McMillan, *Control of Government Action: Text, Cases and Commentary* (LexisNexis Butterworths, 2nd ed, 2009) 593 [9.2.1], namely, that '[t]here is no ethical or pejorative question arising, other than that the decision-making purpose must be authorised by the legislation'.
- 109 In Australia, it is considered that such an extension of judicial review principles beyond simple ultra vires grounds was recognised in *Murphyores Inc Pty Ltd v Commonwealth* (1976) 136 CLR 1. See *FAI Insurances Ltd v Winneke* (1982) 151 CLR 342, 380 (Aickin J).
- 110 *R v Toohey* (1981) 151 CLR 170.
- 111 Justice Wilson determined that the Administrator was the Crown's representative in the Northern Territory (at 279-280). Justice Mason was willing to assume such (at 217). Justices Stephen (at 202), Murphy (at 231, dissenting in the result) and Aickin J (at 265-266) held that the question was unnecessary to determine. Chief Justice Gibbs held that the Administrator was not the representative of the Crown (at 185) but determined the matter on the basis that he was in deference to the approach of the majority and decided that, even if the Administrator was the Crown's representative, the exercise of power was still amenable to judicial review (at 193).
- 112 See, for example, *Aye v Minister for Immigration and Citizenship* (2010) 187 FCR 449, 465 (Lander J); *Stewart v Ronalds* (2009) 76 NSWLR 99, 112 [40] (Allsop P); *Victoria v Master Builders Association* [1995] 2 VR 121, 156 (Eames J) and *Arts v Peko-Wallsend* (1987) 15 FCR 274, 278 (Bowen CJ), 302 (Wilcox J).
- 113 *R v Toohey* (1981) 151 CLR 170, 220 (Mason J).
- 114 *Ibid* 220 (Mason J).
- 115 *Aye v Minister for Immigration and Citizenship* (2010) 187 FCR 449, 469-470 [98] (Lander J).
- 116 This is yet another matter that may get some attention in *CPCF v Minister for Immigration and Border Protection*, as the decision to take the plaintiff and other asylum-seekers to India was apparently made by the National Security Committee of Cabinet.
- 117 Perhaps, for example, in circumstances akin to those in *South Australia v O'Shea* (1987) 163 CLR 378 in which each of the justices was willing to examine Cabinet proceedings at least to the extent of receiving evidence about whether any information had been put before Cabinet that was personal to Mr O'Shea and about which he had not had opportunity to comment (see 387-388, 389 (Mason J); 403 (Wilson and Toohey JJ); 412 (Brennan J) and 416-418 for the more expansive approach of Deane J).
- 118 As was noted in *ibid* 387 (Mason CJ), 402-403 (Wilson and Toohey JJ), 420 (Deane J).

