AIAL FORUM ISSUE 93

AIAL FORUM

ISSUE 93 NOVEMBER 2018

Incorporating the 2018 National Lecture on
Administrative Law by the Hon Justice MJ Beazley AO,
President of the New South Wales Court of Appeal

NOVEMBER 2018

Australian Institute of
Administrative Law

November 2018 Number 93

AIAL FORUM

Australian Institute of Administrative Law Incorporated.

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The AIAL Forum is published by

Australian Institute of Administrative Law Inc.
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This issue of the AIAL Forum should be cited as (2018) 93 AIAL Forum.

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ISSN 1322-9869

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Printed on Certified Paper

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ADMINISTRATIVE LAW AND STATUTORY INTERPRETATION: ROOM FOR THE RULE OF LAW?

The Hon Justice MJ Beazley AO*

In 1803, in the landmark decision of *Marbury v Madison*,[1] Marshall CJ of the US Supreme Court observed that '[i]t is emphatically the province and duty of the judicial department to say what the law is'.[2] On its face, this statement appears to be declaratory of the separation of powers doctrine. In Australia (although not in the US),[3] Marshall CJ's 'memorable words'[4] have been understood in a broader sense, as being 'a seminal statement of judicial review, of the administrative law kind'.[5] Nonetheless, as this article seeks to demonstrate, judicial acceptance of *Marbury v Madison* as the origin of judicial review in Australia has never strayed far from the doctrine of separation of powers.

Marbury v Madison according to the High Court

In one of the High Court's notable citations of *Marbury v Madison*, Brennan J, in *Attorney-General (NSW) v Quin*[6] (*Quin*), referred to Marshall CJ's statement in support of the proposition that:

> the duty [of the court] extends to judicial review of administrative action alleged to go beyond the power conferred by statute or by the prerogative or alleged to be otherwise in disconformity with the law.[7]

But what does it mean to say that it is the duty of the judiciary 'to say what the law is'? One answer can be found in a significant coda to this statement. Brennan J observed:

> The duty and jurisdiction of the court to review administrative action do not go beyond the declaration and enforcing of the law which determines the limits and governs the exercise of the repository's power. If, in so doing, the court avoids administrative injustice or error, so be it; but the court has no jurisdiction simply to cure administrative injustice or error.[8]

This observation indicates limits to, or constraints on, the court's judicial review function, but, to the extent that the observation grounds judicial review in conduct that has already occurred, it is pure orthodoxy.

Marbury v Madison: its latest emanation

The impending exit of the UK from the EU has, perhaps creatively, seen an echo of the principle in *Marbury v Madison* in an altogether different context. In December 2017, a petition for judicial review was lodged by members of the Scottish, UK and European parliaments, seeking a declaration as to whether, when and how the UK's notification to leave the EU may be revoked unilaterally, with the intended effect that the UK

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* *Justice Beazley is the President of the New South Wales Court of Appeal.* *This is an edited version of the National Lecture on Administrative Law, presented at the Australian Institute of Administrative Law National Conference, University of New South Wales, Sydney, NSW, 27 September 2018.* *Justice Beazley expresses her thanks to her researcher, Alice Zhou, for her research and assistance in the preparation of this article.*

would remain in the EU. In this regard, *Wightman MSP v Secretary of State for Exiting the European Union*[9] (*Brexit Case*) was an unusual case, as the petition did not seek to review the actions of any governmental body.

The Court of Session (Lord President Carloway, Lord Menzies and Lord Drummond Young) ruled that the question should be referred to the Court of Justice of the EU.[10] In reaching this conclusion, their Lordships, reflecting Marshall CJ's statement in *Marbury v Madison*, emphasised that the Court's 'central'[11] and 'primary'[12] function was to declare what the law is, a function they said 'quite unsuited'[13] to the legislature and the executive.

A central issue in the case was whether the question posed by the petitioners was justiciable or merely hypothetical, as well as whether the petitioners had standing. The Court held that the question raised by the petition was not hypothetical or academic, having regard to the passing of the *European Union (Withdrawal) Act 2018* (UK), s 13 of which provides that parliamentary approval is required before an agreement to withdraw between the UK and the EU can be ratified.[14] Accordingly, as Lord Menzies observed:

> There will have to be a vote, and it appears to me to be legitimate for those who are involved in that vote to know, by means of a judicial ruling, the proper legal meaning of Article 50, and in particular whether a member state which has given notification of its intention to withdraw from the EU may revoke that notification of intention unilaterally before the expiry of two years after the notification.[15]

Lord Drummond Young added that:

> it is clearly not for the courts to tell Members of Parliament what considerations they should regard as relevant but it is for the courts, if they are requested to do so, to advise Members of Parliament as to what the law is. It is then up to individual Members of Parliament to make what they will of the courts' advice … the question of revocation … is a matter that may, in some circumstances, be relevant to the way in which some Members of Parliament cast their votes on a matter of fundamental importance to the future of the United Kingdom.[16]

The duty to 'say what the law is'

Having, in this admittedly simplified way, identified the polar ends of judicial review, it is timely to consider the nature of the duty of the courts 'to say what the law is', the rationale underlying that duty and, more particularly, how that task is best undertaken.

In the administrative law context, the court's duty to 'say what the law is' has increasingly become the domain of statutory interpretation. Whilst 'administrative law cannot work without statutory interpretation',[17] there is a question whether this is a trend that will constrain the development of administrative law and, in particular, judicial review, in an era of significant regulatory oversight and increased executive activity. There is also an anterior question of what is the underlying rationale of administrative law. This anterior question is critical, lest the development of the law stray beyond its legitimate boundaries or, alternatively, straitjacket its proper development. In this respect, the *Brexit Case* may be seen as teetering on the outer edge of that legitimate boundary.

What is the underlying rationale of judicial review?

Commentators have viewed Brennan J's observation that judicial review is not designed to cure administrative injustice or error as indicating that its 'rationale … is simply to enforce obedience to the law'.[18] The *Brexit Case* aside, there is support for this view in the English and Australian authorities, drawing principally on the doctrine of the rule of law.

Beginning with the Australian authorities, the High Court's jurisprudence has consistently acknowledged and reinforced the importance of the rule of law in the context of judicial review. Indeed, a sharp increase in the Court's reliance on the rule of law as a guiding principle can be observed in the cases that followed the introduction of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (ADJR Act).

One such example is the observation of Brennan J in *Church of Scientology Inc v Woodward*[19] (*Woodward*) in 1982:

> Judicial review is neither more nor less than the enforcement of the rule of law over executive action; it is the means by which executive action is prevented from exceeding the powers and functions assigned to the executive by law and the interests of the individual are protected accordingly.[20]

Two years later, in *A v Hayden*,[21] Brennan J reiterated that '[n]o agency of the executive government is beyond the rule of law'.[22] More recently, in *Plaintiff S157/2002 v Commonwealth*,[23] Gleeson CJ described s 75(v) of the *Constitution* as securing 'a basic element of the rule of law',[24] and in *Argos Pty Ltd v Corbell*[25] (*Argos*) French CJ and Keane J expressed the view that '[t]he availability of judicial review serves to promote the rule of law'.[26] Their Honours noted two other features served by judicial review: 'improv[ing] the quality of administrative decision-making [and] vindicating the interests of persons affected in a practical way by administrative decision-making'.[27] Neither of these observations was novel. However, their Honours' language cannot be ignored: the reference was to 'interests', not 'rights' — an issue to which I will return.

The relationship between the rule of law and judicial review has also been central to the approach taken by the courts in the UK. In 1957, Denning LJ stated that '[i]f tribunals were to be at liberty to exceed their jurisdiction without any check by the courts, the rule of law would be at an end'.[28]

Wade and Forsyth have identified the rule of law as requiring, in the administrative law context, that:

> every government authority which does some act which would otherwise be a wrong … or which infringes a man's liberty … to justify its action as authorised by law — and in nearly every case this will mean authorised directly or indirectly by Act of Parliament. Every act of governmental power … must be shown to have a strictly legal pedigree.[29]

However, as I indicated earlier, the relevance of the rule of law to judicial review has increasingly been articulated in terms of the doctrine of separation of powers.

In *R (Cart) v Upper Tribunal*[30] (*Cart*), Laws LJ in the Divisional Court, in what was described as a 'typically subtle and erudite judgment'[31] by Baroness Hale on appeal to the Supreme Court, observed that:

> The nature of the judicial review jurisdiction owned by the High Court has an elusive quality, because its limits are (generally) set by itself. In consequence, the distinction between a legal place where the jurisdiction cannot go, and a legal place where as a matter of discretion the High Court will not send it, is permeable: even unprincipled. Ultimately the court is simply concerned to give the jurisdiction the reach, or edge, which the rule of law requires.[32]

The question in issue in *Cart* was whether the High Court's supervisory jurisdiction, exercisable by way of judicial review, extended to decisions of certain tribunals that, under statute, were not amenable to any form of appeal. In describing judicial review as 'a principal engine of the rule of law',[33] Laws LJ recognised that to say so was anodyne without giving meaning to the term.[34] Noting that the rule of law is 'a Protean conception',[35]

his Lordship saw its connection in the administrative law sense with the doctrine of the separation of powers. As he explained:

> The sense of the rule of law with which we are concerned rests in this principle, that statute law has to be mediated by an authoritative judicial source, independent both of the legislature which made the statute, the executive government which (in the usual case) procured its making, and the public body by which the statute is administered.[36]

This interplay between the rule of law and the doctrine of separation of powers is reflected in later UK decisions. In *AXA General Insurance Ltd v Lord Advocate*[37] (*AXA*), Lord Hope referred to judicial review as going to 'the root of the relationship between the democratically elected legislatures and the judiciary'.[38] In his Lordship's view, the rule of law plays an important part in 'setting the boundaries of this relationship'.[39]

This same conception of the rule of law, articulated in terms of a relationship with the doctrine of separation of powers, is reflected in the extrajudicial writings of Gageler J.[40] His Honour has observed that the acceptance in Australia of *Marbury v Madison* has led to the identification of the rule of law as the source of judicial review but that it 'is more precisely identified as the constitutional separation of judicial power from legislative and executive power'.[41]

As these various judicial and extrajudicial observations illustrate, judicial review is a natural home for the rule of law and, for that reason, the courts must be cautious not to 'abdicate judicial responsibility',[42] borrowing the language of Gaudron J in *Corporation of the City of Enfield v Development Assessment Commission*[43] (*Enfield*) in relation to the determination of jurisdictional facts. In *Enfield*, the High Court considered the issue of what weight (if any) a judge reviewing a decision of an administrative body was required to give to the conclusions reached by the decision-maker. The plurality[44] rejected the application in Australia of the *Chevron USA Inc v Natural Resources Defense Council Inc*[45] (*Chevron*) doctrine of 'deference'.[46]

However, Gaudron J's placement of the rule of law at the heart of judicial review is of particular note. Her Honour observed that the introduction of schemes such as the ADJR Act owed much to the recognition of two factors: first, the potential for executive and administrative decisions to adversely affect the rights, interests and legitimate expectations of individuals; and, secondly, the inadequacy of the prerogative writ remedies.[47] Observing that the administrative law reforms were also informed by a need for executive and administrative accountability,[48] her Honour observed that:

> Those exercising executive and administrative powers are as much subject to the law as those who are or may be affected by the exercise of those powers. It follows that, within the limits of their jurisdiction and consistent with their obligation to act judicially, the courts should provide whatever remedies are available and appropriate to ensure that those possessed of executive and administrative powers exercise them only in accordance with the laws which govern their exercise. The rule of law requires no less.[49]

Her Honour concluded that:

> Once it is appreciated that it is the rule of law that requires the courts to grant whatever remedies are available and appropriate to ensure that those possessed of executive and administrative powers exercise them only in accordance with the laws which govern their exercise, it follows that there is very limited scope for the notion of 'judicial deference' with respect to findings by an administrative body of jurisdictional facts.[50]

The separation of powers conception of the rule of law aligns with Gaudron J's focus on constraining governmental power in the passage cited above. However, her Honour also

referred to the protection of individual rights and interests. This raises the question whether administrative law serves to restrain governmental power only or whether its purpose is also to protect legal rights and interests — a question which, it has been suggested, remains unresolved in the evolution of judicial review.[51]

The various explanations of judicial review's underlying rationale referred to above appear to answer this question in favour of the former.[52] So much was made clear by Lord Reed in *AXA*, where his Lordship stated that:

> The essential function of the courts is … the preservation of the rule of law, which extends beyond the protection of individuals' legal rights … There is thus a public interest involved in judicial review proceedings, whether or not private rights may also be affected. A public authority can violate the rule of law without infringing the rights of any individual …[53]

Similarly, in *Quin*, Brennan J characterised the scope of judicial review 'not in terms of the protection of individual interests but in terms of the extent of power and the legality of its exercise'.[54] However, individual rights and interests are not irrelevant in administrative law. Questions of standing depend upon interests, but, more relevantly, Brennan J in *Woodward* and French CJ and Keane J in *Argos*, in the passages set out above, expressly referred to the protection and vindication of an individual's interests as a consequence of judicial review.

Further, the principle of legality, as a principle of statutory interpretation, assumes that Parliament does not intend to 'overthrow fundamental principles, infringe rights or depart from the general system of law'[55] unless the statute clearly expresses a contrary intention.

Accordingly, it appears that the answer to the 'rights and interests question' as a concern of administrative law is not that the protection of individual rights and interests is an underlying rationale of judicial review but that judicial review is the means whereby individuals can be assured that their rights and interests will only be affected by administrators acting in accordance with law. This may be viewed as a corollary to the restraint on governmental power.

What is clear, however, is that administrative law does not exist to 'right a wrong' by way of an enforceable remedy of the kind known to the common law and equity or to cure an injustice. If individual interests are protected or vindicated, that is consequential to the underlying rationale of judicial review.

That this is so has long been recognised. Arvind and Stirton have observed that, by the 1950s in the UK, the prevailing view was that the common law could not adequately provide redress for aggrieved individuals in light of pervasive growth and impacts of the administrative state.[56] Examining the discourse of the time, they saw that the academic consensus, far from reflecting today's orthodoxy as to the function of judicial review, was that radical change was needed.

The reformers of the time conceived of administrative law as being aimed at mediated conflicts between public and private interests.[57] Substantive review of decision-making was not only permissible but fundamental, the intent being that courts and other bodies could provide effective redress to individuals, promote better agency behaviour and develop a common law of good administrative decision-making while leaving questions of policy to the executive or Parliament.[58]

Arvind and Stirton suggest that one reason why this course was ultimately stymied was the intervention of Lord Diplock, then recently appointed to the House of Lords.[59] In 1969, Lord

Diplock had helped organise an Anglo-American judicial exchange on administrative law and sent a report on the exchange to the Lord Chancellor. He argued against a wide review of the administrative law system, contending that the focus should only be on simplifying the procedure associated with administrative redress.[60]

There had already been considerable progress in the 1960s in dismantling the doctrines which stood in the way of judicial review of administrative decision-making by virtue of four decisions of the House of Lords,[61] which, to varying degrees, influenced the development of administrative law in Australia. Lord Diplock considered it to be more appropriate for judges to continue to develop the direction of the law, with the caveat that the courts should not go in the direction of substituting their views on policy for those of the decision-maker.[62] The Lord Chancellor subsequently directed the Law Commission to examine only the narrow issue of procedure.

Although the availability of judicial review expanded dramatically in the ensuing years, it was without any of the features for which the reformers had argued. In today's legal and socio-political climate, any suggestion of like reforms would be untenable. The approach which ultimately endured was one which focused on the scope and limits of decision-making power, which construed the limits of such powers in a way that was primarily textual, rather than purposive, and which constrained the material available on review to that necessary to assess the legality of a decision.[63] In other words, the route to review of an administrative decision was by way of statutory interpretation.

A similar path was taken in Australia, with Brennan J at the helm.

An exercise in statutory interpretation: where does the underlying rationale of judicial review fit in?

The celebrated New Administrative Law reforms of the 1970s, in the form of the *Administrative Appeals Tribunal Act 1975* (Cth) and the ADJR Act, referred to by Gaudron J in *Enfield*, as mentioned earlier, were seen as radical developments in the evolution of Australian administrative law.[64] A significant feature of the reforms was the centrality and codification of the grounds of judicial review. However, in an almost contrarian response, there have been multiple attempts by the legislature to limit judicial oversight of administrative action, including the increased codification of decision-making procedures; the increased use of privative clauses; and the increased conferral of broad powers on administrative decision-makers,[65] all of which gave rise to questions of statutory interpretation.

The ascendancy of statutory interpretation in judicial review is therefore unsurprising. The genesis of this trend is usually attributed[66] to Brennan J's decision in *FAI Insurances Ltd v Winneke*[67] and was developed by him in *Kioa v West*,[68] *Quin* and *Project Blue Sky Inc v Australian Broadcasting Authority*.[69] The result was a shift in approach from one where the grounds of judicial review were central to one that expressed the legal norms of administrative law as products of parliamentary intention, to be revealed by applying principles of statutory interpretation.[70]

In current judicial review jurisprudence, the principles of statutory interpretation have been identified as one of four sources of law by reference to which the legality of administrative action may be determined, the others being the *Constitution*, the statute that the executive is charged with administering and the grounds of judicial review.[71] That three of these four sources are statutorily referenced raises the question of the continuing significance of the grounds of judicial review in administrative law — or at least the question of the extent of their significance.

Basten JA spoke earlier this morning of some of the limitations of the grounds of review and the need, particularly in less straightforward cases, to have regard to principles such as the separation of powers and to engage with the task of statutory interpretation.[72] Some have gone so far as to suggest that judicial review is 'a specialized branch of statutory interpretation'.[73] In this regard, it is the principles of statutory interpretation that define what is required for a valid exercise of power and operate to control discretionary decision-making by the executive.[74]

Certainly, recent High Court jurisprudence demonstrates the centrality of statutory interpretation to judicial review. This year, all but two of the judicial review matters that came before the High Court arose in the migration context and turned upon the construction of the *Migration Act 1958* (Cth). For example, in *Plaintiff M174/2016 v Minister for Immigration and Border Protection*,[75] the central question was whether any failure to comply with a provision of the Migration Act regarding the giving of certain information to an applicant meant that there was no 'fast track reviewable decision' capable of referral to the Immigration Assessment Authority or, alternatively, that an essential precondition for the Authority's power to review such a decision was lacking, such that the Authority lacked jurisdiction to conduct a review. At its core, this was a question of statutory interpretation.[76] The two cases that did not arise in the migration context turned upon the proper construction of provisions of the *Building and Construction Industry Security of Payment Act 1999* (NSW) (Security of Payment Act).[77]

Intuitively, the thought of reducing judicial review to an exercise in statutory interpretation seems undesirably simplistic, particularly when one considers that the underlying rationale of judicial review resides in the rule of law, recognised as an underpinning pillar of democracy. In 2000, Gageler J, writing extrajudicially, warned of this very trend.[78] He observed that equating judicial review with the principles of statutory interpretation fails to provide 'a complete explanation of the province and function of judicial review of administrative action',[79] identifying several areas where the common law based notion of judicial review remains 'undoubtedly superior'[80] — in particular, judicial review of the executive's exercise of prerogative power; the artificiality of attributing all administrative law rules to legislative implication; and circumstances where rules of procedural fairness quite apart from a statutory scheme must be observed.[81]

Bateman and McDonald also contend that a statutory interpretation approach to judicial review does little for 'the legitimation of administrative government'.[82] They argue that an approach guided by the grounds of judicial review is better able to serve the rule of law for two reasons: first, the grounds of review work to confine and structure exercises of administrative decision-making; and, secondly, they can lead to the development of generally applicable administrative law norms.[83]

A similar point has been made by Arvind and Stirton, who argue that, by focusing on the statute, judicial review operates in a manner that 'effectively robs the law of any unifying or overarching constitutional principles'.[84] Their concern was that judicial review based on principles of statutory interpretation neither provides guidance to decision-makers nor enables the development of principles of good governance. They suggest that, arguably, the statutory interpretation approach has had no impact on administrative decision-making outside the specific decision challenged or, at best, the narrow class of decisions to which a specific statutory provision applies.[85] However, an approach based on statutory interpretation is not without its merits. Bateman and McDonald themselves recognise that tethering judicial review to the statutory text and legislative purpose lends it 'democratic legitimacy'[86] by grounding it in the people's will as expressed by Parliament.[87] Further, it should not be overlooked that principles of statutory interpretation are common law

principles rooted in values which include the rule of law. The High Court recognised this in the recent decision of *Hossain v Minister for Immigration and Border Protection*[88] (*Hossain*).

In that case, the Federal Circuit Court had made an order in the nature of certiorari, setting aside a decision of the Administrative Appeals Tribunal that had affirmed a decision of a delegate of the Minister to refuse to grant a visa. The Federal Circuit Court also made an order in the nature of mandamus remitting the matter to the Tribunal for redetermination. The High Court held that, although the Federal Circuit Court was correct to find an error of law in the Tribunal's reasoning, it erred in characterising that error as a jurisdictional error.

In reaching this conclusion, the plurality emphasised the importance of statutory interpretation, stating that:

> Just as identification of the preconditions to and conditions of an exercise of decision-making power conferred by statute turns on the construction of the statute, so too does discernment of the extent of non-compliance which will result in an otherwise compliant decision lacking the characteristics necessary to be given force and effect by the statute turn on the construction of the statute. The question of whether a particular failure to comply with an express or implied statutory condition in purporting to make a particular decision is of a magnitude which has resulted in taking the decision outside the jurisdiction conferred by the statute cannot be answered except by reference to the construction of the statute.[89]

Critically, their Honours recognised that:

> [The common law principles that guide the interpretation of statutes conferring decision-making authority] reflect longstanding qualitative judgments about the appropriate limits of an exercise of administrative power to which a legislature can be taken to adhere in defining the bounds of such authority as it chooses to confer on a repository in the absence of affirmative indication of a legislative intention to the contrary. Those common law principles are not derived by logic alone and cannot be treated as abstractions disconnected from the subject matter to which they are to be applied. They are not so delicate or refined in their operation that sight is lost of the fact that '[d]ecison-making is a function of the real world'.[90]

Similar observations were made by Gageler J in *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd*[91] (*Probuild*) — a decision to which I will return. For present purposes, it is relevant to note his Honour's observation that:

> The common law principles of interpretation applicable to determining whether legislation manifests an intention that a decision or category of decisions not be quashed or otherwise reviewed are not static. As with other common law principles or so-called 'canons' of statutory construction, they have contemporary interpretative utility to the extent that they are reflective and protective of stable and enduring structural principles or systemic values which can be taken to be respected by all arms of government. And as with other common law principles of statutory construction, they are not immune from curial reassessment and revision.[92]

A principle of statutory interpretation that is often considered in the context of the rule of law, as well as the right of persons to access the courts,[93] is the principle of legality. Although often seen as a new feature of statutory interpretation, it is aptly described as an old principle, found in early High Court jurisprudence in *Potter v Minahan*[94] but with a new name. In *Lee v New South Wales Crime Commission*,[95] Gageler and Keane JJ considered that:

> [The principle of legality] extends to the protection of fundamental principles and systemic values. The principle ought not, however, to be extended beyond its rationale: it exists to protect from inadvertent and collateral alteration rights, freedoms, immunities, principles and values that are important within our system of representative and responsible government under the rule of law; it does not exist to shield those rights, freedoms, immunities, principles and values from being specifically affected in the pursuit of clearly identified legislative objects by means within the constitutional competence of the enacting legislature.[96]

Similarly, in *Australian Communications and Media Authority v Today FM (Sydney) Pty Ltd*,[97] Gageler J stated that:

> [The principle of legality] insists on a manifestation of unmistakable legislative intention for a statute to be interpreted as abrogating or curtailing a right or immunity protected by the common law or a principle recognised by the common law to be important within our system of representative and responsible government under the rule of law.[98]

I referred earlier to two decisions of the High Court handed down this year which concerned the interpretation of the Security of Payment Act — namely, *Probuild* and *Maxcon Constructions Pty Ltd v Vadasz*[99] (*Maxcon*). These cases concerned the question whether the Supreme Court of NSW (or, in the case of *Maxcon*, the Supreme Court of South Australia) has jurisdiction to make an order in the nature of certiorari quashing a determination made by an adjudicator appointed under the Security of Payment Act (and its South Australian equivalent) for a non-jurisdictional error of law on the face of the record.

Probuild Constructions (Aust) Pty Ltd commenced judicial review proceedings in the Supreme Court in respect of a decision made by an adjudicator regarding its obligation to make certain payments to Shade Systems Pty Ltd. It sought an order in the nature of certiorari quashing the adjudicator's determination.

The plurality (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ) found that the Security of Payment Act evinced 'a clear legislative intention'[100] to exclude the Supreme Court's jurisdiction for non-jurisdictional errors of law. The issue was one of statutory interpretation. As the plurality stated:

> the question is a matter of statutory construction; and in the resolution of such a question, context is, as always, important. The Security of Payment Act contains no privative clause providing in terms that an adjudicator's determination is not to be quashed by way of certiorari on the basis of error of law on the face of the record. But that is not the end of the inquiry. There remains for consideration the question whether, absent an express statement but read as a whole, the Security of Payment Act has that effect. Whether it does depends on examination of the text, context and purpose of the Security of Payment Act. In undertaking that process, '[w]hether and when the decision of an inferior court or other decision-maker should be treated as 'final' (in the sense of immune from review for error of law) cannot be determined without regard to a wider statutory and constitutional context'.[101]

Gageler J, writing separately, likewise approached the matter as a question of statutory interpretation:

> The approach most consonant with our contemporary understanding of the nature and scope of judicial review … is that the question whether recourse to the Supreme Court to obtain an order in the nature of certiorari on the basis of error of law on the face of the record of a decision or category of decisions has been taken away by statute should now be answered through the application of ordinary statutory and common law principles of interpretation unencumbered by any presumption that it has not.[102]

Edelman J, also writing separately, likewise focused on the proper construction of the statute but by reference to the principle of legality. His Honour considered that a narrow approach to the construction of privative clauses, which 'has supported the access of people to the courts to correct legal error for nearly four centuries … is today one of the working hypotheses upon which legislation is drafted'.[103]

> It is sometimes described as part of the principle of legality in the construction of legislation. The concept of 'legality', in the principle of legality, must embrace the determination of whether decisions made with authority are legal — that is, whether they are made by a process that accords with the law: '[t]he rule of law and the ability to have access to a court or tribunal to rule upon legal claims constitute principles of this fundamental character'. Therefore, absent irresistible clarity, a construction will not be

> adopted which departs from the 'general system of law' permitting review of authorised decisions for legal errors.[104]

However, his Honour considered that the principle of legality applies with variable impact:[105] [t]he less need there is for the rationale for the narrow approach to construction, the weaker will be [its] operation'.[106] In respect of legislation in the nature of the Security of Payment Act, which only required adjudicators to determine parties' rights, in effect, on an interim (as opposed to a final) basis, his Honour held that the principle applied 'with very little force'.[107]

Common to both Gageler and Edelman JJ's judgements is a recognition that subsumed within common law principles of statutory interpretation are values central to our system of government, including our system of law. Accordingly, where courts are faced with issues of judicial review that turn upon statutory interpretation, even in the absence of any express consideration of the underlying rationale of judicial review, the very application of the common law principles gives effect to notions of the rule of law. As Lord Steyn in *R v Secretary of State for the Home Department*[108] observed:

> Parliament does not legislate in a vacuum. Parliament legislates for a European liberal democracy founded on the principles and traditions of the common law and the courts may approach legislation on this initial assumption. But this assumption only has prima facie force. It can be displaced by a clear and specific provision to the contrary.[109]

This infiltration, so to speak, of the 'values' underlying judicial review was expressly recognised by Edelman J (with whom Nettle J substantially agreed) in *Hossain*. His Honour observed that, in the context of administrative law, judicial exercises in statutory interpretation are not solely dependent on the literal text;[110] rather, 'the statute is construed in light of the background principles and history of judicial review, as well as common law principles'.[111]

Conclusion

My initial purpose in accepting, with trepidation before such a learned audience, the invitation to give this lecture was to satisfy a curiosity as to the impact of *Marbury v Madison* on Australian administrative law. What I discovered, and what I hope I have described, is that, despite a minimalist approach to its citation, it explains the underlying rationale for judicial review in Australian administrative law — namely, that it is grounded in that part of the rule of law that underpins the doctrine of the separation of powers.

Writing in 1956, Jaffe and Henderson suggested that, without the rule of law, 'the law of judicial review is emptied of its organising principle, is bereft of its generative point of view, and can be stated only as a congeries of diverse cases'.[112] As I have sought to explain, the adjudication of administrative action by way of judicial review has, in large part, if not completely, become anchored in statutory interpretation.

There are critics of this approach and there is sometimes nostalgia for a grounds-based approach. It is true that the different approaches have different impacts on administrative action. In particular, an approach based on statutory interpretation removes, to a significant degree, the expectation that judicial review enables a court to provide guidance for good administration, as has been suggested occurred or can occur under a grounds-based approach.

Rather, the court seeks to ascertain, by the application of the usual principles of statutory interpretation, Parliament's intention in respect of a particular statute, and it is only within that context that the court determines whether the administrative action exceeded that which the decision-maker was charged with doing. Although it is unlikely that an approach

to judicial review based on statutory interpretation will provide guidelines for good administration, its impact is likely to be more profound in that it sends the singular message that all administrative action must fall within the statutory parameters which authorised it.

Accordingly, it can readily be seen that an approach to judicial review based on statutory interpretation not only gives effect to the underlying rationale of judicial review but also in no way constrains it. In particular, the currency now given to the principles to which O'Connor J referred in *Potter v Minahan* under the label of the principle of legality continues to enshrine values central to our system of government, including our system of law, in the application of administrative decision-making that so fundamentally affects the relationship between the government and its citizens.

Endnotes

1 (1803) 1 Cranch 137.
2 (1803) 1 Cranch 137, 177 (Marshall CJ).
3 Justice Stephen Gageler, 'The Underpinnings of Judicial Review of Administrative Action: Common Law or Constitution?' (2000) 28 *Federal Law Review* 303, 310.
4 *Attorney-General (NSW) v Quin* (1990) 170 CLR 1, 35 (Brennan J).
5 James Stellios, 'Marbury v Madison: Constitutional Limitations and Statutory Discretions' (2016) 42 *Australian Bar Review* 324, 324. Stellios' characterisation draws a distinction between constitutional judicial review and judicial review of administrative action, the line between which he suggests is not clean.
6 (1990) 170 CLR 1
7 (1990) 170 CLR 1, 35 (Brennan J), referring to *Victoria v Commonwealth* (1975) 134 CLR 338, 380 (Gibbs J).
8 (1990) 170 CLR 1, 35–36 (Brennan J).
9 [2018] CSIH 62.
10 [2018] CSIH 62.
11 [2018] CSIH 62, [28] (Lord President Carloway).
12 [2018] CSIH 62, [48] (Lord Drummond Young).
13 [2018] CSIH 62, [49] (Lord Drummond Young).
14 [2018] CSIH 62, [27] (Lord President Carloway), [37] (Lord Menzies), [58] (Lord Drummond Young).
15 [2018] CSIH 62, [37] (Lord Menzies).
16 [2018] CSIH 62, [58] (Lord Drummond Young).
17 Jeffrey Barnes, 'How Statutory Interpretation Sustains Administrative Law' (2015) 22 *Australian Journal of Administrative Law* 163, 176.
18 Mark Aronson, Matthew Groves and Greg Weeks, *Judicial Review of Administrative Action and Government Liability* (Thomson Reuters, 6th ed, 2017) 28.
19 (1982) 154 CLR 25.
20 (1982) 154 CLR 25, 70 (Brennan J).
21 (1984) 156 CLR 532.
22 (1984) 156 CLR 532, 588 (Brennan J).
23 (2003) 211 CLR 476.
24 (2003) 211 CLR 476, 482 [5] (Gleeson CJ). This was cited with approval by the High Court in *Graham v Minister for Immigration and Border Protection* (2017) 347 ALR 350, 360 [44] (Kiefel CJ, Bell, Gageler Keane, Nettle and Gordon JJ).
25 (2014) 254 CLR 394.
26 (2014) 254 CLR 394, 411 [48] (French CJ and Keane J).
27 (2014) 254 CLR 394, 411.
28 *R v Medical Appeal Tribunal* [1957] 1 QB 574, 586 (Denning LJ).
29 Sir William Wade and Christopher Forsyth, *Administrative Law* (Oxford University Press, 10th ed, 2009) 17.
30 [2011] QB 120.
31 *R (Cart) v Upper Tribunal* [2012] 1 AC 663, 680 [30] (Baroness Hale).
32 [2011] QB 120, 156 [98] (Laws LJ).
33 [2011] QB 120, 137 [34] (Laws LJ).
34 [2011] QB 120, 137 [35] (Laws LJ).
35 [2011] QB 120, 137 [35]. See also Wade and Forsyth, above n 30, 17. There are many formulations of the rule of law: see, for example, *Prohibitions del Roy* (1607) 12 Co Rep 63, 65; AV Dicey, *Introduction to the Study and the Law of the Constitution* (Palgrave McMillian, 10th ed, 1959) 188–202; Ninian Stephen, 'The Rule of Law' (2003) 22(2) *Academy of Social Sciences* 8, 8; World Justice Project, *WJP Rule of Law Index 2016* <https://worldjusticeproject.org/our-work/wjp-rule-law-index/wjp-rule-law-index-2016>.
36 [2011] QB 120, 137 [36] (Laws LJ).
37 [2012] 1 AC 868.

[38] [2012] 1 AC 868, 910 [42] (Lord Hope). See also the observations of Lord Reed, who stated, at [142], that 'Judicial review under the common law is based upon an understanding of the respective constitutional responsibilities of public authorities and the courts. The constitutional function of the courts in the field of public law is to ensure, so far as they can, that public authorities respect the rule of law. The courts therefore have the responsibility of ensuring that the public authority in question does not misuse its powers or exceed their limits'.

[39] [2012] 1 AC 868, 910 [42] (Lord Hope).

[40] See also Susan Kneebone, 'What is the Basis of Judicial Review?' (2001) 12 *Public Law Review* 95, 99–100.

[41] Gageler, above n 4, 309.

[42] *Corporation of the City of Enfield v Development Assessment Commission* (2000) 199 CLR 135, 158 [60] (Gaudron J).

[43] (2000) 199 CLR 135.

[44] (2000) 199 CLR 135, 151–152 [39]–[42] (Gleeson CJ, Gummow, Kirby and Hayne JJ).

[45] (1984) 467 US 837.

[46] *Chevron USA Inc v Natural Resources Defense Council Inc* (1984) 467 US 837. The *Chevron* doctrine provides that where a statute administered by a federal agency or regulatory authority is susceptible of several constructions, the court will defer to the agency's interpretation of the statute, provided that it is a permissible construction: see Justice Ronald Sackville, 'The Limits of Judicial Review of Executive Action — Some Comparisons Between Australia and the United States' (2000) 28 *Federal Law Review* 315, 323ff.

[47] (2000) 199 CLR 135, 156–157 [54] (Gaudron J).

[48] (2000) 199 CLR 135, 157 [55] (Gaudron J).

[49] (2000) 199 CLR 135, 157 [56] (Gaudron J).

[50] (2000) 199 CLR 135, 158 [59] (Gaudron J).

[51] Joe McIntyre, *What is Administrative Law About? Power, Rights, and Judicial Culture in Australia* (23 April 2018) AUSPUBLAW <https://auspublaw.org/2018/04/what-is-administrative-law-about/>.

[52] See also Kneebone, above n 41, 98.

[53] [2012] 1 AC 868, 950 [169] (Lord Reed). See also *Brexit Case* [2018] CSIH 62 [67] (Lord Drummond Young): 'The fundamental purpose of the supervisory jurisdiction is … to ensure that all government, whether at a national or local level, and all actions by public authorities are carried out in accordance with the law. That purpose is fundamental to the rule of law…'.

[54] (1990) 170 CLR 1, 35 (Brennan J).

[55] *Potter v Minahan* (1908) 7 CLR 277, 304 (O'Connor J).

[56] TT Arvind and Lindsay Stirton, 'The Curious Origins of Judicial Review' (2017) 133 *Law Quarterly Review* 92, 93.

[57] Ibid 99.

[58] Ibid 96, 100–1.

[59] Ibid 107.

[60] Ibid 107–8.

[61] These were *Ridge v Baldwin* [1964] AC 40; *Conway v Rimmer* [1968] AC 910; *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997; and *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147.

[62] Arvind and Stirton, above n 57, 108.

[63] Ibid 109.

[64] Matthew Groves, 'Should We Follow the Gospel of the Administrative Decisions (Judicial Review) Act 1977 (Cth)?' (2010) 34 *Melbourne University Law Review* 736, 736–7.

[65] See, for example, Justice John Basten, 'Administrative Law and Statutory Interpretation' [2012] *New South Wales Judicial Scholarship* 12.

[66] Will Bateman and Leighton McDonald, 'The Normative Structure of Australian Administrative Law' (2017) 45 *Federal Law Review* 153, 155–6, 163–72.

[67] (1982) 151 CLR 342.

[68] (1985) 159 CLR 550.

[69] (1998) 194 CLR 355.

[70] See Bateman and McDonald, above n 66.

[71] Peter Cane, Leighton McDonald and Kristen Rundle, *Principles of Administrative Law* (Oxford University Press, 3rd ed, 2018) 5.

[72] Justice John Basten, 'Judicial Review — Can We Abandon Grounds?' (Speech delivered at Australian Institute of Administrative Law National Conference, University of New South Wales, 27 September 2018).

[73] Stanley de Smith, Harry Street and Rodney Brazier, *Constitutional and Administrative Law* (Penguin Books, 4th ed, 1981) 558, quoted in *Union des Employes de Service, Local 298 v Bibeault* [1988] 2 SCR 1048, 1087 (Beetz J).

[74] Chief Justice French, 'Statutory Interpretation and Rationality in Administrative Law: National Lecture on Administrative Law 2015' (2015) 82 *AIAL Forum* 1, 2, 10. See also Wade and Forsyth, above n 30, 17.

[75] (2018) 353 ALR 600.

[76] (2018) 353 ALR 600, 602 [1] (Gageler, Keane and Nettle JJ), 621 [92] (Edelman J).

[77] See *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd* (2018) 351 ALR 225; *Maxcon Constructions Pty Ltd v Vadasz* (2018) 351 ALR 369.

78 Gageler, above n 4, 312.
79 Ibid.
80 Ibid.
81 Ibid.
82 Bateman and McDonald, above n 66, 178.
83 Ibid 177.
84 Arvind and Stirton, above n 57, 112.
85 Ibid 116.
86 Bateman and McDonald, above n 66, 175.
87 Ibid 175–6.
88 [2018] HCA 34. See also *Shrestha v Minister for Immigration and Border Protection* [2018] HCA 35.
89 [2018] HCA 34 [27] (Kiefel CJ, Gageler and Keane JJ).
90 [2018] HCA 34, [28] (Kiefel CJ, Gageler and Keane JJ).
91 (2018) 351 ALR 225.
92 (2018) 351 ALR 225, 239 [58] (Gageler J).
93 *Hockey v Yelland* (1984) 157 CLR 124, 130 (Gibbs CJ).
94 [1908] HCA 63.
95 (2013) 251 CLR 196.
96 (2013) 251 CLR 196, 310 [313] (Gageler and Keane JJ).
97 (2015) 255 CLR 352.
98 (2015) 255 CLR 352, 381–382 [67] (Gageler J).
99 (2018) 351 ALR 369.
100 (2018) 351 ALR 225, 234 [35] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).
101 (2018) 351 ALR 225, 233 [34] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).
102 (2018) 351 ALR 225, 240 [60] (Gageler J).
103 (2018) 351 ALR 225, 249 [88] (Edelman J).
104 (2018) 351 ALR 225, 249 [87] (Edelman J).
105 (2018) 351 ALR 225, 254 [102] (Edelman J).
106 (2018) 351 ALR 225, 254 [103] (Edelman J).
107 (2018) 351 ALR 225, 249 [90] (Edelman J).
108 [1998] AC 539.
109 [1998] AC 539, 587 (Lord Steyn).
110 [2018] HCA 34, [64] (Edelman J).
111 [2018] HCA 34, [64] (Edelman J).
112 Louis L Jaffe and Edith G Henderson, 'Judicial Review and the Rule of Law' (1956) 72 *Law Quarterly Review* 345, 347.

RECENT DEVELOPMENTS

Katherine Cook

Appointment of Australian Information Commissioner and Privacy Commissioner

Ms Angelene Falk has been appointed the Australian Information Commissioner and Privacy Commissioner for a three-year term effective from 16 August 2018.

Ms Falk has held senior positions in the Office of the Australian Information Commissioner (OAIC) since 2012. These include Deputy Commissioner since 2016 and Acting Australian Information Commissioner and Privacy Commissioner since March 2018, leading the OAIC in fulfilling the office's functions across privacy, freedom of information and government information management.

Ms Falk has extensive experience delivering the functions of independent regulators and a track record of working across Commonwealth and State agencies, business and the community in law, policy and education.

The Commissioner role is critical to helping ensure the privacy of Australians, particularly in the online environment, and the Attorney-General is confident Ms Falk is the appropriate candidate to meet this challenge.

Ms Falk has been at the forefront of addressing regulatory challenges and potential uses of data in a global environment and also worked to promote public access to information held by government.

Ms Falk played a key role across business, community and government agencies on the implementation of the Notifiable Data Breaches scheme under the *Privacy Act 1988*, which commenced in February 2018.

In 2014 Ms Falk oversaw the OAIC's significant work and stakeholder engagement on the implementation of the reforms to the Privacy Act that commenced that year.

<https://www.attorneygeneral.gov.au/Media/Pages/Appointment-of-australian-information-commissioner-and-privacy-commissioner.aspx>

Appointment of new Victorian Chief Examiner

The Andrews Labor Government has announced the appointment of Sally Winton as an examiner with the Office of the Chief Examiner.

Ms Winton is currently the Public Access Deputy Commissioner in the Office of the Victorian Information Commissioner, where she has worked since September 2017.

She played a key role in the establishment of the Office, working closely with the Information Commissioner and the Privacy and Data Protection Deputy Commissioner.

In her current role, Ms Winton has carried out external reviews of freedom of information decisions and advocacy to promote the objectives of the *Freedom of Information Act 1982*.

Ms Winton was previously with the Office of the Freedom of Information Commissioner, where she initially acted as the Assistant Commissioner from October 2016 and then acted as the Commissioner from June 2017. From 2010 to 2016, Ms Winton held various legal roles at the Australian Criminal Intelligence Commission, rising to the role of National Litigation Manager.

Ms Winton began her career at the Commonwealth Attorney-General's Department in 2006, including as Acting Principal Legal Officer.

She has a Bachelor of Laws and a Bachelor of Arts from the University of Queensland and a Graduate Diploma of Legal Practice from the Australian National University.

The Office of the Chief Examiner was established in 2005 to help combat organised crime by obtaining evidence through the use of coercive powers.

<https://www.premier.vic.gov.au/new-appointment-to-office-of-chief-examiner/>

New Race Discrimination Commissioner

Australia's new Race Discrimination Commissioner will take up the position on Monday, 8 October 2018.

Mr Chin-Leong Tan has been appointed to the position for a term of five years.

Mr Tan is a well-known and recognised leader in the multicultural community, and I congratulate him on this significant appointment. Mr Tan's story is like that of so many Australians who were born overseas and chose to make a new life in Australia.

Because of the opportunities presented by and available in Australia, Mr Tan pursued his tertiary education in Australia and made Australia his home. After completing degrees in Arts and Law, Mr Tan practised as a lawyer for over 20 years in Australia.

Since 2015, Mr Tan has been the Director of Multicultural Engagement at Swinburne University of Technology in Melbourne and led the development of a Charter of Cultural Diversity, resulting in the university being awarded at the 2017 Victorian Multicultural Excellence Awards.

Between 2011 and 2015, Mr Tan served as the Chairperson and Commissioner of the Victorian Multicultural Commission. At the 2017 Victorian Multicultural Excellence Awards ceremony he was honoured with an Acknowledgement of Service in recognition of his dedicated service to the Victorian Multicultural Commission.

He has also been a member of the Victorian Police Commissioner's Human Rights Strategic Advisory Group, a member of the Victorian Department of Premier and Cabinet's Multicultural Services Delivery Inter-Departmental Group and a member of the Victorian Government Ministerial Council for a Multilingual and Multicultural Victoria.

Mr Tan also has extensive experience within the legal profession, having served on various local council bodies and associations, providing him with great experience in a range of community engagement activities, including with Australia's multicultural communities.

Mr Tan has served as a member of the Australian Football League's Multicultural Focus Group and is a well-respected community leader on a range of community and public affairs issues.

<https://www.attorneygeneral.gov.au/Media/Pages/new-race-discrimination-commissioner-5-october-2018.aspx>

Trust, transparency and right to information: accountability in an age of democratic disquiet

A culture of secrecy and a desire for non-disclosure are still commonplace across many areas of politics and the bureaucracy, according to Professor Ken Smith, Dean and Chief Executive of the Australian and New Zealand School of Government.

Professor Smith made this claim during his delivery of this year's Right to Information (RTI) Day Solomon Lecture, titled 'Trust, Transparency and Right to Information: Accountability in an Age of Democratic Disquiet'.

'Work that makes government more transparent or improves integrity must be seen as essential for rebuilding the trust that makes it possible for governments to operate effectively and work for the public good.'

In the lecture, Professor Smith also advocated for the need to return to the basics of our fundamental purpose of ensuring public trust and the need always to operate in the public interest rather than serve narrower sectional interests.

Professor Smith said, 'We need to understand our relative position as public officers within the community as elites and ensure that government is not perceived as being of the elites, by the elites, and for the elites'.

'The Right to Information reforms and their implementation are so important to reversing the massive declines in trust. We must do our utmost to ensure engaged, participatory and deliberative democracy.'

'Focusing on transparency in the way we go about our business and continuing to open up government, and of course access to the information which supports our evidentiary basis for decision-making — will bring huge benefits to the community and importantly build rather than continue to erode trust in our democratic institutions', Professor Smith said.

Queensland's Information Commissioner, Ms Rachael Rangihaeata, said, 'RTI Day celebrations and the Solomon Lecture are a timely reminder that building community trust through more open, transparent and accountable government requires strong leadership and continual work by all levels of the public service'.

'We must be proactive and vigilant in ensuring a right to access government-held information, and Queensland government agencies have a responsibility to release information unless it is contrary to the public interest to do so', Ms Rangihaeata said.

A copy of Professor Smith's speech and recording of the 2018 Solomon Lecture are available at <www.oic.qld.gov.au/rtiday2018>.

The Solomon Lecture was hosted by the Office of the Information Commissioner in partnership with the Queensland Public Service Commission.

<https://www.oic.qld.gov.au/information-for/media/trust,-transparency-and-right-to-information-accountability-in-an-age-of-democratic-disquiet>

OIC joins the NT Ombudsman's Office

The Northern Territory Ombudsman, Mr Peter Shoyer, has welcomed the staff of the Office of the Information Commissioner to his team.

Following the recommendations in the Martin report (which led to the establishment of the Independent Commissioner Against Corruption), the freedom of information and privacy functions of the Office of the Information Commissioner have been transferred to the Ombudsman.

As part of the arrangement, Mr Shoyer has taken over as Information Commissioner from Ms Brenda Monaghan. Ms Monaghan has been appointed Deputy Ombudsman and will continue to deal with freedom of information and privacy matters as Deputy Commissioner. Mr Shoyer was the inaugural Information Commissioner for the Northern Territory from 2003 to 2007.

'We are all very positive about the new arrangement', Mr Shoyer said. 'It will allow a larger team to respond to any concerns regarding FOI, privacy and administration in public bodies.'

<https://www.ombudsman.nt.gov.au/news/oic-joins-ombudsmans-office>

Recent decisions

Can a last-minute change in judicial proceedings result in a denial of procedural fairness?

Nobarani v Mariconte [2018] HCA 36 (15 August 2018)

The appellant claimed an interest in challenging a handwritten will made in 2013 by the late Ms Iris McLaren (the 2013 Will). The 2013 Will left the whole of Ms McLaren's estate to the respondent. In August 2004, Ms McLaren had made a will in which she made bequests to the Animal Welfare League of money and land and bequeathed to the appellant shares of her jewellery and personal possessions (the 2004 Will).

The appellant filed a caveat against a grant of probate without notice to him. The Animal Welfare League also filed a caveat. The respondent later reached compromise with the Animal Welfare League, and this claim was dismissed.

The respondent brought proceedings for orders that the caveats cease to be in force (the caveat motion). The respondent also filed a summons for probate of the 2013 Will and a statement of claim. As part of the caveat motion, the respondent filed an affidavit sworn by Ms McLaren's solicitor, who prepared the 2013 Will. The solicitor said he knew Ms McLaren well by the time of her death. When he attended her for the signing of the 2013 Will, she was alert and interested and said the respondent was the only person who cared about her. He said she understood that she had left everything to the respondent, and the 2013 Will was signed by Ms McLaren in the presence of two witnesses.

In the caveat motion, the appellant was not named as a defendant and, although he was served with the statement of claim and filed an appearance, he was not directed by the

Court to take any steps in those proceedings. The appellant was unrepresented. At a directions hearing on 23 April 2015, it was explained to the appellant that the trial would be limited to determination of his caveat motion.

However, on 14 May 2015, three business days before the trial, at the first directions hearing held by the trial judge, that judge told the appellant that the trial would be of the claim for probate and directed that the appellant be joined as a defendant. Senior counsel for the respondent did not mention that the appellant had only filed evidence in opposition to the caveat motion.

On 20 May 2015, the trial commenced. The appellant's conduct at the trial was not orderly and his defence was hastily prepared and almost incomprehensible. The substantially abbreviated timetable to trial had consequential effects, including that the appellant was unable to call the key witnesses to the 2013 Will. The appellant made a number of applications for adjournments. These were refused by the trial judge, who stated that the appellant had had sufficient time to prepare because the matter had been set down for a trial for some time. The trial judge delivered judgement orally, granting probate of the 2013 Will in solemn form. The appellant was ordered to pay costs.

The appellant then appealed to the NSW Court of Appeal. A majority of the Court of Appeal (Ward JA and Emmett AJA) dismissed the appellant's appeal. Ward JA concluded that, although the appellant had been denied procedural fairness, that denial did not deprive him of the possibility of a successful outcome. Emmett AJA concluded that the appellant did not have an interest in the validity of the 2013 Will. In dissent, Simpson JA would have allowed the appeal, concluding that the appellant has been denied procedural fairness and that the denial was a substantial miscarriage of justice.

By grant of special leave, the appellant appealed to the High Court. Before the High Court, the appellant contended that the Court of Appeal erred in not ordering a retrial. The respondent contended, among other things, that there was no denial of procedural fairness and, if there was, there was no substantial miscarriage of justice by reason of any such denial. The High Court found that the trial judge did not appreciate, and was not informed, that the dates that had been set down were only to be used for the hearing of the caveat motion and that no directions had been made for taking any steps for a trial of the claim for probate.

The High Court unanimously held that the appellant was denied procedural fairness. The High Court found that the denial of procedural fairness arose from the consequences, and effect on the appellant, of altering the hearing, at short notice, from a hearing of the caveat motion to a trial of the claim for probate.

While the case presented by the respondent, with the evidence of Ms McLaren's solicitor at its heart, was strong, the grant of probate in solemn form was not inevitable. The denial of procedural fairness amounted to a 'substantial wrong or miscarriage' in the sense that the appellant was denied the possibility of a successful outcome.

The correct test for determining on appeal whether an administrative decision is legally unreasonable

Minister for Immigration and Border Protection v SZVFW [2018] HCA 30 (8 August 2018)

On 3 December 2013, SZVFW and his wife applied for protection visas. The application included a postal and residential address in Roselands, New South Wales. On 3 March 2014, the Department of Immigration and Border Protection invited SZVFW to an interview

via a letter sent to the Roselands address. On 25 and 26 March 2014, a Mandarin-speaking departmental officer contacted SZVFW to reschedule his interview. Neither SZVFW nor his wife attended the scheduled interview or provided any further supporting documents. Their applications were refused by a delegate of the then Minister for Immigration and Border Protection.

After the applications were refused, the respondents sought review by the Tribunal of a decision of a delegate of the appellant (the Minister) to refuse their application for protection visas. Both applicants included the Roselands address and SZVFW's mobile number and email address.

In May 2014, the Tribunal wrote to the respondents at their Roselands address, via ordinary post, inviting them to provide material or written arguments on the review. On 15 August 2014, using the same method, the Tribunal invited the respondents to appear before it at a hearing. The respondents did not contact the Tribunal or attend the hearing.

The Tribunal, relying on s 426A(1) of the *Migration Act 1958* (Cth), proceeded to determine the review application, affirming the delegate's decision to refuse the protection visas. Section 426A(1) relevantly provided that, if an applicant for review was invited to appear before the Tribunal and fails to appear, the Tribunal may proceed to make a decision on the review without taking further action to allow or enable the applicant to appear before it.

On 15 September 2014, SZVFW and his wife were informed of the Tribunal's decision. The letter was addressed to the Roselands address.

The respondents sought judicial review in the Federal Circuit Court of the Tribunal's decision to proceed to make a decision in their absence. The primary judge held that the Tribunal's decision to proceed without taking further action to allow or enable the respondents to appear before it was legally unreasonable. Her Honour considered that the Tribunal could have easily identified another avenue for communicating with SZVFW and his wife because they had provided SZVFW's mobile number and email address to the Tribunal. The primary judge also noted that the matter had been before the Tribunal for a relatively short period of time and SZVFW, and his wife, were not represented by a migration agent.

The Minister appealed to the Full Court of the Federal Court. The Minister challenged the primary judge's conclusion of unreasonableness. The Full Court upheld the primary judge's decision, holding that the Minister was required to demonstrate that the primary judge's evaluation of the legal unreasonableness ground involved appealable error of fact or law akin to that required in appeals from discretionary judgements (which are subject to the principles explained in *House v The King* (1936) 55 CLR 499). The Full Court found such an error had not been demonstrated and dismissed the appeal.

By grant of special leave, the Minister appealed to the High Court. The Court unanimously allowed the appeal.

The High Court held that principles stated in *House v The King* had no application to an appeal by way of rehearing from a judicial review of an administrative decision on the ground that the decision was legally unreasonable. Rather, the Full Court of the Federal Court was required to examine for itself the administrative decision of the Tribunal to determine whether the primary judge was correct to conclude that the decision was unreasonable.

In this case, the High Court unanimously held that, contrary to the conclusion reached by the primary judge, the administrative decision of the Tribunal was not legally unreasonable. In the Court's view, given the respondents' failure to respond to the Tribunal's invitations, and having regard to s 426A(1), the Tribunal's decision to proceed in the absence of the respondents was not unreasonable. Section 426A(1) enabled the Tribunal to make a decision without taking any further action to allow an applicant to appear before it. Moreover, the primary judge paid no regard to the lack of interaction between SZVFM and the Department, when they did not attend to be interviewed, in circumstances where could be no suggestion that they had not received a written invitation to attend that interview. As such, there was no suggestion that the failure of SZVFW and his wife to attend the Tribunal hearing was unremarkable.

Whether an error of law in relation to one criterion is a jurisdictional error where another criterion was not met

Hossain v Minister for Immigration and Border Protection [2018] HCA 34 (15 August 2018)

Mr Sorwar Hossain is a citizen of Bangladesh. He first came to Australia in 2003 on a student visa. When this expired he unsuccessfully applied for two protection visas and acquired a debt to the Commonwealth as a result of these applications. Between 2008 and 2013 he was an unlawful non-citizen. In 2010, Mr Hossain met a woman who became his de facto partner in 2013. In May 2015, he applied for a partner visa. A delegate of the then Minister for Immigration and Border Protection refused to grant this visa.

Mr Hossain then applied to the Administrative Appeals Tribunal (the Tribunal) for review of the delegate's decision. As part of its review of the delegate's decision, the Tribunal had to decide whether it was satisfied that Mr Hossain met two criteria prescribed by the *Migration Regulations 1994* (Cth). The first criterion was that the application for the visa be made within 28 days of the applicant ceasing to hold a previous visa 'unless the Minister is satisfied that there are compelling reasons for not applying' that criterion. The second criterion was that the visa applicant 'does not have outstanding debts to the Commonwealth unless the Minister is satisfied that appropriate arrangements have been made for payment'. Section 65 of the *Migration Act 1958* (Cth) provided that, 'if satisfied' that all the criteria prescribed for the visa had been met, the Minister (or on review the Tribunal) was to grant the visa; and that, 'if not so satisfied', the Minister (or on review the Tribunal) was to refuse to grant the visa.

The Tribunal was not satisfied that the first criterion had been met because Mr Hossain had not applied for the partner visa within 28 days of ceasing to hold a previous visa and the Tribunal was satisfied that there were no compelling reasons, as at the time at which Mr Hossain had applied for the partner visa, for not applying that criterion. The Tribunal also was not satisfied that the second criterion had been met because Mr Hossain had a debt to the Commonwealth, which he had made no arrangements to repay. Although Mr Hossain told the Tribunal that he intended to repay the debt, he had provided no evidence that he had taken any steps to repay the debt.

The Tribunal accordingly affirmed the delegate's decision not to grant the partner visa.

Mr Hossain applied to the Federal Circuit Court of Australia for judicial review of the Tribunal's decision. By the time the application came to be heard, Mr Hossain had fully repaid his debt to the Commonwealth.

The Minister conceded, before the Federal Circuit Court, that the Tribunal had made an error of law by deciding that there were no compelling reasons for not applying the first

criterion as at the time of the visa application. Instead, the Tribunal should have decided whether such reasons existed as at the time of the Tribunal's decision. The Minister further argued that the conceded error was not a jurisdictional error because the Tribunal's failure to be satisfied that the second criterion (the debt to the Commonwealth) was met provided an independent basis on which the Tribunal was bound to affirm the delegate's decision.

The Federal Circuit Court held that the Tribunal's error in relation to the first criterion was jurisdictional in nature and meant that the Tribunal's decision was invalid, notwithstanding that the Tribunal also had not been satisfied that the second criterion had been met.

The Minister then appealed this decision to the Full Court of the Federal Court. On appeal, a majority of the Full Court held that the Tribunal's error was jurisdictional in nature. However, that error had not stripped the Tribunal of authority to affirm the delegate's decision, because it had to be satisfied that a separate criterion (the debt to the Commonwealth) had not been met. In dissent, Mortimer J thought the correct approach was to accept that the error was jurisdictional and then to ask whether there is utility in the grant of relief to an applicant because of the second basis for the decision on review. In her view, approaching the matter as one of discretion, the orders made by the Federal Circuit Court were not futile because Mr Hossain had repaid his debt to the Commonwealth and therefore meeting the second criterion would no longer be an issue. Further, if the Tribunal had not made an error in relation to the first criterion, properly instructed it might have been persuaded to delay making its decision until such time as Mr Hossain was able to pay his debt to the Commonwealth.

By grant of special leave, Mr Hossain appealed to the High Court. The High Court opined that to describe a decision as 'involving jurisdictional error' is to describe that decision as having being made outside of jurisdiction. A decision made outside jurisdiction is a decision in fact which is properly to be regarded for the purposes of the law pursuant to which it is purported to be made as 'no decision at all'. To that extent the decision is 'invalid' or 'void'.

The High Court held that a decision-maker is required to proceed on a correct understanding of the applicable law but that an error of law will not be jurisdictional in nature if the error does not materially affect the decision. The Tribunal's findings with respect to the second criterion provided an independent basis on which the Tribunal was bound to affirm the delegate's decision. Therefore, the Tribunal's incorrect decision on the first criterion was immaterial to determining whether a jurisdictional error had occurred.

The suggestion that the Tribunal might have allowed Mr Hossain more time to arrange to repay his debt if the Tribunal had not made the error in relation to the first criterion was insufficient to demonstrate that the Tribunal's decision might have been different had it not made the error in relation to the first criterion. The High Court dismissed the appeal.

JUDICIAL REVIEW: CAN WE ABANDON GROUNDS?

Justice John Basten*

Since its commencement on 1 October 1980 the recognised point of reference for a statement of the grounds for judicial review has been s 5 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (ADJR Act). That is true not only of statutory review within the terms of the ADJR Act but also of review in the supervisory jurisdiction of state Supreme Courts, where the ADJR Act does not apply, and (though perhaps to a lesser extent) in proceedings under s 75(v) of the *Constitution*. The influence of the ADJR Act, despite questioning in recent years as to its continued relevance, cannot be doubted. However, only five years after the ADJR Act commenced, Lord Diplock, in *Council of Civil Service Unions v Minister for the Civil Service*[1] (*CCSU*), characterised the grounds as procedural impropriety, illegality and irrationality. The commentary in the CCH Service on the ADJR Act, edited by then Alan Robertson SC, applied this characterisation in discussing the grounds for an order of review.[2] Although the grounds were not coterminous with common law principles, the language of the ADJR Act was generally seen as reflecting the common law, as explained by Mason J in *Minister for Aboriginal Affairs v Peko-Wallsend Ltd*, dealing with failure to take into account a relevant consideration.[3]

A number of factors have caused both courts and commentators to reconsider the operation of the grounds over the 40 years since they were drafted. It is sufficient, by way of background, to note three such events. First, and perhaps obscurely for those not working in the area, there was the insertion of a new s 166LB in the *Migration Act 1958* (Cth), now better known as s 476, which sought to permit judicial review on some grounds but not others. One of the included grounds was that 'the decision was an improper exercise of the power conferred by [the Act]', but that ground was said to exclude taking an irrelevant consideration into account or failing to take a relevant consideration into account. This attempt by the Migration Act, then the major source of federal judicial review decisions, to adopt the language of s 5 of the ADJR Act but to carve out some grounds as unavailable failed. It was doomed to fail because it ignored the fact that the grounds were expressed in imprecise language at a reasonably high level of generality and involved much potential overlap. Failure to take account of a mandatory consideration must, one would think, be an error of law, but error of law was an available ground of review. The exercise came unstuck,[4] not only because it was internally incoherent but also because it failed to take into account the statutorily immune jurisdiction of the High Court to grant relief by way of the constitutional writs.

The second event involved a further amendment of the Migration Act by which Parliament sought to include a strong privative clause in order to constrain the availability of judicial review. That occurred in the immediate aftermath of 9/11. The *Migration Legislation Amendment (Judicial Review) Act 2001* (Cth) was part of a suite of legislation to which assent was given on 27 September 2001 and which came into operation almost immediately. That led, in *Plaintiff S157/2002 v Commonwealth of Australia*,[5] to the enlistment of 'jurisdictional error' as a description of the constitutional limit

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on the effectiveness of a Commonwealth privative clause in constraining the supervisory jurisdiction of the High Court.

The third event was the adoption of the same concept of 'jurisdictional error' as a constitutional constraint on the power of a state Parliament to limit the supervisory jurisdiction of state Supreme Courts, as explained in 2010 in *Kirk v Industrial Court (NSW)*.[6]

These developments set the scene for what has become, as I read recent judgements, a major rethinking of how we approach the availability of judicial review in Australia.[7]

However, I want to start not in this country but with an English decision — not one of the UK Supreme Court or the Court of Appeal but of a Divisional Court of the Queen's Bench Division. Unusual cases can lead us to question basic assumptions underlying conventional thinking, and this was a most unusual case. *The Queen (on the application of DSD and NBV) v The Parole Board of England and Wales*[8] (*Radford*) was remarkable because it involved a challenge to a decision of the Parole Board to release a prisoner. (The prisoner called himself John Radford, and I will use that name for the case.) The case arose in this way. Mr Radford, then known as Worboys, was convicted in March 2009 of 19 serious sexual offences committed on women who had been passengers in his taxi. (He was then a cab driver in London.) In April 2009, he was sentenced to an indeterminate sentence for public protection, with a minimum term of eight years imprisonment. That period expired in February 2016, but Mr Radford was only eligible to be released if the Parole Board was satisfied that 'it is no longer necessary for the protection of the public that the prisoner should be confined'.[9]

There was more to Mr Radford's history than the 19 counts on which he had been convicted. They alone might not have led to the title of 'the black cab rapist'. A dossier supplied to the Parole Board, based on information provided by the police, identified 'at least 80 potential victims' in addition to the women involved in the charged offending for which he had been convicted. This material (together with the results of other litigation) was not considered by the Parole Board. In a judgement delivered on 28 March 2018 the Divisional Court held that the material should have been considered; accordingly, the Court set aside the decision of the Parole Board. Mr Radford remained (and remains) in custody.

There are two background matters which warrant attention before turning to the reasoning of the Court. First, there was an interesting issue in relation to standing to bring the proceedings challenging the release order. Much was made in the media at the time of the fact that the relevant minister, the Justice Secretary, did not challenge the order. The primary applicants, known as DVD and NBV, were women who had been the victims of conduct of which Mr Radford had been convicted. However, applications were also brought by the Mayor of London and by News Group Newspapers Ltd, although News Group's challenge was limited to restrictions on publication. The standing of the complainants was not challenged and the Court held that the Mayor did not have standing, although it had regard to his submissions.

The Divisional Court itself noted the uniqueness of the case, noting that:

(a) 'never before has a decision to direct the release of a prisoner been challenged'; and;
(b) '[b]ecause the only parties to a hearing before the Parole Board are the Secretary of State and the prisoner, it also follows that never before has judicial review been mounted by anyone other than a party to the proceedings'.

(That may not be quite correct; we would think of *Re McBain; Ex parte Australian Catholic Bishops Conference*.[10]) The Court also noted that there had not previously been a challenge to a rule prohibiting publication of information about proceedings before the Parole Board and the names of persons concerned in the proceedings.[11]

The second background matter concerns other proceedings brought by DSD and NBV against the Commissioner of Police under the *Human Rights Act 1998* (UK). Those proceedings alleged a failure of the police to conduct effective investigations into Mr Radford's crimes. They claimed compensation, being successful at trial. An appeal by the Police Commissioner was dismissed in June 2015.[12] A further appeal to the UK Supreme Court was dismissed on 21 February 2018.[13] (Given the relevance of human rights law to both domestic tort law and the regulatory functions of administrative law, this decision is important in its own right.) The relevance of the Human Rights Act litigation for present purposes was that the judgement was available to the Parole Board, but the findings of fact made by the trial judge had been made in proceedings to which Mr Radford was not a party.

Mr Radford was fully aware of the difficulties he faced in persuading the Board that he was no longer a threat to public safety. He sought to acknowledge his offending and demonstrate a degree of insight by what the Divisional Court thought may have been 'a carefully calibrated account, steering adroitly between admitting too much and too little, rather than one that is entirely open and forthcoming'.[14] He also changed his surname from Worboys to Radford.

In substance, the challenge to the decision of the Parole Board turned on two related factors: first, what was described as 'missing material'; and, secondly, procedural fairness. The Parole Board did not have before it a number of sources of information against which to judge the credibility and reliability of the offender's account to it of his offending. Thus, in the Human Rights Act proceeding, the trial judge (Green J) had found that Mr Radford had committed 'in excess of 105 rapes and sexual assaults upon women in his taxi'. He also provided 'critical detail of the circumstances of the police arrest and what was found (all of which could, in any event, have been made available to the Parole Board)'.[15]

Turning to the reasoning of the Divisional Court, its first step was to consider whether the decision of the Parole Board, assessed upon an examination of the material that it took into account rather than by reference to that which, arguably, it ought to have taken into account, was *Wednesbury* unreasonable or irrational. The Court rejected a challenge mounted on that basis.[16]

The Court's second step was to consider a challenge based on failure to have regard to 'relevant considerations', identified as evidence of extensive offending beyond the convictions for which he had been sentenced. Recognising that, in the absence of any express statutory obligation, it was necessary to imply an obligation to take such material into account, the Court rejected that ground. It reasoned that such an obligation would only be implied 'if evidence of wider offending were always relevant to the statutory question: it cannot depend on the circumstances of individual cases'.[17]

On its face, that reasoning is curious. It is not difficult to bring to mind statutes which identify mandatory considerations in express terms but which will be subject to an express or implied qualification that such factors must be considered, but only so far as relevant in the circumstances of the case. To give but one example, old s 79C of the *Environmental Planning and Assessment Act 1979* (NSW) (now s 4.15) requires a consent authority dealing with a development application to take into consideration 'such of the following matters as are of relevance to the development the subject of the development application'.

However, there may be a more nuanced approach to this aspect of the reasoning, to which I will return.

In the result, the Divisional Court upheld the challenge to the release order on the basis that the Board ignored 'a matter [which] is so obviously material that it would be irrational to ignore it', applying *Wednesbury* principles of unreasonableness.[18] The central issue on the parole application was identified as the honesty and veracity of Mr Radford's account of his offending. The Divisional Court, reflecting reasoning of the kind adopted by the High Court in *ACMA v Today FM*[19] (*ACMA*) said, 'whereas we agree … that it is not the role of the Parole Board to determine whether a prisoner had committed other offences, we cannot accept the extension of that submission … that it is precluded from considering evidence of wider offending when determining the issue of risk'.[20]

How should we assess this approach in Australia? First, *ACMA* held that the licensing authority could determine that a licensee had committed an offence and thus breached a licence condition, although the authority was not a criminal court. That was a step further than merely 'considering evidence'; it involved a determination of breach for the limited purpose of the licensing function. Secondly, although our High Court has been guarded in imposing an obligation to inquire, it accepts that there may be circumstances where that is necessary. In *Minister for Immigration and Citizenship v SZIAI*,[21] the Court said:

> [I]t may be that a failure to make an obvious inquiry about a critical fact, the existence of which is easily ascertained, could, in some circumstances, supply a sufficient link to the outcome to constitute a failure to review. If so, such a failure could give rise to jurisdictional error by constructive failure to exercise jurisdiction. It may be that failure to make such an inquiry results in a decision being affected in some other way that manifests itself as jurisdictional error.[22]

We should not reject out of hand a ground of review based on a duty to inquire, but the label we apply may raise two other questions.

First, by seeking out statutory implications, are we really adopting a fig leaf of legislative justification for what is in substance the imposition of a requirement by the court? Secondly, does the adoption of terms like 'jurisdictional error' and 'constructive failure to exercise jurisdiction' merely substitute one label for another, so that we are adopting higher and higher levels of generality to describe the exercise being undertaken by a reviewing court, with a resultant diminution in transparency? If these concerns have substance, the conventional grounds of review, despite their vagueness and elements of overlapping, would at least provide greater particularity.

In relation to the first question, it is time to return to the way the Divisional Court dismissed the 'relevant considerations' ground. It is tolerably clear that mandatory considerations are not all of a kind. Taking s 4.15 of the Environmental Planning and Assessment Act, several of the mandatory considerations are provisions of various kinds of planning instruments. A failure to apply the provision of an instrument will turn on whether it is applicable in the circumstances. That is likely to involve a matter of construction of the instrument and hence a question of law. On the other hand, a requirement to consider 'the likely impacts of [the] development' and 'the suitability of the site for the development' will engage an evaluation of the facts. Further, it is said that 'the public interest' is a mandatory consideration. What that would encompass cannot be determined in the abstract. It too will depend upon the circumstances of the case and may involve highly contestable judgements. But it is important that these factors be informed by the specific statutory context within which the decision is made.[23] The label provides little assistance.

In relation to the second question, consider the statement of Gummow and Callinan JJ in *Dranichnikov v Minister for Immigration and Multicultural Affairs*[24] (*Dranichnikov*) that '[t]o

fail to respond to a substantial, clearly articulated argument relying upon established facts was at least to fail to accord Mr Dranichnikov natural justice'.[25] Their joint reasons further noted that it may also be 'either characterised as a failure to accord natural justice or as that, and more, which we consider it to be, including a constructive failure to exercise jurisdiction'.[26]

I see no difficulty in identifying, as a mandatory consideration, the content of an application. If an asylum seeker alleges a fear of persecution in his or her country of nationality, it would be legal error for the decision-maker to fail to assess the basis of the claim. That does not mean that factual assertions must be accepted, but it may mean that a plausible claim which, if accepted, would engage the *Convention Relating to the Status of Refugees*,[27] Art 1, must be assessed. If the challenge is that the decision-maker did not assess the claim adequately, is that a failure to address a mandatory consideration, a failure to inquire or simply a failure to exercise the statutory power? Or should one acknowledge that genuine, proper and realistic consideration of a claim will involve matters of degree and judgement and really we are applying a reasonableness standard?

Let me now turn to the High Court's recent decision in *Probuild Constructions v Shade Systems*[28] (*Probuild*). The issue was whether an adjudicator's determination of a dispute in relation to a progress payment under the *Building and Construction Industry Security of Payment Act 1999* (NSW) was reviewable for error of law on the face of the record. The Court of Appeal had said no; the High Court agreed. The plurality said the only question was whether the statutory scheme ousted the jurisdiction of the Supreme Court to quash for error of law on the face of the record — a power now found in s 69 of the *Supreme Court Act 1970* (NSW).[29] The plurality said that the jurisdiction was ousted by necessary implication. Gageler J and Edelman J reached the same result but by routes which dealt rather differently with the supervisory jurisdiction. For present purposes I want to consider two propositions in the reasoning of Gageler J.

Gageler J identified *Attorney General (NSW) v Quin*[30] as a 'turning point' in the development of Australian jurisprudence. For that characterisation he had the support of the Court in *Corporation of the City of Enfield v Development Assessment Commission*,[31] which described the principle formulated by Brennan J as encapsulating '[t]he fundamental consideration in this field of discourse'.[32] Gageler J summarised the point in *Attorney General (NSW) v Quin*[33] in the following passage:

> In the course of giving reasons for allowing an appeal against an order of the Court of Appeal of the Supreme Court of New South Wales, which order had been sought to be justified as an exercise of the Supreme Court's supervisory jurisdiction, Brennan J there formulated the principle that '[t]he duty and jurisdiction of the court to review administrative action do not go beyond the declaration and enforcing of the law which determines the limits and governs the exercise of the repository's power'.[34] His Honour added that '[i]n Australia, the modern development and expansion of the law of judicial review of administrative action have been achieved by an increasingly sophisticated exposition of implied limitations on the extent or the exercise of statutory power'.[35] His Honour went on to explain both reasonableness[36] and procedural fairness[37] as within the category of limitations on the exercise of a statutory power that are ordinarily implied.[38]

The second step in Gageler J's argument was to pick up the common law presumption of statutory interpretation 'that a statutory conferral of decision-making authority on a person or body other than a court is conditioned by an implied statutory requirement that the person or body can validly exercise that authority only on a correct understanding of the law applicable to the decision to be made'.[39] The presumption, Gageler J stated, is 'similar in concept and in operation to the common law presumptions of statutory interpretation which support the statutory implication of conditions of reasonableness and procedural fairness'. That is, they condition the exercise of power so that breach of the requirement is a jurisdictional error.

The consequence of those two propositions, Gageler J continued, is that the power of a superior court to issue certiorari to quash for non-jurisdictional error of law on the face of the record is 'anomalous'.[40] In other words, if the decision-maker has no power to make a decision based on a wrong understanding of the law then any error of law can be corrected for jurisdictional error; if the decision-maker is entitled to make a decision based on a wrong understanding of the law, it 'would at best be supererogation and at worst conducive of incoherence' to provide a power to quash the decision for error of law on the face of the record.

The result in *Probuild*, in Gageler J's view, was that, if one were satisfied that the adjudicator was entitled to make a determination on a wrong construction of the contract, it made no sense to then invoke a presumption that certiorari would be available for error of law on the face of the record — the record in this case constituting the adjudicator's reasons. This reasoning is attractive because it addresses, at least inferentially, the puzzle at the heart of the concept of certiorari — namely, what is non-jurisdictional error of law? However, one might go a step further and question the concept of 'error of law', which is at the heart of Gageler J's second proposition, as itself fraught with difficulties.

One may appreciate the willingness to look behind 'presumptions' which are an important part of statutory construction. On the other hand, I am not persuaded that a supervisory jurisdiction based on error of law on the face of the record is either incoherent or necessarily illogical. A trial judge in the Supreme Court undoubtedly has power to determine the facts of a case and the relevant law and apply the law to the facts. It is neither incoherent nor illogical to allow an appeal by way of rehearing from the trial judge's decision. On one view, where the supervisory jurisdiction is engaged with respect to an alleged error of law on the face of the record, it is little different from an appeal for error of law.[41]

However, there is a more fundamental consideration to be drawn from this discussion. That is this: if one wishes to understand better the scope and limitations of the supervisory jurisdiction of the court, as opposed to its appellate jurisdiction, one is working at the intersection of the common law and statute.[42] There are a number of principles of statutory interpretation which are important. Those principles operate in the sphere of public law and therefore rely on public law doctrines including the separation of powers; that doctrine requires the courts to supervise the legal limits of powers but not to exercise the powers which are conferred on officers within the executive branch. That is what Brennan J said in *Quin*.

Judicial review may be founded in statute or in the general law, as with the s 75(v) jurisdiction of the High Court and the s 69 jurisdiction of the New South Wales Supreme Court — the latter being mirrored by forms of statutory recognition in other states. Not all, but most, exercises of administrative power by government agencies are statute-based. The scope of the power will be determined by the statute conferring the power. Not all, but most, disputes arise from the exercise or failure to exercise powers which are discretionary or based on conditions of engagement which require evaluative judgements (which is a closely related concept). I assume that Mr Radford's Parole Board had no power to refuse him release if satisfied that his continued incarceration was not necessary for the protection of the public. No-one but the Parole Board could make that inherently contestable predictive judgement. The question was: could it take into account findings of fact made by a trial judge in proceedings to which Mr Radford was not a party (and which, incidentally, the Commissioner of Police, who was the defendant, did not challenge)? Could it otherwise place weight on unproven allegations and complaints? The Parole Board declined to do so on the basis that to place weight on this material would be a breach of procedural fairness. That view was said to be manifestly unreasonable and even irrational.

So how should the Parole Board have used this material? The answer given by the Divisional Court was that it could be used to challenge the sincerity and reliability of Mr Radford's account of the limited nature of his offending and his degree of insight into his conduct. For this purpose, at a hearing various matters would need to have been presented to Mr Radford for his response or explanation.

Before finding that the Parole Board's procedures were manifestly unreasonable, or even irrational, one would wish to know more about the workload of the Parole Board, how it conducted hearings and so on.

Of course, to set aside a decision may have a limited effect on the rights of an affected individual; the process can be repeated. But the judgement of the reviewing court should engage sufficiently in a practical sense with the powers and procedures of the decision-maker to allow a repeat consideration of the application to be carried out lawfully.

It is this last point which, albeit based on a highly charged case, leads me to a conclusion that we do not do judicial review very well in unusual or difficult cases.

In part that is because we have grounds of review which operate at different levels of generality. At the highest level, we have 'jurisdictional error', or 'error of law on the face of the record'. Both of these phrases are unhelpful without more precise analysis. At the next level, we have the tripartite classification from the *CCSU* case of procedural impropriety, illegality and irrationality. These concepts are useful to the extent that they tell us that reviewable error can arise if unfair procedures are adopted, if a legal constraint on power is breached, and if the result is assessed by the court to be unacceptable.[43]

At a third, and more specific, level we have the s 5 grounds from the ADJR Act. They are not entirely satisfactory because, as every experienced pleader knows, what is essentially one challenge can be classified in different ways.

Is there another way? Some years ago I had a clash of events. I was due to give a paper on administrative law to our judges but had hoped to attend the launch by then Chief Justice French of a review of the UNSW Law School curriculum. I rang to apologise. Having ascertained that my talk was due to start 15 minutes before the launch, French CJ explained that there was no problem. 'All you need to say', he told me, 'is that administrative law is all about statutory interpretation. You can easily do that in 15 minutes'.

I accept the point; most questions of power will require careful attention to the power-conferring statute. However, that gives rise to a different set of issues: how best to construe statutes and how to apply, in a particular statutory context, general law principles of procedural fairness and reasonableness. In this exercise, labels will not assist.

Let me finish with an example. There is no doubt that the 'reasonableness' criterion relied on in *Radford* is fraught in two broad respects. First, it unavoidably requires a court to engage in an evaluative assessment of the actual decision (and perhaps, as in *Radford*, with the procedures adopted to reach that decision). The High Court, after a period of doubt, has reaffirmed the principle of restraint implicit in Brennan J's statements in *Quin*: within the limits of power, the court is not concerned with the merits.[44] The court has no mandate to re-exercise the power or to set a decision aside on the basis that it would have reached a different decision.

Secondly, in their terms the tests of manifest unreasonableness and irrationality (which operate differently) provide no criteria for what is ultimately an evaluative judgement. In that context there is an attraction in structured proportionality reasoning. Why not ask: (1) for

what legitimate purpose is the power conferred; (2) does its exercise impinge on individual rights; and (3) is there a less intrusive result which is reasonably adapted to the legitimate purpose? (Of course, depending on context, this human rights protective version may need to be reformulated.) Those who resist that approach note that it recasts the exercise the decision-maker should take; it therefore invites the court to revisit the merits — a function denied by conventional jurisprudence.

My conclusion: I am not averse to labels. They can be useful as a checklist; and, for busy lawyers and judges, they may provide better guidance than principles articulated at a high level of generality. However, they may promise greater precision than they can deliver, and it is clear they do not describe independent, self-contained concepts.

On the other hand, in less straightforward cases we must have regard to basic constitutional principles such as the separation of powers and rely on implied statutory constraints, engaging principles of statutory interpretation and placing weight on the context provided by the specific statute.[45] We in Australia tend to place far more weight on these factors than do the British. That may be the influence of our written *Constitution*. But recall that the canonical statement of Brennan J in *Quin* was made in relation to state jurisdiction, not federal jurisdiction.

Would an Australian court decide *Radford* differently? It is not my purpose to answer that question, but I would leave you with two thoughts.

First, a decision to release on parole, unlike the initial sentence, is a decision for the executive. The relevant minister presented material to the Board and accepted the Board's decision. The only person with a legal interest affected by the outcome was Mr Radford. Would we allow a member of the public to seek judicial review? Were not the interests of the victims, so far as the liberty of the offender was concerned, at an end with the convictions and sentencing? Secondly, we would probably call it a constructive failure to exercise jurisdiction but otherwise, as the joint reasons stated in *ACMA*, 'it is not offensive to principle that an administrative body is empowered to determine whether a person has engaged in conduct that constitutes a criminal offence as a step in the decision to take disciplinary or other action'.[46]

The basis of judicial review lies in the breach of a mandatory condition imposed on the exercise of a specific power, usually statutory. The statute, not a taxonomic label, will determine the validity of the decision.

Endnotes

1 [1985] AC 374.
2 *Australian High Court and Federal Court Practice*, Vol 1 [¶10-635].
3 (1986) 162 CLR 24, 39; [1986] HCA 40.
4 See *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323; [2001] HCA 30.
5 (2003) 211 CLR 476; [2003] HCA 2.
6 (2010) 239 CLR 531; [2010] HCA 1.
7 See most recently *Hossain v Minister for Immigration and Border Protection* [2018] HCA 34.
8 [2018] EWHC 694 (Admin).
9 *Criminal Justice Act 2003* (UK) s 239(1)(b).
10 (2002) 209 CLR 372; [2002] HCA 16.
11 [2018] EWHC 694 (Admin) [3].
12 *Commissioner of Metropolitan Police v DVD* [2016] QB 161; [2015] EWCA Civ 646 (Lord Dyson MR, Laws and Kitchen LJJ).
13 *Commissioner of Police of the Metropolis v DSD* [2018] UKSC 11.
14 [2018] EWHC 694 (Admin) [127].
15 [2018] EWHC 694 (Admin) [51]–[52].
16 [2018] EWHC 694 (Admin) [116], [130].

17 [2018] EWHC 694 (Admin) [142].
18 [2018] EWHC 694 (Admin) [141], [156], [159]–[162].
19 *Australian Communications and Media Authority v Today FM (Sydney) Pty Ltd* (2015) 255 CLR 352; [2015] HCA 7.
20 [2018] EWHC 694 (Admin) [155].
21 (2009) 83 ALJR 1123; [2009] HCA 39 at [25].
22 See further *Minister for Immigration and Citizenship v SZGUR* (2011) 241 CLR 594; [2011] HCA 1, [22]–[23] (French CJ and Kiefel J), [74]–[75] (Gummow J), [91] and [92] (Heydon and Crennan JJ agreeing).
23 *Hossain v Minister for Immigration and Border Protection* [2018] HCA 34, [27] (Kiefel CJ, Gageler and Keane JJ); *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd* (2018) 92 ALJR 248; [2018] HCA 4, [44], [49] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ), [102] (Edelman J).
24 (2003) 77 ALJR 1088; [2003] HCA 26.
25 (2003) 77 ALJR 1088; [2003] HCA 26, [24].
26 (2003) 77 ALJR 1088; [2003] HCA 26, [25].
27 Opened for signature 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954).
28 (2018) 92 ALJR 248; [2018] HCA 4.
29 (2018) 92 ALJR 248; [2018] HCA 4, [2].
30 (1990) 170 CLR 1; [1990] HCA 21.
31 (2000) 199 CLR 135; [2000] HCA 5.
32 (2000) 199 CLR 135; [2000] HCA 5, [43] (Gleeson CJ, Gummow, Kirby and Hayne JJ).
33 (1990) 170 CLR 1.
34 (1990) 170 CLR 1, 35–36.
35 (1990) 170 CLR 1, 36.
36 (1990) 170 CLR 1, 36.
37 (1990) 170 CLR 1, 39–40.
38 (2000) 199 CLR 135; [2000] HCA 5, [71].
39 (2018) 92 ALJR 248; [2018] HCA 4, [75].
40 (2002) 209 CLR 372; [2002] HCA 16, [276]; (2018) 92 ALJR 248; [2018] HCA 4, [77].
41 Which is not inconsistent with its origins; cf *Hossain* [2018] HCA 34, [60] (Edelman J).
42 [2018] HCA 34, [28] (Kiefel CJ, Gageler and Keane JJ).
43 [2018] HCA 34, [19]–[20].
44 *Minister for Immigration and Border Protection v SZVFW* (2018) 92 ALJR 713; [2018] HCA 30, [11] (Kiefel CJ), [52]–[53] (Gageler J), [82] (Nettle and Gordon JJ), [134]–[135] (Edelman J).
45 (2018) 92 ALJR 713; [2018] HCA 30, [134] (Edelman J).
46 (2015) 255 CLR 352; [2015] HCA 7, [33].

A WORKABLE FORMULATION FOR JURISDICTIONAL ERROR IN AUSTRALIA?

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Since the introduction of the privative clause in s 474 of the *Migration Act 1958* (Cth), Australian courts have taken the view that s 474 does not protect 'jurisdictional errors'.[1] The obvious follow-up question is 'what is a jurisdictional error?', but that question is one that courts in the common law world have been unable to answer. The High Court's recent decision in *Hossain v Minister for Immigration and Border Protection*[2] (*Hossain*) gives some kind of optimism that a solution is at hand. However, I still argue that the distinction between jurisdictional and non-jurisdictional error is unnecessarily complex at best and illusory at worst, and Australian law would still do well to rid itself of the concept altogether.

Judicial interpretation of 'jurisdictional error'

The purpose of successive amendments made to pt 8 of the *Migration Act 1958* (Cth) since 1994 demonstrate an attempt by successive governments to reduce the scope for judicial review of migration decisions. However, the judgement in *S157/2002 v Commonwealth*[3] (*S157*) made it clear that s 474 of the Migration Act will not protect a decision affected by a 'jurisdictional error'. The question now is what that term means.

It is well known that the distinction between jurisdictional and non-jurisdictional errors of law has been abolished in the UK.[4] That is, all errors of law are regarded as going to the decision-maker's jurisdiction. In Canada, the Supreme Court has not quite been able to bring itself to abolish the distinction altogether, but the possibility has been canvassed. In particular, in *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association* Rothstein J, writing for the majority, stated 'it may be that the time has come to reconsider whether, for purposes of judicial review, the category of true questions of jurisdiction exists and is necessary to identify the appropriate standard of review'.[5] Regardless, not one Supreme Court decision since the crucial case of *Dunsmuir v New Brunswick*[6] has turned on whether a decision-maker has committed a jurisdictional error or has simply made an unreasonable decision.

Australian courts, however, maintain that there is still a difference between jurisdictional and non-jurisdictional errors but that nearly all errors of law will be jurisdictional errors. Keifel J attempted to explain the difference between jurisdictional and non-jurisdictional errors in *Linett v Australian Education Union* as follows:

> The distinction between jurisdictional error and a 'mere error of law' is maintained, the latter being one which has been arrived at on an issue that has been entrusted to the inferior court or tribunal to decide for itself, even if the decision is wrong.[7]

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Despite this reasoning, there does not seem to have been a case in Australia decided since *Plaintiff S157/2002 v Commonwealth*,[8] at any judicial level, that has turned on whether an identified error of law is jurisdictional or not. That is, there has not been a decision since *S157*, until the recent cases that we will discuss shortly, that has found the existence of an error of law but has found that it is not a jurisdictional error.[9] It is notable that a well-known decision on the scope of jurisdictional errors, *Minister for Immigration and Multicultural Affairs v Yusuf*[10] (*Yusuf*), gave only an expressly non-exhaustive list of such errors and, more recently, in *Kirk v Industrial Relations Commission (NSW)*[11] (*Kirk*), the High Court has stated that 'it is neither necessary, nor possible, to mark the metes and bounds of jurisdictional error'.[12] That is, a jurisdictional error is whatever a court says it is. Further, if s 474 of the Migration Act does not demonstrate that a 'migration decision' is an 'issue that has been entrusted to the inferior court or tribunal to decide for itself', what on earth does?

Federal Court decisions

Ratumaiwai

One attempt to distinguish between a jurisdictional and non-jurisdictional error came in *Ratumaiwai v Minister for Immigration and Multicultural Affairs*[13] (*Ratumaiwai).* This was a case involving judicial review of a decision to refuse to find that a visa applicant was a 'special needs relative', and Hill J found as follows:

> [27] It is clear from the transcript that the Tribunal considered, and rejected, the claim of the applicant that the giving of financial assistance qualified him as a 'special need relative' within the meaning of that expression. Even although the Tribunal Member did not deal with the issue of financial assistance in the reasons for decision, as he was obliged to do under s 430(1)(b) of the Act, it is clear that the Member did not fail to consider the question. He did consider it and rejected it. So, it cannot be said that the Tribunal Member failed to take into account financial assistance as a relevant consideration …
>
> [28] The distinction between error of fact and error of law is a fine one. While it is true that the ordinary English meaning of a word is a question of fact, so that a Tribunal which defines the word wrongly does not make an error of law, what was involved in the present case was whether it was open to the Tribunal to find that a person who gave financial assistance to a nominator came within the expression 'special need relative' …
>
> [29] In my view, once it is seen that the Tribunal has addressed the issue of financial assistance, however, even if in so doing it has made an error of law, that error is not, in my opinion, a jurisdictional error.[14]

The conclusion reached by Hill J was nevertheless equivocal and did not explain why the error of law in question, assuming that one had been made, was not a jurisdictional error. A number of cases since this decision was handed down have stated that making an error of fact is not a jurisdictional error, but they do not make it clear whether that error is a non-jurisdictional error of law.[15]

SZIZO

Another case that might have come *close* to making a distinction between a jurisdictional and non-jurisdictional error, but ultimately did not do so, was *Minister for Immigration and Citizenship v SZIZO*[16] (*SZIZO*). In that case, the Court distinguished between 'mandatory' and 'facilitative' provisions of the Refugee Review Tribunal (RRT) Codes of Procedure and found that the RRT had not committed a jurisdictional error despite an apparent breach of

s 441G of the Act. That is, the High Court found the existence of 'core' and 'non-core' provisions in the Codes of Procedure to be a way to relax the strict compliance approach to the codes, without actually distinguishing between jurisdictional and non-jurisdictional errors.

An attempt at an explanation: MZYZA

In 2013 a brave attempt to distinguish between jurisdictional and non-jurisdictional errors was made by the Federal Court in *Minister for Immigration and Citizenship v MZYZA*[17] (*MZYZA*). In this case, a Department of Immigration and Citizenship (DIAC) decision to refuse a protection visa was upheld by the RRT, which had been concerned with the authenticity of certain documents, including a letter supporting the applicant's claimed facts. The RRT had put to the applicant that it was 'very easy to obtain false documents in India'[18] but made no explicit finding that the specific letter in question was fraudulent. As a result, the Federal Magistrates Court found that the RRT had made a jurisdictional error. The Minister had argued that the 'weight' to be given to the letter was a matter for the RRT and that the RRT had implicitly decided to give it little or no weight. However, the Federal Magistrate found as follows:

> I do not accept the submission that the Tribunal implicitly decided to give the letter little or no weight. There is no indication in the Tribunal's reasons for decision of any cognisance of the letter in the part of the Tribunal's reasons that records its reasons for decision, as opposed to its summary of the background. It seems to me that the Tribunal overlooked the letter while weighing up the evidence and formulating its decision, as opposed to setting out the background to the case.[19]

The Federal Magistrate went on to find that the letter was a crucial piece of evidence and that the RRT may have reached a different conclusion had it turned its mind to the matter.[20] The RRT decision was therefore set aside.

Tracey J upheld the Minister's appeal in the Federal Court. His Honour did so primarily on the basis that a mere defect in the reasons for a decision is not a ground of jurisdictional error[21] and that it was clear from the RRT's reasons that it rejected the applicant's claim to be a member of a certain political party.[22] Tracey J summed up as follows:

> Even if it is accepted that the Tribunal failed to have regard to the contents of the letter, I do not consider that such a failure constituted jurisdictional error. The Tribunal was bound to have regard to and assess the first respondent's claim to have been persecuted because of the political and religious beliefs attributed to him ... It did so. It was not suggested that the failure (if there was one) to refer to the contents of the letter occurred because the Tribunal had misdirected itself as to the proper scope of its deliberations or by failing to identify the relevant claims and integers of the claims raised by the first respondent. It was not bound to consider each and every piece of evidence which related to those claims.[23]

His Honour added that the letter 'did not, in my view, amount to evidence of pivotal importance, or as being so fundamental to the first respondent's claim, that a failure to give consideration to its contents caused jurisdictional error'.[24]

The analysis given by Tracey J is very thorough, but he himself admits that 'value judgments are involved in determining whether material can be regarded as so "fundamental" or so "important" or so "overwhelming" that a failure to have regard to it constitutes jurisdictional error'.[25] It still seems apparent that courts have a lot of discretion in determining whether something is a 'jurisdictional error' or not, and *MZYZA* still does not provide an example of a

decision turning on a classification of something found to be an error of law as jurisdictional or not.

A pragmatic approach: SZUNZ

Finally, the decision of the Full Federal Court in *SZUNZ v Minister for Immigration and Border Protection*[26] (*SZUNZ*) has the potential to go some way towards resolving the question of whether an error of law is 'jurisdictional' or not. While the decision in *SZUNZ* did not *turn* on this distinction, it may have proposed a means by which jurisdictional and non-jurisdictional errors can be distinguished.

In short, the Full Federal Court in *SZUNZ* appears to have taken the view, for the first time, that an error of law will not be a *jurisdictional* error unless it has an impact on the tribunal's final decision. In this case, the Full Federal Court was concerned with the interpretation of s 36(2)(aa) of the Act and, in particular, the means by which a stateless person's country of former habitual residence was to be determined.

All three judges were critical of the RRT's interpretation of s 36(2)(aa) of the Act and its interpretation of the definition of 'receiving country' in s 5. Despite this, each of the three judges (Buchanan, Flick and Wigney JJ) found that the RRT's decision was made on the facts of the case, and its incorrect interpretation of the Act ultimately made no difference to the final decision. However, *SZUNZ* lacks a clear majority judgement, despite the Full Federal Court unanimously dismissing the appeal, as each gave a separate judgement. This means that there was still no unambiguous differentiation between jurisdictional and non-jurisdictional errors.

Buchanan J found that the RRT had erred in its interpretation of s 36(2)(aa) but that it had not made a jurisdictional error, as its error ultimately played no part in its final decision, which was based primarily on the facts of the case.[27] His Honour therefore takes the boldest approach of the *SZUNZ* bench, finding that the RRT committed that rare species of legal error — a non-jurisdictional error of law — because its misinterpretation of ss 5(1) and 36(2)(aa) of the Migration Act, an error of law, did not affect the overall result to the applicant. Buchanan J stated:

> The RRT apparently took the view that it was obliged to proceed on the basis that whether the appellant was 'an habitual resident' of a country for the purposes of s 36(2)(aa) was to be determined 'solely' by reference to the law of that country as the definition, on a literal reading, might appear to suggest. If that was the approach that was taken then, in my respectful view, it was an error but (for reasons to be developed) was not one which was a jurisdictional error in the circumstances of the present case.[28]

Flick J went close to endorsing the views of Buchanan J but was more equivocal about whether the RRT had committed an error of law in the first place — his Honour took the 'even if this is an error of law, it is not a jurisdictional error' way out. However, Flick J seems to agree with Buchanan J in principle that an error of law that does not impact on the overall decision is not a jurisdictional error. Wigney J avoided the issue, simply stating that the RRT committed no jurisdictional error in coming to the conclusion that it did.

The *SZUNZ* approach was more recently given support in *Minister for Immigration and Border Protection v SZUXN*,[29] in which Wigney J (a member of the SZUNZ bench) set aside a decision of the Federal Circuit Court[30] which found a decision of the RRT to be

unreasonable. Wigney J did hedge his bets somewhat, finding that the RRT decision was not unreasonable and then going on to find that, in any event, the impugned passages of the decision were not a 'foundational element' or 'critical' to the RRT's decision.[31] This meant that no jurisdictional error had been committed.

The High Court decision in *Hossain*

***Decisions of the delegate and the Administrative Appeals Tribunal*[32]**

Mr Hossain was a national of Bangladesh who made a valid application for a partner visa in Australia. The delegate refused the application on two grounds — firstly, Mr Hossain was unlawful at the time of his application and did not meet the criteria for grant of a visa prescribed by sch 3 of the Regulations;[33] and, secondly, Mr Hossain owed a debt to the Commonwealth which was not the subject of repayment arrangements, meaning he did not meet Public Interest Criterion 4004 (PIC 4004).[34]

Mr Hossain sought review from the Administrative Appeals Tribunal (AAT), which affirmed the refusal decision. Significantly, the AAT found that 'Mr Hossain had not applied within 28 days of ceasing to hold a previous visa and was satisfied that there were no compelling reasons as at the time of the application for not applying the criterion'.[35] Further, there was no evidence that Mr Hossain had repaid his debt to the Commonwealth, despite his stated intention to do so.

Lower court decisions

Mr Hossain then appealed against the AAT's decision to the Federal Circuit Court. By that time, Mr Hossain had paid his debt to the Commonwealth.[36] Moreover, the Minister accepted that the AAT had made an error of law in its application of sch 3 of the Regulations. The AAT had found that there were no compelling reasons not to apply the sch 3 criteria at the time of Mr Hossain's application, where the true test was whether compelling reasons existed at the time of decision. The latter approach had been found to be the correct one in *Waensila v Minister for Immigration and Border Protection*,[37] and the Minister conceded the error. However, the Minister argued that because, on the facts available to the AAT at the time, Mr Hossain could not meet the requirements for grant of the visa in any event, the error was not jurisdictional in nature. That is, because the decision of the AAT would have been the same in any event, its error of law was not a jurisdictional error. It appears that the Minister did not refer to *SZUNZ*,[38] but the argument nevertheless seems to be drawn from that decision.

The Federal Circuit Court rejected the Minister's argument, refusing to split the AAT's reasoning into 'impeachable and unimpeachable parts'.[39] On the Minister's appeal, the Full Federal Court gave a very confusing decision, with the majority categorising the AAT's error as jurisdictional but nevertheless upholding the appeal on the basis that the 'Tribunal's error had not stripped [it] of authority to make the decision to affirm the delegate's decision'.[40] At para 23, Flick and Farrell JJ stated:

> In the circumstances of the present case, it is respectfully concluded that any legal error on the part of the Tribunal — be it characterised as jurisdictional or otherwise — in respect to the construction and application of the phrase 'compelling reasons' for the purposes of cl 820.211(2)(d)(ii) did not have any

> of the consequences that the Tribunal's decision to refuse the visa was a nullity or that the Tribunal was stripped of all authority or jurisdiction to make that decision or that the Tribunal was incapable of determining a separate and discrete point, being the conclusion expressed in respect to Public Interest Criterion 4004.[41]

Their Honours added that '[e]ven where jurisdictional error is exposed, a decision may only be regarded as a nullity if the error strips the decision-maker of authority to make the decision'.[42] With all due respect to Flick and Farrell JJ, if this reasoning had been allowed to stand, an already meaningless distinction between jurisdictional and non-jurisdictional errors would have been joined by a concept that some jurisdictional errors invalidate a decision and some do not, at which point many Australian administrative lawyers would have simply surrendered. The High Court in *Hossain*, thankfully, squashed this concept when it stated that 'the majority in the Full Court was therefore wrong to distinguish between a decision involving jurisdictional error and a decision wanting in authority … [t]hey are one and the same'.[43]

Mortimer J dissented, both in reasoning and the result. Her Honour found that the error was jurisdictional in nature and that the only remaining issue was whether relief would be futile because of Mr Hossain's previous failure to meet PIC 4004. Because Mr Hossain could now demonstrate that he did in fact meet the requirements of PIC 4004, an order of certiorari was not futile and that order should therefore be granted.[44]

Mortimer J also stated that, in the alternative, the two visa criteria at issue at the AAT were not entirely independent of each other. If the AAT had applied the sch 3 criteria correctly and been satisfied that there were compelling reasons for not applying the criterion at the time of decision, the AAT might have decided to delay making its decision until such time as Mr Hossain was able to satisfy it that he had either paid his debt to the Commonwealth or entered into an arrangement with the Commonwealth for payment to occur. Mr Hossain had therefore missed out on a genuine opportunity for the grant of the visa he sought, and the error was jurisdictional for that reason also.[45]

Decision of the High Court

Majority judgement

The High Court majority judgement was given by Kiefel CJ and Gageler and Keane JJ. Their Honours described the concept of the jurisdictional error as a 'terminological tangle'[46] and noted that, under the regime set out in the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (ADJR Act), the term had almost fallen into disuse. Only the introduction of s 474 into the Migration Act required its resuscitation.[47] In particular, their Honours noted that '[f]or so long as there remains a necessity for courts to fall back on constitutionally entrenched minimum jurisdictions to engage in judicial review of administrative action, however, the traditional distinction between jurisdictional and non-jurisdictional error cannot be avoided'.[48] In other words, so long as governments attempt to find ways around s 75 of the *Constitution*, the courts will use whatever means are necessary to ensure that this cannot happen.

The majority judges described the term 'jurisdiction' as meaning 'the scope of the authority that is conferred on a repository'[49] and that a 'jurisdictional error', therefore, is a 'failure to comply with one or more statutory preconditions or conditions to an extent which results in a decision which has been made in fact lacking characteristics necessary for it to be given

force and effect by the statute pursuant to which the decision-maker purported to make it'.[50] Presumably this includes requirements such as natural justice, which courts presume to be a requirement of administrative decision-making unless it is specifically excluded by the enabling statute.[51] For all intents and purposes, a decision affected by jurisdictional error is 'no decision at all', 'void' or 'invalid'.[52]

Finally on this point, the majority stated that the 'question of whether a particular failure to comply with an express or implied statutory condition in purporting to make a particular decision is of a magnitude which has resulted in taking the decision outside the jurisdiction conferred by the statute cannot be answered except by reference to the construction of the statute'.[53] That is, whether an error is 'jurisdictional' or not can only be determined by examining the decision-maker's enabling legislation.

While it is correct that the decision to grant or refuse a visa is predicated, under s 65 of the Migration Act, on the Minister's satisfaction as to whether the criteria for the grant of that visa have been met or not, the point remains that 'the Minister's state of satisfaction or of non-satisfaction is in each case conditioned by a requirement that the Minister or his or her delegate, or the Tribunal forming its own conclusion on review, must proceed reasonably and on a correct understanding and application of the applicable law'.[54] The key point of the judgement comes in para 35, which states as follows:

> Here the Tribunal breached that implied condition[55] by misconstruing and misapplying the criterion which related to the timing of the making of the application. The breach, however, could have made no difference to the decision which the Tribunal in fact made to affirm the decision of the delegate. That was because the Tribunal was not satisfied that the public interest criterion was met, and, on the findings which the Tribunal made, the Tribunal could not reasonably have been satisfied that the public interest criterion was met. The Tribunal in those circumstances had no option but to affirm the decision of the delegate.[56]

The result was that the AAT's error 'in construing and applying the criterion relating to the timing of the making of the application did not rise to the level of a jurisdictional error'.[57]

Finally, the joint judgement also rejected the approach of Mortimer J in the Full Federal Court, stating that there could not have been any obligation on the AAT to adjourn the hearing to see if Mr Hossain would pay his debt to the Commonwealth, because it simply did not believe that he would.[58] The High Court, impliedly at least, seemed to regard this as a finding that was open to the AAT.

Edelman J

Edelman J also dismissed the appeal, holding that the Tribunal's error of law was not material in that it was neither fundamental nor an error that could have affected its ultimate decision. This 'lack of materiality', in his Honour's words, had the effect that the AAT's misconstruction of sch 3 of the Migration Regulations was not a jurisdictional error.[59] Interestingly, none of the judges in the High Court referred to *SZUNZ*, but this comment from Edelman J closely mirrors that decision.

Edelman J considered the requirements for granting a writ of certiorari to quash a decision affected by jurisdictional error and stated that 'this appeal requires consideration of the reasons that a writ of certiorari is generally ordered in respect of a decision made under statute, so as to appreciate the nature of the requirement of materiality that was the focus of

the appeal'.[60] That is, his Honour took the view that the 'materiality' of the AAT's error, in the sense of whether it made a difference to the overall result for the applicant, was a crucial issue to be considered.

His Honour emphasised that there were two overlapping categories of error that can lead to the grant of such an order. Firstly, there are 'errors that have the consequence that the decision maker had no authority to make the decision'; and, secondly, there are 'errors that appear on the face of the record', irrespective of such authority.[61] The first kind of error is the true 'jurisdictional error', which results in the invalidity of the decision, while the second is merely 'voidable' rather than void ab initio.[62] Edelman J explained the 'overlap' between the two categories as follows:

> The categories overlap because an error in the second category could mean that the decision itself was unlawful and without authority. But an error might also fall within the second category if a step in the process by which the decision was reached was unlawful, even where the decision was made with authority.[63]

In Australia, the key issue is not the overlapping categories but between errors characterised as jurisdictional or non-jurisdictional, certainly where a privative clause is involved. Edelman J agreed with the majority when he stated that making that distinction depends on the construction of the statute under which the decision-making power is exercised, with reference to its text, the background principles of jurisdiction and the history of judicial review, as well as common law principles such as 'the consequences of an error that a legislature will be taken to intend will usually depend on the gravity of the error'.[64] This is an interesting argument to make in a migration case, where the clear intention of the Parliament was that the decision should not be set aside except on the basis of the *Hickman*[65] errors.

Regardless, Edelman J found that the requirement that the error be material before certiorari is granted is common to both types of error. The instant appeal, Edelman J noted, focused on whether a non-material error was a jurisdictional error.[66] Edelman J then referred to a number of cases which his Honour regarded as standing for a 'materiality' requirement, including *SZIZO*,[67] *Kirk*,[68] *Craig v South Australia*[69] and *Yusuf*.[70] In particular, his Honour noted that, in *Yusuf*, 'McHugh, Gummow and Hayne JJ reiterated the usual implication that for an error to be jurisdictional, what "is important" is that the error is made "in a way that affects the exercise of power"'.[71] That is, the High Court itself had previously at least hinted that an error of law is not jurisdictional in nature unless it is material in some sense.

Edelman J then stated that 'an error will not usually be material, in this sense of affecting the exercise of power, unless there is a possibility that it could have changed the result of the exercise of power'.[72] Furthermore, 'materiality will generally require the error to deprive a person of the possibility of a successful outcome'.[73] In this case, s 65 of the Migration Act, which requires the decision-maker to be satisfied that an applicant fulfils the requirements, including the criteria in the Regulations, has the effect that 'the usual implications that an immaterial error will not invalidate a decision made under that section'.[74]

Edelman J, then, took the view that the essential issue was whether the AAT's error in reasoning on one criterion was material and therefore jurisdictional in nature if that error 'could not have affected the other criterion on which the visa was refused'.[75] In this case, the AAT's error did not deprive Mr Hossain of the possibility of a successful outcome, because he could not be found to have satisfied PIC 4004. The error was therefore not jurisdictional

and the decision of the Full Federal Court was to be affirmed (although on the basis of very different reasoning). His Honour did, however, leave open the possibility that some errors that do not affect the outcome of a matter may, nevertheless, result in a decision being set aside. Edelman cites as one example, 'for reasons that could include respect for the dignity of the individual', 'an extreme case of denial of procedural fairness'.[76] However, his Honour found that no such circumstances arose in this case.[77]

Finally, Edelman J also considered the approach of Mortimer J in the Full Federal Court. His Honour found that assessing the materiality of an error 'does not take place in a universe of hypothetical facts'[78] but instead on the basis of the existing facts before a decision-maker. At the time of the AAT's decision, those facts were that the debt remained unpaid and there were no arrangements to repay it. Consequently, the AAT's error did not deprive the appellant of a successful outcome, and it had to affirm the delegate's decision because the appellant had not satisfied the PIC. Its error on the construction of sch 3 was therefore immaterial and was not a jurisdictional error.[79]

Nettle J

Nettle J agreed substantially with the reasons of Edelman J, adding observations that there may be a range of circumstances where an error is jurisdictional even though a party is not deprived of the possibility of a successful outcome. In addition to Edelman J's example of respect for the dignity of the individual, discussed above, Nettle J added the possibility of a decision-maker who is required to address a single specific criterion making the error of addressing the wrong criterion.[80] That did not occur in this case because, while the Tribunal made an error of law in interpreting sch 3 of the Migration Regulations, it still retained jurisdiction to determine the application on the basis of the failure to meet PIC 4004.[81]

Finally, because of the wide range of potential errors within the variety of statutory schemes, it is not possible to derive an exhaustive list of errors that will or will not deprive a party of a successful outcome. Nettle J summed up by stating that '[p]erhaps the most that can or should be said on the subject is that, if an error is jurisdictional, in the scheme of things it will not infrequently be the case that it will deprive a party of a possibility of a successful outcome'.[82] His Honour would also have dismissed Mr Hossain's appeal.

Conclusions

One issue that the High Court does not address in *Hossain* is why, even given the constitutional issues referred to by the majority, it is necessary to retain the distinction between jurisdictional and non-jurisdictional errors at all. The obvious best solution to the intractable jurisdictional versus non-jurisdictional error of law conundrum is to abolish the distinction completely, as has been done in the UK[83] and canvassed in Canada.[84] Another approach is to regard all errors of law as jurisdictional in nature, meaning that any error of law will result in a decision being set aside, unless the grant of relief would be futile.

However, if Australian courts insist on retaining an increasingly theoretical distinction, the approach in *Hossain*, foreshadowed in *SZUNZ*, is quite a reasonable one — an error of law only goes to the decision-maker's jurisdiction if it has an impact on the final result. This is, of course, an argument I have made elsewhere.[85] This would still have the effect that all a court

would need to do is identify an error of law and then, if that error deprived the applicant of the possibility of a successful result, set the decision aside. There would, at least, be no need to go into arcane details about whether an error of law was jurisdictional or not before deciding whether the error in question was material, in the sense that it could have affected the outcome for the applicant. While Hossain is not, to my mind, the best solution to the jurisdictional/non-jurisdictional error conundrum, it is a workable one, and one that is worthwhile following, at least in the shorter term.

Endnotes

1 *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476.
2 [2018] HCA 34.
3 (2003) 211 CLR 476.
4 *Anisminic Pty Ltd v Foreign Compensation Commission* [1969] 2 AC 147; *Pearlman v Governors of Harrow School* [1979] QB 56.
5 *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association* [2011] SCR 61, [42].
6 [2008] 1 SCR 190.
7 (2002) 191 ALR 597, 605.
8 (2003) 211 CLR 476.
9 Interestingly, French J came to a similar conclusion in 1993, when he wrote that '[w]hatever the proper interpretation of Anisminic it is clear that the High Court has maintained the distinction between jurisdictional error and error within jurisdiction. The distinction seems to have little work to do in the cases relating to the operation of privative clauses'. See Robert S French, 'The Rise and Rise of Judicial Review' (1993) 23 *Western Australian Law Review* 120, 128.
10 (2001) 206 CLR 323.
11 [2010] HCA 1.
12 (2010) 239 CLR 531, [71].
13 [2002] FCA 311. This was one of the cases considered in *NAAV v MIMIA* [2002] FCAFC 228.
14 [2002] FCA 311, [27]–[29].
15 See, for example, *SZGOW v Minister for Immigration and Anor* [2006] FMCA 1689; *SZINP v Minister for Immigration and Citizenship* [2007] FCA 1747; *M33 of 2004 v Minister for Immigration and Anor* [2007] FMCA 684; *MZYFO v Minister for Immigration and Anor* [2009] FMCA 1148; and *Patel v Minister for Immigration and Anor* [2011] FMCA 773.
16 [2009] HCA 37.
17 [2013] FCA 572.
18 [2013] FCA 572, [15].
19 *MZYZA v Minister for Immigration and Citizenship* [2013] FMCA 15, [23].
20 [2013] FMCA 15, [32].
21 [2016] FCCA 1729, [31] and [32].
22 [2016] FCCA 1729, [42].
23 [2016] FCCA 1729, [68].
24 [2016] FCCA 1729, [68].
25 [2016] FCCA 1729, [60].
26 [2015] FCAFC 32.
27 [2015] FCAFC 32, [32].
28 [2015] FCAFC 32, [28].
29 [2016] FCA 516.
30 *SZUXN v Minister For Immigration & Anor* [2015] FCCA 1268.
31 [2015] FCAFC 32, [71].
32 Much of this section is paraphrased from [4]–[10] of *Hossain*: [2018] HCA 34.
33 Migration Regulations, para 820.211(2)(d)(ii) of sch 2, provided that an applicant who did not hold a substantive visa at the time of application must meet cl 3001 of sch 3.
34 Migration Regulations, para 820.223(1)(a) of sch 2, required an applicant to meet, amongst other requirements, PIC 4004.
35 [2018] HCA 34, [7] (emphasis added).
36 [2018] HCA 34 [9].
37 (2016) 241 FCR 121.
38 [2015] FCAFC 32.
39 [2016] FCCA 1729, [20], referring to *SZBYR v Minister for Immigration and Citizenship* (2007) 81 ALJR 1190, 1198.
40 [2018] HCA 34, [13], referring to the decision of the Full Federal Court in *Minister for Immigration Border Protection v Hossain* (2017) 252 FCR 31, [27]–[30].
41 (2017) 252 FCR 31.

42 At [24] (emphasis in original).
43 [2018] HCA 34, [26].
44 *Minister for Immigration and Border Protection v Hossain* (2017) 252 FCR 31, [100].
45 (2017) 252 FCR 31, [75]–[76].
46 [2018] HCA 34, [17].
47 [2018] HCA 34, [21].
48 [2018] HCA 34, [22].
49 [2018] HCA 34, [23].
50 [2018] HCA 34, [24].
51 See, for example, *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82.
52 [2018] HCA 34, [24].
53 [2018] HCA 34, [27].
54 [2018] HCA 34, [34], citing *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611, 651–654.
55 The condition referred to in para 34 — that is, that the decision must be made 'reasonably and on a correct understanding and application of the applicable law'.
56 [2018] HCA 34.
57 [2018] HCA 34, [37].
58 [2018] HCA 34, [36].
59 [2018] HCA 34, [46].
60 [2018] HCA 34, [60].
61 [2018] HCA 34, [61].
62 [2018] HCA 34, [63].
63 [2018] HCA 34, [61].
64 [2018] HCA 34, [64].
65 *R v Hickman, Ex parte Fox and Clinton* (1945) 70 CLR 598.
66 (1945) 70 CLR 598, [65].
67 [2009] HCA 37.
68 [2010] HCA 1.
69 (1995) 184 CLR 163, 179.
70 (2001) 206 CLR 323.
71 [2018] HCA 34, [71], citing *Yusuf*, (2001) 206 CLR 323, 351.
72 [2018] HCA 34, [72].
73 [2018] HCA 34.
74 [2018] HCA 34, [76].
75 [2018] HCA 34.
76 [2018] HCA 34, [72], citing in support *R (Osborn) v Parole Board* [2014] AC 1115, 1149; and *DWN042 v Republic of Nauru* (2017) 92 ALJR 146, 151.
77 [2018] HCA 34.
78 [2018] HCA 34, [78].
79 [2018] HCA 34, [79].
80 [2018] HCA 34, [40].
81 [2018] HCA 34, [41].
82 [2018] HCA 34, [42].
83 *Anisminic Pty Ltd v Foreign Compensation Commission* [1969] 2 AC 147; *Pearlman v Governors of Harrow School* [1979] QB 56.
84 *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association* [2011] SCR 61.
85 See also Alan Freckelton, 'Jurisdictional Errors and the Full Federal Court's Decision in *SZUNZ v Minister for Immigration and Border Protection*' (2015) 64 *Immigration Review Bulletin* 4.

A NATIONAL INTEGRITY COMMISSION

The Hon Michael Murray AM QC*

Integrity has no need of rules
– Albert Camus

The need

Sadly, there is no level of government bureaucracy, federal or state, where the activities of public officers, in the wide sense of that term, display the level of integrity to which Camus referred. There are those for whom the temptation to engage in corrupt behaviour, in the belief that they can achieve a benefit by illegitimate means without detection or by creating a systemic web involving others who will not blow the whistle, is strong enough to cause them to 'have a go'.

Most of the Australian jurisdictions have now, in one way or another, moved to create investigative agencies with the general remit of anti-corruption in the broad sense, whether the conduct in question is criminal in nature or not. They are armed with extraordinary powers, enabling evidence to be gathered, tested and ultimately used against malefactors in ways not permitted by the general law, particularly as available to the police and other agencies of the state which have the power to initiate and prosecute criminal proceedings and/or to pursue compensation or other civil remedies for breaches of the law.

The public perception is that federal agencies of government are no less prone to this danger than other Australian jurisdictions and there is no point in waiting for cases to occur so as to demonstrate that the public perception is well grounded in fact. The incidence of corrupt activity may be occasional and on the fringe of public service, and corruption may never be able to be entirely eliminated, but that is no reason to decline to seek a remedy.

The generally available collection of agencies at work in areas of specific subject-matter will not suffice. They work best because they are concerned to deal with specific areas in ways which seek to provide a remedy without substantial interference with our rights as citizens. I have in mind an admittedly incomplete list of matters and agencies, as follows:

- financial accountability — Auditors-General;
- fair public administration — Ombudsmen;
- public sector ethical standards — Public Sector Commissioners;
- political ethical standards — parliaments and governments; and
- criminal activity — the police and Directors of Public Prosecutions.

Of course, matters may come to light in various ways by means of complaint or authorised forms of whistleblower processes and, for those with standing (a concept which today is more relaxed than was formerly the case), the courts may be approached by way of various forms of judicial review, both as to the merits of a matter and procedural issues, including the rather old-fashioned prerogative processes, for injunctive or declaratory or other relief, if due process has not been observed.

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Subject to a measure to which I will shortly refer, I see no need to interfere with any of that, provided the exercise of their powers by integrity or anti-corruption agencies is not constrained by questions of standing. It is invariably the case that such agencies may exercise their powers no matter whether a matter comes before them by way of complaint, any form of notification or of their own motion. Under s 83 of the *Corruption, Crime and Misconduct Act 2003* (WA), the consent of the Parliamentary Inspector is required before prerogative or injunctive relief can be sought or obtained or a declaratory judgement can be given. I make no comment upon that provision.

Corruption

So far as I am aware, the term 'corruption' is not defined in legislation, but, as is the case in the definition of the relevant criminal offences, its meaning is taken from the common law. That seems to me to be appropriate. The term should bear its natural meaning and allow for some flexibility. Corrupt officials are inventive in the ways in which they misbehave and in their motivation. As the saying goes, 'You will know corruption when you come across it'.

Under the Western Australian Corruption, Crime and Misconduct Act, corruption involves the use of the status conferred upon the person by the public office held, the exercise of a power incidental to the office, or the failure or refusal to do so, for a purpose foreign to that for which the power was conferred, or for an improper purpose, with the intention to obtain some private (not necessarily financial) advantage or benefit for the officer or another, or to cause some detriment (not necessarily financial) to another.[1]

The corrupt conduct may be an act or acts, or the omission to act, and, absent the intention or motive, it may be entirely lawful. The necessary breadth of the concept shows why effective anti-corruption may not be left to the general civil and criminal law and the investigation processes available there, which may lead to accepted remedies after processing a matter through the courts, although, of course, access to such remedies after investigation by an integrity commission — if necessary, using its expanded, more draconian powers — has produced an appropriate conclusion, is not foreclosed.

In my opinion the breadth of the concept should not make it susceptible to constitutional challenge in the federal sphere because the functions and exercise of power of the integrity agency will be concerned with the oversight of the proper functioning of federal agencies established in areas of clearly available legislative power at the federal level. The 'incidental power' under the *Constitution* is available to support a properly constructed federal integrity agency.

Challenging an integrity agency

Where the decisions and processes of integrity agencies have been overturned, it has been effectively on the ground that the agency has arrogated power and jurisdiction to itself which in fact it did not possess. In Western Australia the recent case of *A v Maughan*[2] provided a timely reminder that the Corruption and Crime Commission (CCC) was entirely a creature of its statute and could not, by the use of concepts of statutory construction concerning accretion of power by way of necessary intendment, provide itself with a power to initiate and conduct criminal prosecutions which was not expressly contained within its Act.

I think that is also a fair description of the point at issue before the High Court in *ICAC v Cuneen*,[3] where the plurality of four judges held that, for conduct to be lawfully subject to investigation and the use of ICAC's extensive powers, it must be capable, if proved, of having an adverse connection to the exercise of the public office in question in one of the

ways described in the jurisdictional section of the New South Wales Act, s 8. Where such sweeping powers, abrogating ordinary rights, were to be available, it could only be because the statute clearly expressed the intention to make it so.

The role of the integrity agency

In my view the proper role of an integrity agency is to use the powers available to it, as required in its judgement, to ascertain what in its opinion are the primary facts concerning alleged corrupt behaviour and to refer the matter to an appropriate agency or agencies to consider in the ordinary way whether the matter should be prosecuted criminally and/or civilly against such persons as that agency considers should be prosecuted. In addition, there will be cases where the proper course is to refer corrupt conduct to an agency which is the home of the corruption, whether systemic or not, so that it may take appropriate remedial action within its power to remedy the matter.

The people amenable to its reach will be involved public officers and the ultimate remedy is publicity, which should only name those about whose conduct an opinion is expressed where that is necessary to remedy the harm done or to instruct other public officers. A properly constructed integrity agency is, in effect, a super-investigator with enhanced powers to expose the facts about which it expresses its opinion, recognising that it is not a court applying accepted standards of proof to overcome the presumption of innocence as if it was a prosecutor.

It is necessary that the agency has enhanced powers of investigation which may override the protections and privileges ordinarily available to a person who is accused of wrongdoing. Commonly, such agencies may be invested with extraordinary powers:

- the power to act upon notification (sometimes compulsory), upon complaint or of their own motion;
- enhanced powers of entry and search of places, vehicles and people;
- use of assumed identities;
- controlled operations of secret surveillance of various kinds, including undercover involvement in criminal activity and integrity testing;
- the power to require the attendance of persons upon the integrity agency and the production of documents, et cetera;
- the power to work cooperatively with, or prevent the involvement of, other investigative agencies; and
- the compulsory examination of witnesses, who may be legally represented, and claim legal professional privilege but, generally speaking, not the privilege against self-incrimination.

Secrecy

It is generally the case that integrity agencies are subject to comprehensive non-disclosure provisions, other than when a matter is referred to an appropriate authority for consideration of, and to take, action by way of prosecution or civil claim.

When that is done, care is taken to preserve the ordinary privileges and rules applicable to parties to litigation and witnesses. For example, under the Western Australian Act information provided under compulsion to the CCC is inadmissible in evidence against the person making the statement except when testing the witness's evidence, when it may be put as a prior inconsistent statement.

Otherwise, public disclosure is, in Western Australia and generally, confined to circumstances where it is considered to be in the public interest to advance the fight against corruption in particular circumstances. It ordinarily occurs by way of the process of reporting to Parliament (usually by way of a report to its bipartisan standing committee) and even then it should be the case that an opinion or finding formed in respect of the conduct of an individual public officer or other person who is found to be party to or in some way involved in the corruption should not name the individual unless necessary for the purpose mentioned above.

The principle that the privacy of an individual should only be breached where necessary to deal appropriately with the corruption is, in Western Australia at least, central to the process of investigation. If I, as Parliamentary Inspector, hold an inquiry into an allegation concerning a public officer, it must be conducted in private, although I am given all relevant powers of a Royal Commission.

To a substantial degree the same holds good for our CCC. Its examinations are not open to the public unless, in the discretion of the Commission, it considers that it is in the public interest to open all or part of its proceedings to the public, 'having weighed the benefits of public exposure and public awareness against the potential for prejudice or privacy infringements'.[4] In my opinion, that is as it should be, and that approach provides the best protection possible against 'collateral damage' to the reputations and careers of those caught up in the process of investigation until their implication is established and the case is one where it is considered necessary to reveal identities.

Oversight of an integrity agency

I am convinced that, rather than seek to rely on the engagement of processes of procedural and merits review, in a haphazard way, through the courts, the effective mechanism of overview of the work of an integrity agency is by the Parliament itself through its entirely independent officer, the Parliamentary Inspector.

My office is established in common form. I have wide powers to audit the work of the CCC to ensure its compliance with the law and the appropriateness and effectiveness of its processes. I have the function to deal with misconduct by the CCC and its officers and I may act upon complaint, upon compulsory notification of allegations concerning the CCC and its officers or of my own motion. My investigations or inquiries may involve complete access to the CCC's files, the production of anything relevant to a matter, and the gathering of evidence.

I may take over an investigation of the CCC; in some circumstances I may correct its findings; and I may make recommendations for remedial action. I may refer matters to other appropriate agencies such as the police and the Director of Public Prosecutions. The process of reporting to Parliament, generally via the joint standing committee, is an effective mechanism to achieve remedial action where fault is established. Although the Commission is ordinarily not bound to accept my views, it generally does so and, in any event, the public has the assurance of independent scrutiny of its work.

Endnotes

1 *WA v Burke, Grill and Hondros* (2011) 42 WAR 124, [278]–[287], [329]–[332], applying *Willers v The Queen* (1995) A Crim R 219, 225, 231.
2 [2016] WASCA 128, [103]–[151] (Martin CJ).
3 [2015] HCA 14.
4 *Corruption, Crime and Misconduct Act 2003* (WA) ss 139, 140.

FACT-FINDING IN THE 21ST CENTURY AND BEYOND

Mark Robinson SC and Juliet Lucy*

The social, cultural and legal contexts in which findings of fact are made in Australia (and the potential for challenging those findings in a superior court) have changed significantly since 1985, when Glass JA of the New South Wales Court of Appeal confidently asserted in *Azzopardi v Tasman UEB Industries Ltd*[1] (*Azzopardi*), with Samuels JA's agreement, that factual finding which is 'perverse' 'unreasonable' or 'contrary to the overwhelming weight of the evidence' does not ever disclose an error of law for the purposes of judicial review (see also *Bruce v Cole*[2]).

Fact-finding is now informed by contemporary research which casts doubt on the reliability of demeanour as an indication of truth-telling and which suggests that judges (and others) cannot reliably distinguish truth from falsehood on the basis of appearances and manner. Further, the vagaries of human memory are now better understood. Fact-finding now occurs in a context where data proliferates, particularly in electronic form, and where technology produces an overwhelming amount of evidence, from DNA to data and metadata, about a person's location, habits and social media histories.

Legal challenges to fact-finding have also evolved. There is now greater potential for errors to be challenged in judicial review on the grounds of irrationality, legal unreasonableness and breach of procedural fairness. This paper examines these issues which are faced by administrators, tribunal members and judges in making and challenging findings of fact in the 21st century.

Technology and the internet have transformed the world into a place where facts abound and are readily available and accessible. We have seen the rise of social media and a manifest increase in visual as well as verbal information. Any teenager with a smartphone is now able to produce and exchange a vast amount of information daily (and generally does). Commercial and governmental transactions have become more complex and more document driven.

The rise of technology has begotten mega-litigation, where quantities of evidence which were once unthinkable are put before a court for the purpose of 'assisting' the court to make factual findings.

The human body may now be conceived of as another form of data. The Human Genome Project produced the first complete sequences of individual human genomes at the start of the 21st century, in 2001. Much more is now understood about our DNA, which stores our genetic data. Memory is increasingly being understood in terms of the physical workings of the human brain, and evidence-based psychological research has now provided us with a

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much more accurate understanding of how human memory works. Much of this new learning is contrary to commonly and long-held assumptions, including those of many judges.

In the world of administrative law, government has expanded exponentially, and administrators are now making a much larger range and volume of factual administrative decisions than they once did. These have a direct and often significant impact on people's lives, including in relation to social security entitlements, occupational licences, migration decisions and access to information and privacy. Tribunals now play a much greater role in fact-finding when reviewing administrative factual findings, as governments give tribunals power to review an ever-increasing quantity of administrative decisions almost as a matter of course.

Further, the rise of the 'super tribunal' in the states and territories and in the Commonwealth has given tribunals some of the jurisdiction formerly exercised by the courts.

The law has taken some steps to respond to these very significant changes in the circumstances in which administrators and courts are required to find facts and in our understanding of what facts are and how the human mind can ascertain them. However, it is helpful to consider the ongoing relevance of historical approaches to factual findings and the extent to which legal doctrines have become out of step with contemporary scientific knowledge.

Electronic data explosion

The explosion in the availability of data, mainly electronic, has transformed the task of making findings of fact. First, the internet provides a ready source of information which the fact-finder may seek to consult. Secondly, there is much more material to consider when determining facts. In the area of refugee law, for example, the amount of 'country information' available is simply vast (stored only on a large networks of computers) — see, for example, *Muin v Refugee Review Tribunal*.[3] Making a finding of fact where information so proliferates can be a very challenging task and it requires skills of sorting, prioritising and limiting this information. Access is also an issue.

The vast quantities of data made possible by electronic modes of capturing, creating, storing and transmitting information has fostered what has been called 'mega-litigation'. In *Seven Network Limited v News Limited*[4] (*C7*), Sackville J commented that discovery had given rise to an electronic database containing 85 653 documents, comprising 589 392 pages, and that 12 849 documents, comprising 115 586 pages, were admitted into evidence. Sackville J noted the limitations of human memory[5] and preferred to rely for his factual findings on the large volume of available documentary evidence rather than oral testimony.[6] Administrators generally do not have to deal with such a vast amount of material; nevertheless, they are increasingly making factual decisions on the basis of a greater quantity of material.

The huge amount of available data changes the scope and nature of fact-finding, with human recall becoming less important and contemporary documentary evidence (such as emails and email chains) or scientific evidence (such as DNA) gaining in importance.

Such findings on appeal

Advances in the study of human psychology have cast doubt on the validity of appellate courts' traditional reluctance to overturn factual findings based upon a witness's

demeanour. Some of the relevant studies are discussed by Justice Peter McClellan in his article 'Who is telling the truth? Psychology, common sense and the law'.[7]

Justice Ipp has expressed the view, extrajudicially, that demeanour findings are intuitive and that '[i]t is the absence of rationality that makes demeanour findings so arbitrary, so ephemeral, so uncertain, so personal and subjective, so susceptible to subconscious prejudice, so susceptible to error'.[8] Similarly, Justice McClellan's view is that '[d]emeanour will only reveal incompetent liars'.[9]

Judicial restraint in overturning factual findings on the basis that the trial judge has had the advantage of having seen and heard the oral evidence may therefore need to be reconsidered. Justice Virginia Bell has referred to the 'psychological research casting doubt on the ability to discern truthfulness from an individual's physical presentation', although her Honour did not consider restraint in overturning facts as found by a primary judge to be misplaced.[10] However, in some cases, an appellate court may have the advantage in not seeing the witness, in that an individual's physical presentation could positively mislead a primary judge as to that person's veracity, particularly where the individual is of a different cultural/language background from that of the judge.

The insights of psychological research on the human ability to discern truth from a person's demeanour have had some impact on judicial decision-making. Contrary to popular belief, confidence is not a reliable indicator of truth, and the perception that it is means that particular social groups, such as white males, are more likely to be believed than others.[11] Similarly, research shows that liars often deliberately control supposed deception cues such as fidgeting and postural shifts,[12] so that these are unreliable signs of a person's veracity.

In *Fox v Percy*,[13] Callinan J doubted whether the traditional appellate treatment of challenged findings of fact with a 'very high degree of sanctity' was warranted. Similarly, in *CSR Ltd v Della Maddalena*,[14] Kirby J cautioned against returning to an era in which appellate relief might be denied in deference to 'the subtle influence of demeanour' which may have affected the primary judge's factual findings.[15]

Memory: the data of the mind

Memory is another form of data, but it is a form which contemporary scientific research has shown to function in ways which do not accord with community or 'common sense' assumptions. Judges and other decision-makers who make factual findings on the basis of erroneous assumptions about memory are therefore likely to make factual errors. Judicial appreciation of this has led some judges to place greater reliance upon documentary material.[16]

In *Gestmin SGPS SA v Credit Suisse (UK) Limited*,[17] Leggatt J expressed the view[18] that the legal system has not 'sufficiently absorbed the lessons of a century of psychological research into the nature of memory and the unreliability of eyewitness testimony'. Identifying some common errors about memory, his Honour continued:

> Underlying … these errors is a faulty model of memory as a mental record which is fixed at the time of experience of an event and then fades (more or less slowly) over time. In fact, psychological research has demonstrated that memories are fluid and malleable, being constantly rewritten whenever they are retrieved.[19]

Having reviewed other limitations of human memory, his Honour concluded[20] that 'the best approach for a judge to adopt in the trial of a commercial case is, in my view, to place little

if any reliance at all on witnesses' recollections of what was said in meetings and conversations, and to base factual findings on inferences drawn from the documentary evidence and known or probable facts'.

The Australian Royal Commission into Institutional Responses to Child Sexual Abuse at one stage commissioned a detailed report on the effects of child sexual abuse on memory and complainants' evidence. The 2017 report concluded that 'the criminal justice system's expectations about, and understanding of, the operation of human memory, and of children's memory in particular, are at odds with contemporary scientific psychological research'.[21] The authors commented that 'contemporary research has revealed the presence of numerous and extensive disparities between common-sense beliefs and scientific findings about human memory'.[22] These included a lack of awareness that 'errors of omission, such as gaps and missing information, and errors of commission, such as self-contradictions, are fundamental features of human memory'.[23] Similarly, it was an error to think that recall of specific details was a hallmark of an accurate memory.[24] These misunderstandings about human memory can have significant legal effects, because when a person is not regarded as credible on the basis that the person does not recall specific details of an event, or there are some contradictions in the account of an event, this may lead a prosecutor to decide not to prosecute or a jury not to convict.

The difficulties of assessing whether a person is recalling an event accurately are particularly acute in the administrative law context where that person is an asylum seeker.[25] In that context, the asylum seeker is likely to have suffered trauma — a factor affecting memory. The asylum seeker may also be from a non-English speaking background and need an interpreter. Finally, the asylum seeker is likely to be of a different cultural background from that of the departmental officer or tribunal member who assesses his or her claim. These factors present great challenges to the fact-finding process, particularly when it is recognised that demeanour is often an unreliable indicator of truth-telling and that memory is more unreliable than is generally believed. Notwithstanding all this, refugee and migration decisions based on credit abound.

Awareness of evidence-based research about memory and perceptions of demeanour may warrant an altogether different approach to fact-finding from that traditionally adopted by courts and tribunals.

Relying solely on documents in administrative decision-making

Notwithstanding the now identified problems of the frailty of human memories, reliance on documentation alone, particularly contemporaneous documentation, is also fraught with difficulties. There is a line of cases in New South Wales, for example, that establishes that (statutory) medical assessors and their review panels in motor accident personal injury cases must not treat an alleged lack of contemporaneous documentary evidence as supporting a causal connection between a car accident and a claimant's injury as being determinative of whether that causal connection exists. The medical decision-makers must also have regard to and deal with the claimant's evidence (written, oral or both) — see, for example, *Owen v Motor Accidents Authority*,[26] *Bugat v Fox*,[27] *Francica v Allianz Australia Insurance Ltd*[28] and *AAI Ltd trading as GIO as agent for the Nominal Defendant v McGiffen*.[29]

The errors identified in these cases are also characterised alternatively by the courts as a denial of procedural fairness (to the claimant, the injured motor accident victim).

The rise and rise of metadata

In addition to the rise of our reliance on increasing numbers of electronic documents and databases is the existence of a growing awareness of the information buried in those documents, styled as metadata.

Metadata is found buried in most MS Word documents, emails and PDF documents. It often contains a wealth of information and enables much more than the document itself to be identified and (possibly) explained. Metadata is everywhere.

Our legal system has demonstrated to date very little capacity for identifying and dealing with this new species of information. Generally, it is not produced as a matter of course when discovery of documents is ordered by the courts, although this may be changing in the United States.[30]

Findings of fact: the traditional approach

There is generally no error in a decision-maker making a wrong finding of fact (*Waterford v Commonwealth*,[31] *Bruce v Cole*[32]).

A wrong finding of fact made on the way to an ultimate determination is not reviewable (*Australian Broadcasting Tribunal v Bond*[33] (*Bond*)).

The law on disturbing findings of fact in judicial review proceedings is set out in the judgement of Jordan CJ in *The Australian Gaslight Co v The Valuer-General*,[34] which in summary is that a finding of fact by a tribunal of fact cannot be disturbed if the facts referred to by the tribunal on which the finding is based are capable of supporting its finding and there is evidence capable of supporting its inferences; such a finding can only be disturbed if (a) there is no evidence to support its inferences, (b) the facts inferred by it and supported by evidence are incapable of justifying the finding of fact based on those inferences, and (c) the tribunal of fact had misdirected itself in law — see also *Azzopardi*[35] and *Bond*.[36] In *Bond*, the Court said:

> a finding of fact will then be reviewable on the ground that there is no probative evidence to support it and an inference will be reviewable on the ground that it was not reasonably open on the facts, which amounts to the same thing.[37]

A finding of fact that was made in the absence of supporting evidence is an error of law (*Kostas v HIA Insurance Services Pty Ltd*;[38] see also *Minister for Immigration & Ethnic Affairs v Pochi*).[39] The position that findings of fact must be supported by logically probative evidence is again developed in the judgement of Deane J in *Bond*.[40]

In *Bond*, Mason CJ[41] said that a finding of fact can amount to a reviewable decision if 'the statute requires or authorizes the decision-maker to determine an issue of fact as an essential preliminary to the taking of ultimate action or the making of an ultimate order'. However, his Honour went on to say that 'in ordinary circumstances, a finding of fact, including an inference drawn from primary facts, will not constitute a reviewable decision because it will be no more than a step along the way to an ultimate determination'. One of the reasons was that to expose all findings of fact 'to judicial review would expose the steps in administrative decision-making to comprehensive review by the courts and thus bring about a radical change in the relationship between the executive and judicial branches of government'.

In *Bond* the Chief Justice made the following comments about when factual questions may give rise to an error of law:

> The question whether there is any evidence of a particular fact is a question of law: *McPhee v S Bennett Ltd*; *Australian Gas Light Co v Valuer-General*. Likewise, the question whether a particular inference can be drawn from facts found or agreed is a question of law: *Australian Gas Light*; *Hope v Bathurst City Council*. This is because, before the inference is drawn, there is the preliminary question whether the evidence reasonably admits of different conclusions: *Federal Commissioner of Taxation v Broken Hill South Ltd*. So, in the context of judicial review, it has been accepted that the making of findings and the drawing of inferences in the absence of evidence is an error of law: *Sinclair v Maryborough Mining Warden*.
>
> But it is said that '[t]here is no error of law simply in making a wrong finding of fact': *Waterford v The Commonwealth*, per Brennan J. Similarly, Menzies J observed in *Reg v District Court; Ex parte White*:
>
> > 'Even if the reasoning whereby the Court reached its conclusion of fact were demonstrably unsound, this would not amount to an error of law on the face of the record. To establish some faulty (eg illogical) inference of fact would not disclose an error of law.'
>
> Thus, at common law, according to the Australian authorities, want of logic is not synonymous with error of law. So long as there is some basis for an inference — in other words, the particular inference is reasonably open — even if that inference appears to have been drawn as a result of illogical reasoning, there is no place for judicial review because no error of law has taken place.[42]

As this passage makes clear, the issue in *Bond* as to when a factual error might amount to an error of law arose in the context of judicial review proceedings. Glass JA's comments in *Azzopardi*,[43] referred to at the beginning of this article, were about what constitutes an error of law for the purposes of an appeal (on a point of law). In the passage from *Bond* cited above, Mason CJ drew on the reasoning from appeals concerning errors of law, when considering the circumstances in which factual findings were judicially reviewable.

While both *Azzopardi* and *Bond* might still be good law in Australia, a number of judicial developments in Australia have, in essence, overtaken them and ameliorated some of the harshness in finding of facts and judicial review.

This is so principally arising from the High Court of Australia's decision in *Minister for Immigration & Citizenship v Li*[44] (*Li*). That case established essentially a new ground of judicial review that has come to be known as 'legal unreasonableness'. There is also within that ground a collection of other available grounds of judicial review, including a suggestion that the ground of 'proportionality' might eventually take a foothold in Australian jurisprudence.[45]

The High Court's decision in *Li*[46] significantly extended the capacity of superior courts in Australia to review an administrative decision and to determine whether it was legally 'reasonable'.

Finally released from the 'absurdity' of the high standard of outcome articulated in *Associated Provincial Picture Houses v Wednesbury Corporation*[47] (*Wednesbury*), Australian courts now have a broader jurisdiction to determine whether the outcome of an exercise of discretion has an evident and intelligible justification by reference to the terms, scope and purpose of the statute conferring the power. However, the point at which the outcome of a discretionary decision cannot be said to be justified by reference to the statute conferring the power can sometimes be no more than a matter of impression.

We suggest that in this particular context, the doctrine of proportionality might well emerge so as to provide a principled approach to a court in determining whether a discretionary administrative decision is justified and lawful.

The rationality grounds of review

Australian courts are constrained from considering the merits of administrative decision making because of the constitutional separation of judicial from legislative and executive power (*Re Minister for Immigration & Multicultural Affairs; Ex Part Lam*[48]). One exception to this constraint has been the ground of judicial review styled as 'unreasonableness' first articulated in *Wednesbury*,[49] which focused on the outcome of the decision, rather than on the process or procedure for making the decision.

In England and Wales, the test of *Wednesbury* unreasonableness has been stated in these terms. The impugned decision must be 'objectively [so] devoid of any plausible justification that no reasonable body of persons could have reached [it]';[50] and the impugned decision had to be 'verging on absurdity' in order for it to be vitiated.[51]

That stringent test was applied in Australia. In *Prasad v Minister for Immigration*,[52] the Federal Court of Australia considered the ground, now codified in s 5(2)(g) of the *Administrative Decisions (Judicial Review) Act 1977* (Cth). The Court held that, in order for invalidity to be determined, the decision must be one which no reasonable person could have reached[53] and that to prove such a case required 'something overwhelming'.[54] It must have been conduct which no sensible authority acting with due appreciation of its responsibilities would have decided to adopt, and when 'looked at objectively … was so devoid of any plausible justification that no reasonable body of persons could have reached them'.[55]

A decision which fails to give proper weight to a relevant factor may also be challenged as being unreasonable.[56] But the ground of judicial review is generally considered one of last resort, as courts are reluctant to embark on an exercise which could seem to come close to reviewing a decision on its merits. In *Li*, Gaegler J said that judicial determinations of *Wednesbury* unreasonableness have been 'rare',[57] although statistically the *Wednesbury* unreasonableness ground has been taken in Australia fairly frequently (in 19 per cent of cases).[58] However, almost all the cases were determined on another ground of judicial review.

The 'illogical and irrational ground' of judicial review was also initially treated with suspicion by Australian courts. In *Minister for Immigration and Multicultural Affairs v Eshetu*[59] the plurality suggested that the ground might be no more than an emphatic way of expressing disagreement with the decision. However, in *Re Minister for Immigration & Multicultural Affairs; Ex parte Applicant S20/2002*,[60] in circumstances where the then bifurcated *Migration Act 1958* (Cth) (temporarily) expressly forbade reliance on *Wednesbury* unreasonableness as a ground of judicial review to challenge a migration decision, the High Court accepted a plea of illogicality and irrationality as constituting an independent ground of judicial review, although it found the ground was not made out on the facts of that case. In *Minister for Immigration & Multicultural Affairs v SLGB*,[61] in which the appellant was successful, the Court extended the application of that ground to a decision-maker's satisfaction as to the existence of a jurisdictional fact. In *WAHP v Minister for Immigration & Multicultural & Indigenous Affairs*,[62] although dissenting as to the result, Lee J fairly stated the principle in these terms:

> A determination that is based on illogical or irrational findings or inferences of fact may be shown to have no better foundation than an arbitrary decision and accordingly the review process will be unfair and will not have been conducted according to law … Illogical or irrational findings or inferences of fact upon which a determination is based become examinable as part of the matter that is subject to judicial review pursuant to the application for a prerogative or constitutional writ.[63]

At this point, a principled difference between *Wednesbury* unreasonableness on the one hand and illogicality and irrationality on the other appeared to remain in that, in the former, the Court exercised supervision of the quality of the discretionary outcome of the decision-maker, whereas in the latter the Court supervised the quality of the procedure.[64]

In *Minister for Immigration & Citizenship v SZMDS*[65] (*SZMDS*), the High Court again considered the ground of illogicality and irrationality in respect of a jurisdictional fact. However, the Court split on the question of whether a remedy sounded for procedural irrationality and illogicality, or irrationality and illogicality of outcome. The view of Heydon J and the joint judgement of Crennan and Bell JJ[66] was that a remedy should be given for serious irrationality in procedure, regardless of the outcome. However, the view of Gummow ACJ and Kiefel J (as her Honour then was) was that, whether or not there was irrationality in the procedure, no remedy sounded if the outcome was reasonable.[67]

The significance of the decision was that, despite the effort of Gummow ACJ and Kiefel J to fashion a careful distinction between fact review and review of jurisdictional facts, they appeared to suggest that a remedy for an illogical and irrational decision may also be conditioned only by its outcome.

The legal unreasonableness ground of review

The High Court has long held that a decision-maker must exercise a discretionary power reasonably, either because the legislature is taken to intend that the discretion must be exercised reasonably[68] or because of the necessary construction of the statute giving the discretionary power.[69]

In *Li*,[70] the migration applicant's entitlement to an Australian visa turned on the assessment of her skills as a cook. The applicant had undertaken two assessments of her ability. The second assessment was unfavourable and, before the tribunal hearing, the applicant had lodged a challenge of that assessment for error. The Migration Review Tribunal decided that the applicant had had sufficient time to demonstrate compliance with the conditions of her visa and it refused a two-week adjournment to wait for the result of that review of her skills assessment. It rejected her application for a visa, relying on the second unfavourable assessment.

The plurality in *Li*[71] confirmed that, in the case of a discretionary decision, there is a presumption of law that discretionary power will be exercised reasonably and added that the legal standard of unreasonableness in discretionary matters was not limited to *Wednesbury* unreasonableness.

The plurality discussed the notion of proportionality in the context of judicial review in the following terms:

> In the present case, regard might be had to the scope and purpose of the power to adjourn in s 363(1)(b), as connected to the purpose of s 360(1) (170). 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. 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.[72]

French CJ said:

> A distinction may arguably be drawn between rationality and reasonableness on the basis that not every rational decision is reasonable. It is not necessary for present purposes to undertake a general consideration of that distinction which might be thought to invite a kind of proportionality analysis to

> bridge a propounded gap between the two concepts. Be that as it may, a disproportionate exercise of an administrative discretion, taking a sledgehammer to crack a nut, may be characterised as irrational and also as unreasonable simply on the basis that it exceeds what, on any view, is necessary for the purpose it serves.[73]

Accordingly, the notion of proportionality was squarely raised by the High Court as a potential ground of judicial review, perhaps in its own right or perhaps as a part of the collection of grounds that make up legal unreasonableness.

Even where reasons have been provided, they may lead to a conclusion that a decision lacks an inevitable and intelligible justification. The plurality also said, agreeing with Mason J in *Minister for Aboriginal Affairs v Peko Wallsend Ltd*,[74] that there was a close analogy between judicial review of administrative action and appellate review of judicial discretion:

> It was said in *House v The King* [(1936) 55 CLR 499] that an appellate court may infer that in some way there has been a failure to properly exercise the discretion 'if upon the facts the result is unreasonable and plainly unjust'. The same reasoning might apply to the review of the exercise of a statutory discretion where unreasonableness is an inference drawn from the facts and from the matters falling for consideration in the exercise of the statutory power.[75]

Gageler J agreed:

> Review by a court of the reasonableness of decision made by another repository of power is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process but also with whether the decision falls within a range of possible, acceptable outcomes which are defensible with respect to the facts and law.[76]

French CJ held[77] that the decision of the Tribunal was infected by jurisdictional error because, despite the Migration Act codifying the requirements of procedural fairness applying to decisions made under the Act, the Tribunal failed to afford procedural fairness at common law by not granting an adjournment, and the decision was also *Wednesbury* unreasonable because the statutory grant of decisional freedom could not be construed as sanctioning a decision that was arbitrary or capricious or lacked common sense.[78]

Ultimately, the plurality in *Li* held that the Tribunal's decision involved legal error and should be quashed. It was not possible for the Court to ascribe an established ground of judicial review to the error because no one ground seemed to fit. The Court finally held that the 'result itself bespeaks error' and a remedy was granted.

The decision in *Li* has been explained and followed in several decisions of the Full Court of the Federal Court, a few of which are of particular significance. In *Minister for Immigration and Border Protection v Singh*[79] (*Singh*) the Court held that the legal unreasonableness ground is invariably fact dependent and can attach to the unreasonableness of the process or to the unreasonableness of the result. The Court explained this last conclusion, which appears to reconcile the views expressed in *SZMDS*, by considering the administrative reality that some decisions are supported by reasons and some are not. The Court said:

> legal unreasonableness can be a conclusion reached by a supervising court after the identification of an underlying jurisdictional error in the decision-making process … However legal unreasonableness can also be outcome focused, without necessarily identifying another underlying jurisdictional error … In circumstances where no reasons for the exercise of power, or for a decision, are produced, all a supervising court can do is focus on the outcome of the exercise of power in the factual context presented, and assess, for itself, its justification or intelligibility … Where there are reasons, and especially where a discretion is being reviewed, the court is able to follow the reasoning process of the decision-maker through and identify the divergence, or the factors, in the reasons said to make the decision legally unreasonable … Although it is not necessary for the purposes of this appeal to resolve the question whether those should be seen as two different kinds of review and what might flow from

> that, we are inclined to the opinion that, where there are reasons for the exercise of a power, it is those reasons to which a supervising court should look in order to understand why the power was exercised as it was … [U]nlike some other grounds for review of the exercise of power, the reasoning process in review for legal unreasonableness will inevitably be fact dependent… any analysis which involves concepts such as 'intelligible justification' must involve scrutiny of the factual circumstances in which the power comes to be exercised …[80]

In *Minister for Immigration and Border Protection v Stretton*,[81] the Full Court summarised the principles expressed in *Singh* and expressly rejected the view that the ground of legal unreasonableness was unprincipled. The Court said:

> the Court's role [remains] strictly supervisory. It is concerned with determining whether there has been a lawful exercise of power having regard, in particular, to the terms, scope and purpose of the statute conferring the power. In circumstances where reasonable minds might differ about the outcome of, or justification for, the exercise of power, or where the outcome falls within the range of legally and factually justifiable outcomes, the exercise of power is not legally unreasonable simply because the Court disagrees, even emphatically, with the outcome or justification. If there is an evident, transparent and intelligible justification for the decision … or if the decision is within the 'area of decisional freedom' of the decision-maker, it would be an error for the Court to overturn the decision simply on the basis that it would have decided the matter differently.[82]

Despite the Full Court's insistence that there was a principled basis on which the outcome of a decision may be characterised as reasonable or not, the point at which the outcome of a discretionary decision cannot be said to be justified by reference to the statute conferring the power remains (at least to some extent) a matter of impression.

The question of whether the legal unreasonableness recognised in *Li* is confined strictly to the exercise of discretion, or whether it may extend to the making of factual findings, was considered by the Full Court of the Federal Court in *Muggeridge v Minister for Immigration and Border Protection*.[83] Charlesworth J (with whom Flick and Perry JJ agreed) indicated that, for a decision to be legally unreasonable, the error affecting the process of reasoning adopted by the decision-maker must occur in the exercise of a discretionary power.[84] However, such an error could be an error of fact-finding. Her Honour quoted, with approval, the following passage from the judgment of Wigney J in *Minister for Immigration and Border Protection v SZUXN*:

> allegations of illogical or irrational reasoning or findings of fact must be considered against the framework of the inquiry being whether or not there has been jurisdictional error on the part of the Tribunal: *SZRKT* at 137 [148]. The overarching question is whether the Tribunal's decision was affected by jurisdictional error: *SZRKT* at [151]. Even if an aspect of reasoning, or a particular factual finding, is shown to be irrational or illogical, jurisdictional error will generally not be established if that reasoning or finding of fact was immaterial, or not critical to, the ultimate conclusion or end result: *Minister for Immigration and Citizenship v SZOCT* (2010) 189 FCR 577 at [83]–[84] (Nicholas J); *SZNKO v Minister for Immigration and Citizenship* (2013) 140 ALD 78 at [113]. Where the impugned finding is but one of a number of findings that independently may have led to the Tribunal's ultimate conclusion, jurisdictional error will generally not be made out: *SZRLQ v Minister for Immigration and Citizenship* (2013) 135 ALD 276 at [66]; *SZWCO* at [64]–[67].[85]

Thus, where a factual finding is irrational or illogical, and it is critical to a decision-maker's ultimate conclusion, the ensuing decision may be set aside on the ground of legal unreasonableness.

Proportionality

In *McCloy v New South Wales*[86] (*McCloy*), the Court considered the question of whether New South Wales legislation capping political donations, prohibiting political donations from property developers and restricting indirect campaign donations was invalid for infringing the freedom of political communication implied in the Commonwealth *Constitution*. The majority applied a proportionality test of 'suitable', 'necessary' and 'adequate in its balance'

to determine whether the impugned legislation was reasonably appropriate and adapted to advance its object. The majority's approach was cautious:

> proportionality in Australian law describes a class of criteria which have been developed by this Court over many years to determine whether legislative acts *or administrative acts* within the constitutional or legislative grant of power under which they purport to be done. … [C]riteria have been applied to purposive powers; to constitutional legislative powers … to incidental powers …; and to powers exercised for a purpose authorised by the constitution or a statute, which may limit or restrict the enjoyment of a constitutional guarantee, immunity or freedom, including the implied freedom of political communication … [But this] does not involve a general acceptance of the applicability to the Australian constitutional context of similar criteria as applied in the courts of other jurisdictions. It does not involve the acceptance of the application of proportionality analysis by other courts as methodologically correct.[87]

Nevertheless, the majority's express reference to 'administrative acts' suggests a potential for the doctrine of proportionality to play an independent role in judicial review.

The majority in *McCloy* propounded 'at least a three stage test' of proportionality,[88] although it referenced decisions of the Supreme Courts of the United Kingdom and Canada (*Bank Mellat v Her Majesty's Treasury (No 2)*[89] and *R v Oakes*[90] respectively) as authority for the proposition that there might be a four-stage test. The test of 'structured proportionality' is, first, whether the impugned decision is in pursuit of a legitimate object ('legitimacy'); second, whether the means for pursuing the legitimate object are rational, fair and not arbitrary ('suitability'); third, whether alternative strategies could and should have been chosen which would intrude less on the affected individuals rights ('necessity'); and fourth whether even a minimally intrusive limitation is permissible in pursuit of the legitimate end ('balance').[91]

Proportionality review is now well established in the United Kingdom to the extent that administrative decisions are challenged for breach of the Human Rights Act. It is apparent that proportionality is a more intrusive general standard than the currently available common law grounds of review impugning the outcome of a decision. This is demonstrated in the United Kingdom decision of *R v Ministry of Defence; Ex parte Smith*,[92] in which Smith challenged her dismissal from the Royal Air Force on the basis of her sexuality. Smith failed at common law on a plea of irrationality but succeeded in the European Court of Human Rights, which allowed her appeal on a test of proportionality under the human rights legislation.

In Australia, as articulated by the majority in *McCloy*, proportionality analysis has so far been generally confined to questions of constitutional law (and, even then, only to 'purposive powers' in the *Constitution*).[93] It is applied to gauge the sufficiency of connection between the purpose of a head of constitutional power and a law, not the extent to which a law may affect individual rights,[94] although the High Court has left open the possibility that proportionality analysis might extend to human rights law.[95]

In Australia, the doctrine of proportionality remains 'at the boundaries' of administrative law.[96] However, the more expansive comment made by the majority in *McCloy* recognises that a number of decisions over the years have left open the possibility that proportionality might play a greater role in the determination of administrative law decisions. In *Fares Rural Meat & Livestock Pty Ltd v Australian Meat & Livestock Corporation*[97] (*Fares Rural Meat*), Gummow J, sitting as a Federal Court judge, suggested that one of the three 'paradigms' of *Wednesbury* unreasonableness was that the exercise of the power was out of proportion in relation to the scope of power.[98] In *New South Wales v Macquarie Bank Ltd*,[99] Kirby J once held a regulation invalid for not being proportional to the object of the enabling Act, although his Honour's view was not part of the ratio of the decision.

In *Li*, French CJ referred to proportionality in the context of the decision-maker's area of 'decisional freedom' and stated that 'not every rational reason is reasonable. There may be scope for proportionality analysis to bridge the gap between the two concepts'.[100] The plurality in *Li* also referred to *Fares Rural Meat*, observing that the application of a proportionality analysis by reference to the scope of the power was the type of unreasonableness under consideration: 'an obviously disproportionate response is one path by which a conclusion of unreasonableness may be reached'.[101]

Further, in *Singh*, the Full Court held:

> If a proportionality analysis were undertaken … it could be said that the exercise of power to refuse a short adjournment in these circumstances was disproportionate to the Tribunal's conduct of the review to that point, to what was at stake for the first respondent, and what he might reasonably have hoped to secure through a re-mark.[102]

Proportionality as a test of legal unreasonableness?

Proportionality is derived from the civil law. Writing extrajudicially, Bathurst CJ summed up the tension involved in incorporating a civil law doctrine into the common law:

> Civil law principles are thought to derive from natural law and in that sense to be static and inflexible, while common law principles have been described as working hypotheses and kaleidoscopic, in the sense that they are in a constant state of change in minute particulars. The concern associated with foreign intrusions of principle has been aptly summarised by Justice Douglas of the Queensland Supreme Court [as] 'is the genius of the common law expressed in its propensity for bottom-up reasoning in danger of being replaced by a form of procrustean top-down reasoning?'[103]

Hooper describes the difficulties English courts have experienced in transitioning structured proportionality, from its application to European rights legislation to the common law more generally.[104] Hooper acknowledges that structured proportionality may appear to systematise a court's approach to determining whether the substance of an administrative decision is lawful but suggests that, when looked at closely, the stages of structured proportionality, particularly the last stage, involve the court in making a 'multitude of policy decisions'.[105] Further, Boughey makes the point that the application of proportionality in common law jurisdictions is best adapted to resolving questions of whether individual rights have been infringed by reference to written bills of rights, and that it is only subsequent to the *Human Rights Act 1998* in the UK, which required courts to have regard to Strasbourg jurisprudence when a Convention right was engaged, and human rights legislation in Canada and New Zealand, that courts in these jurisdictions have begun engaging in proportionality review.[106] Australia, lacking a bill of rights against which administrative action can be measured, provides infertile ground for the application of the doctrine of proportionality.

Conclusion

It would be wrong to suggest that proportionality analysis is, at this moment, an accepted or established tool of Australian administrative law jurisprudence. In *Gaynor v Chief of the Defence Force (No 3)*,[107] for instance, rule 85 of the *Defence (Personnel) Regulations 2002* (Cth) provided that an army officer's service could be terminated if the relevant commanding officer was satisfied that the retention of the officer was not in the interests of the Defence Force or the service. The Chief of the Defence Force terminated Gaynor's service because he had published statements concerning his private views about political matters. Buchanan J at first instance held that, where the exercise of discretion was not reasonably and appropriately adapted to serve a legitimate end, it was an exercise of discretion in excess of the statutory grant of power. However, on appeal, the Full Court held that Buchanan J's analysis had impermissibly converted the limitation on legislative power

to an individual right. If the implied freedom was to be protected at the administrative review level, it could only be through the traditional grounds — for instance, by characterising the implied freedom as a relevant consideration that the decision-maker had failed to take into account.

Nevertheless, there is some evidence that proportionality is making inroads into Australian legal thinking:

> Where proportionality analysis is applied in one area of public law it is prone to leaking into other areas in order to maintain consistency in legal reasoning. In the Australian context, the question of consistently applying structured proportionality analysis arises right at the intersection of constitutional and administrative law, namely: when legislation confers a wide discretion on an administrator, which is not itself necessarily inconsistent with the constitutional limitation, but can be exercised in a way which is inconsistent …[108]

Australian courts have long confined themselves to reviewing the procedure of administrative decisions, not their substance. The High Court's decision in *Li* has significantly increased the jurisdiction of Australian courts to inquire into the substance and as to fact-finding. The courts, in conformity with their constitutional limits, should only exercise this enlarged jurisdiction according to principle. However, the question of whether the substance of an administrative decision and findings of critical or ultimate facts can be justified by reference to the statute conferring the power remains in part (for now) a matter of impression.

The doctrine of proportionality offers a principled approach. It is no objection that proportionality is a civil law concept. The common law has always adapted civil law doctrines to supply common law deficiencies. The development of the law of frustration of contract is just one example. It is also no objection that proportionality may involve the courts in making policy or value judgement decisions. There is a distinction between the civil doctrine of proportionality used to characterise the relationship between the state and the individual as a matter of substantial justice, and the adoption by the common law of the analytical tool of structured proportionality to aid in the determination of the reasonableness of legislation infringing on freedoms. It is also no real objection that Australia, unlike other common law jurisdictions, has not legislated for human rights. While it might be true to say that proportionality analysis arose in the UK, Canada and New Zealand because of the introduction of human rights legislation in these jurisdictions, it is not true to say that, as a consequence, human rights legislation is a necessary precondition of the emergence of proportionality in administrative law. French CJ, as well as Kirby P and the Full Court of the Federal Court (in obiter remarks), all contemplate the application of the principle of proportionality to facts not giving rise to questions of human rights.

The true objection to structured proportionality is the absence of an overarching standard in Australia against which to test the proportionality of an impugned decision. However, this does not mean that structured proportionality cannot be used to test the proportionality of a decision where such a standard exists. Both *Li* and *Singh* were decisions in which a decision-maker failed to grant an adjournment. The obvious standard against which the proportionality of the refusal could be tested was procedural fairness, or fairness more generally. Kirby P, in *New South Wales v Macquarie Bank Ltd*,[109] found that the Act under which the impugned decision had been made itself provided the standard against which the proportionality of the decision could be tested. These examples indicate that structured proportionality analysis might, on a case-by-case basis, provide a principled and transparent approach to assessing the legal reasonableness of a decision where a standard against which the proportionality of the decision can be measured can be identified.

Where to from here?

The position taken in *Azzopardi* that a perverse factual finding does not give rise to an error of law has its corollary in judicial review proceedings in the principle that the court's role is not to engage in merits review. The drawback of this position is that it effectively gives administrative decision-makers free rein to make decisions which ignore the probative force of the evidence which is all one way, or to find facts using reasoning which is demonstrably unsound. As Kirby P (as his Honour then was) said in his dissenting judgement in *Azzopardi*, '[i]t should be no part of our system of justice to condone perverse and completely unreasonable decisions'.[110]

This observation has even greater force now, over 30 years later, in the judicial review context, given that the state and Commonwealth legislatures have greatly expanded the range of areas in which they make decisions affecting citizens' lives. Many of these decisions are reviewable by 'super tribunals', which are empowered to substitute their own administrative decisions for those of government officials. Such super tribunals have been created to provide, amongst other things, cheap and effective merits review. Where a tribunal itself makes a perverse factual decision, it would be a strange result if that decision was not amenable to correction. The High Court's decision in *Li* and the Federal Court cases which follow and explain it are symptomatic of a greater willingness on the part of courts to intervene where discretionary decisions and findings of fact are irrational or illogical. To this extent, the law appears to be moving in a direction which accords with community expectations, albeit courts are still careful not to trespass on the 'area of decisional freedom' of the administrator.

The law is still struggling to adapt to many of the other changes pertinent to fact-finding in the 21st century: the evidence-based research about the working of human memory and the human ability to detect untruths from demeanour; the explosion of electronic and other data; and the advent of previously unknown forms of data, such as DNA and metadata.

Particular judges have acknowledged the validity of research that indicates that widely-held assumptions about the way memory works, and the reliability of demeanour as an indicator of veracity, are simply erroneous. This has influenced the way those judges have decided cases, and their comments (both judicial and extra-judicial) are likely to have a more widespread effect on other judicial officers and administrative decision-makers over time. However, we know of no case in which a decision-maker who has come to conclusions about the reliability or credibility of a witness, on the basis of erroneous assumptions about memory, has been found to have made an error of law. There is no legal principle requiring decision-makers (whether judicial or administrative) to consult recent research about memory before determining that a witness's self-contradictions when recalling an event indicate that the witness is lying. In fact, if a decision-maker were to rely upon such research without first informing the parties, this might itself constitute a breach of procedural fairness. The current system thus tends to entrench error in this particular aspect of fact-finding.

Another concern is the law's approach to factual findings as to a person's credibility, given what we now know about the human ability (or lack of ability) to detect falsehood. Decision-makers who make findings about the credibility of people from different cultural backgrounds, such as in the refugee area, are thus likely to make factual errors if they are not educated about the relevant psychological research.[111] Making credibility findings is particularly problematic if the party or witness is from a non-English speaking background and using an interpreter. In asylum seeker cases, a decision-maker must often rely solely or primarily on the asylum seeker's own testimony, and thus must deal with constraints upon the reliability of personal, uncorroborated memories (and missing documentation), the

intervention of an interpreter, the effect of trauma, and the difficulties of assessing credibility from the demeanour of a person of another cultural background. A legal approach which does not put any boundaries around the making of adverse credit findings in this context could be seen to be wanting.

The law with respect to reviewing factual findings will no doubt continue to evolve. We consider that there is scope for greater judicial intervention in the context of fact-finding which is made on unscientific and erroneous assumptions about human behaviour, and fact-finding which is legally unreasonable. Both are examples of irrational decision-making — an area where the courts have recently expressed a greater willingness to identify and set aside erroneous factual decisions.

Endnotes

1 (1985) 4 NSWLR 139, 155–156.
2 (1998) 45 NSWLR 163, [187E]–[189E].
3 (2002) 76 ALJR 966.
4 [2007] FCA 1062.
5 [2007] FCA 1062, 374.
6 [2007] FCA 1062, [375].
7 (2006) 80 *Australian Law Journal* 655.
8 Justice David Ipp, 'Problems with fact-finding' (2006) 80 *Australian Law Journal* 667, 670.
9 Justice Peter McClellan, 'Who is telling the truth? Psychology, common sense and the law' (2006) 80 *Australian Law Journal* 655, 658.
10 Justice Virginia Bell, 'Appellate review of the facts' (2014) 39 *Australian Bar Review* 132.
11 The Hon Justice Peter McClellan, 'Who is telling the truth? Psychology, common sense and the law' (2006) 80 *Australian Law Journal* 655, 658.
12 Ibid.
13 (2003) 214 CLR 118, 163 [145].
14 (2006) 80 ALJR 458, 466 [23].
15 The reference is to McHugh J's judgement in *Abalos v Australian Postal Commission* (1990) 171 CLR 167, 179.
16 See, for example, *Seven Network Limited v News Limited* [2007] FCA 1062, [374]–[375].
17 [2013] EWHC 3560.
18 [2013] EWHC 3560, [16].
19 [2013] EWHC 3560, [17].
20 [2013] EWHC 3560, [22].
21 Jane Goodman-Delahunty, Mark A Nolan and Evianne L van Gijn-Grosvenor, *Empirical guidance on the effects of child sexual abuse on memory and complainants' evidence* (Royal Commission into Institutional Responses to Child Sexual Abuse, 2017) 8.
22 Ibid 18.
23 Ibid 22.
24 Ibid.
25 Douglas McDonald-Norman, 'Young's "Fact Finding Made Easy" in Refugee Law: A Former Practitioner's Perspective' (2018) 92 *Australian Law Journal* 349.
26 (NSW) (2012) 61 MVR 245, [52], [55].
27 (2014) 67 MVR 150; [2014] NSWSC 888 [31].
28 [2015] NSWSC 1140 [39], [84]–[85], [99], [103], [109]–[110].
29 (2016) 77 MVR 348, [63]–[95].
30 See Justice Brian Tamberlin and Lucan Bastin, 'Metadata and the Discovery of Electronic Evidence,' (2008) 36 *Australian Business Law Review* 457.
31 (1987) 163 CLR 54, 77 (Brennan J).
32 (1998) 45 NSWLR 163, 187F–190E (Spigelman CJ; Mason P, Sheller and Powell JJA agreeing).
33 (1990) 170 CLR 321, 340–341.
34 (1940) 40 SR (NSW) 126, 137–138.
35 (1985) 4 NSWLR 139.
36 (1990) 170 CLR 321.
37 (1990) 170 CLR 321, 359–360 (Mason CJ).
38 (2010) 241 CLR 390.
39 (1980) 44 FLR 41, 62–68 (Deane J; Evatt J agreeing).
40 (1990) 170 CLR 321, 367 (compare the decision of Mason CJ at 356).
41 (1990) 170 CLR 321, 340.
42 (1990) 170 CLR 321, 355 (citations omitted).

43 (1985) 4 NSWLR 139.
44 (2013) 249 CLR 332.
45 This was explored in a paper by Mark Robinson SC and Dr Simon Blount, 'The New Judicial Review — Legal Unreasonableness', for the Law Society of NSW Government Solicitors Conference on 5 September 2017, and it is partly reproduced here.
46 (2013) 249 CLR 332.
47 [1948] 1 KB 223.
48 (2003) 214 CLR 1, [76] (McHugh and Gummow JJ).
49 [1948] 1 KB 223.
50 *Bromley London Borough Council v Greater London Council* [1983] 1 AC 768, [821].
51 *Puhlhofer v Hillingdon London Borough Council* [1986] 1 AC 484.
52 (1985) 6 FCR 155.
53 (1985) 6 FCR 155, 167.
54 (1985) 6 FCR 155, 168.
55 (1985) 6 FCR 155, 168.
56 *Minister for Aboriginal Affairs v Peko Wallsend Ltd* (1986) 162 CLR 24, 41 (Mason J)
57 (2010) 240 CLR 611, [113].
58 Roger Douglas, *Douglas and Jones's Administrative Law* (Federation Press, 5th ed, 2006) 470.
59 (1999) 197 CLR 611, [40].
60 (2003) 77 ALJR 1165.
61 (2004) 78 ALJR 992, [37]–[38] (Gummow and Hayne JJ).
62 [2004] FCAFC 87.
63 [2004] FCAFC 87, [7].
64 Mark Aronson, Matthew Groves and Greg Weeks, *Judicial Review of Administrative Action and Government Liability* (Thomas Reuters (Professional) Australia Limited, 6th ed, 2017) 264 [4.710].
65 (2010) 240 CLR 611.
66 (2010) 240 CLR 611, [131].
67 (2010) 240 CLR 611, [27].
68 *Kruger v Commonwealth* (1997) 190 CLR 1, [36] (Brennan CJ); *Attorney General (New South Wales) v Quin* (1990) 170 CLR 1, [36] (Brennan J).
69 *Abebe v The Commonwealth* (1999) 197 CLR 510, [116] (Gaudron J).
70 (2013) 249 CLR 332.
71 (2013) 249 CLR 332, [63], [68].
72 (2013) 249 CLR 332, [74].
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BETTER GOVERNMENT: LEARNING FROM MISTAKES

John McMillan AO*

This article, delivered in honour of Professor Jack Goldring, deals with the intersection of administrative law and public administration. The same topic was taken up by Professor Goldring in a book co-authored with political scientist Ian Thynne in 1987, *Accountability and control: government officials and the exercise of power*. Their book, one of the first serious works on Australian law and administration, examined the dual role that administrative law can play in providing a redress mechanism for members of the public while kindling improvements in administrative systems and practice. I will examine the same theme from the perspective of my Commonwealth and State Ombudsman experience.

Mistakes that tell a story

Through handling thousands of individual complaints and approaches each year, an Ombudsman office is well placed to identify systemic defects in administrative conduct. These can be taken up either in individual complaint investigations or in broader-scale own-motion investigations initiated by the Ombudsman. The individual complaints provide a window on a broader picture.

There are many celebrated examples of how improvements in government are traceable to individual failures that alerted us to deeper problems. Currently in New South Wales there is a wholesale restructure of water regulation that was triggered by a recent ABC *Four Corners* program that highlighted a few incidents in the Barwon–Darling river system. An earlier *Four Corners* program that highlighted the mistreatment of a young detainee in the Northern Territory resulted in a Royal Commission into juvenile detention in the Territory. Australian immigration administration was completely revamped 10 years ago following revelations about the detention of Cornelia Rau and the deportation of Vivienne Alvarez. A significant shake-up of our security intelligence framework and practices occurred on two occasions following specific incidents that were soon condemned — an armed training exercise by officers at the Sheraton Hotel in Melbourne and the detention of Dr Haneef in Brisbane.

Similar examples can be given of individual mistakes that triggered wholesale review and change in areas as diverse as hospital admissions, airline security, licence processing, police interviewing, quarantine regulation, military discipline and parole processing.

Not all bureaucratic failures trigger a process of review or reform. Some mistakes go unexposed. And, even when exposed, the blameworthy agency may downplay the mistake as merely exceptional or episodic. Sometimes that may be a correct reading — there are indeed ‘oops’ moments in which mistakes occur that were accidental, unpredictable and unavoidable.

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The worry is when this becomes the innate cultural and attitudinal response within an agency to individual mistakes. The hasty response of some agencies is to say that a mistake was unrepresentative and does not pose a greater risk. This is sometimes put arithmetically — that a particular mistake represents only a miniscule fraction of similar decisions that were not questioned or disputed.

The alternative is to pause and ask if there is a lesson to be learnt. Would a better system have avoided the problem that occurred? Was the mistake and its impact inexcusable?

The industry that excels in taking that approach is, not surprisingly, the aeronautics industry. A moment's reflection tells us that so many things could go wrong in the sky. At any given moment there are an estimated 3300 planes in the air moving 660 000 people between 20 000 cities worldwide. And yet we implicitly assume that nothing will go wrong when we board a plane. Our confidence can be traced to the ironclad philosophy in the aeronautics industry that every single error or mistake must be reviewed to assess the risk of systemic failure.

I will now pursue that theme by discussing three different case studies from Ombudsman work over the past year. The case studies are the Centrelink Robodebt controversy, the Operation Prospect investigation into a New South Wales law enforcement episode, and developments in university complaint handling.

Automated decision-making and the Robodebt controversy

We rely on computers to undertake a large proportion of our business and social transactions. We go online to do banking, pay tax, apply for a passport, enrol to vote, plan holidays, purchase tickets, conduct research — and much more.

In many transactions with government there may be no human intervention or evaluation of the information we submitted. Though Australia has among the strictest border controls worldwide, we can leave and re-enter the country through an electronic SmartGate without as much as a 'G'day' or 'See you later'. We can submit our tax return online through an e-tax portal that electronically assesses our tax liability and generates a statement of reasons to explain a decision that we usually accept, whether we understand it or not.

Government agencies have actively embraced computer decision-making as part of a digital transformation agenda. The driving philosophy is that automated decision-making is efficient, fair, accurate, consistent and economical. Legislation expressly authorises at least 11 federal government agencies to arrange for a computer to make a decision that must otherwise be made by an official nominated in the statute.[1] Government decision-making is undergoing a radical transformation.

But what happens if the computer makes an error or a person wants to challenge the computer-generated decision or we have a query but we do not know how to converse knowledgeably with the computer?

Those questions are squarely raised by what was dubbed the 'Robodebt' controversy. The *Social Security Act 1991* (Cth) outlines the circumstances in which a social security recipient may owe a debt to the Commonwealth. One such circumstance is that a person has received a payment at a rate higher than the correct rate because of undeclared income.

In former days Centrelink officers undertook manual comparison of Centrelink and Australian Taxation Office records to identify data discrepancies and, if they found any, to

commence a debt raising and recovery process. This was a resource-intensive exercise, and officers could only investigate roughly 20 000 discrepancies each year. If a discrepancy was discovered, Centrelink could rely on its information-gathering powers to require the client or an employer to provide information. A client who was aggrieved by an adverse decision might individually complain to the Ombudsman, commence internal review proceedings or appeal externally to the Social Security Appeals Tribunal.

In 2016 the Department of Human Services (in which Centrelink is located) launched a new automated system called Online Compliance Intervention (OCI). This system compares a client's Centrelink statement with the employer-reported income data held by the tax office. If there is a discrepancy, the client receives an OCI-generated request to confirm or update their income. The OCI may then compute a new income figure, based on the client's response or lack of response, and generate a debt letter. Overnight, the number of Centrelink debt letters jumped from 20 000 per year to 20 000 per week. The first round of letters went out just before Christmas 2017.

The Commonwealth Ombudsman soon commenced an own-motion investigation after receiving an 87 per cent increase in complaints.[2] The Ombudsman's report in April 2018 identified a number of problems that pointed to larger issues that can arise in automated decision-making. A central problem was a high error rate that was attributable not to the computer program but to how people engaged with the system. If the correct information was entered, the program would accurately calculate if a debt was due. But, if a person misunderstood what was required or made entry errors, the computer would reach the wrong decision. The government subsequently confirmed that 20 000 of the debt recovery notices that were issued to clients were reduced or rescinded on the basis of fresh information.[3]

The Ombudsman found that OCI letters were unclear. Many clients misunderstood how income data was to be entered online. Rigid business rules in the OCI program disadvantaged clients who had not retained historical income records. A statute-authorised 10 per cent recovery fee was automatically applied to any debt that was not properly explained. OCI letters did not provide a contact phone number in the Centrelink compliance team. Clients who called the general customer service line could encounter long delays or receive inadequate advice. Non-government welfare assistance organisations were not adequately forewarned or trained on how to assist clients to enter information into the system. The OCI system rollout was too rapid rather than incremental.

Other commentators (including a Senate committee) queried whether the introduction of an automated system in this manner was in fact unlawful by effectively imposing an onus of proof upon Centrelink clients. The Social Security Act provisions that authorise Centrelink to raise and recover debts implicitly assume a process to establish that a debt is due. But did the OCI process circumvent that requirement and transfer the onus to Centrelink clients to establish that a presumptive debt generated by an automated data-matching process was in fact wrong?[4] As the Ombudsman report noted, the automated OCI system 'effectively shifted complex fact finding and data entry functions from the department to the individual'.[5]

Another side to technology that is illustrated by the Robodebt controversy is how people react when things go wrong. As I noted earlier, in former days the main formal options for an aggrieved party were to individually complain to the Ombudsman or a member of parliament or to initiate internal or external review proceedings. Those options remain, but the immediate response to Robodebt illustrates the scrutiny environment in which agencies now work.

Recipients of Robodebt letters went online to share their experiences and ask questions. One alert observer saw the chatter and created the NotMyDebt website and Twitter hashtags to join the conversations, and they were also taken up on Facebook. What has been described as a 'Robodebt community' arose overnight, comprising Centrelink clients, journalists, lawyers, academics, activists, legal assistance services and advocacy organisations.[6] The communal discussion and shared information alerted many people to the fact of system problems, erroneous results and their review rights. Pressure for an Ombudsman and Senate committee inquiry grew. Changes to the OCI system were quickly implemented by government. There was a surge in legal aid appointments and review applications.

In summary, the work of the Robodebt community showed administrative law at work in a fast-paced, crowd-sourced and social media driven manner. This was perhaps unprecedented, but it is probably prophetic.

Robodebt is also a case study in how technology is changing our understanding of how administrative decisions are made and legal processes are meant to work. We have centuries-old expertise in framing laws and designing administrative programs. But, as Robodebt shows, that provides no guarantee of administrative perfection if either the business rules of an automated system or the user-interface design is not ideal.

These challenges were identified in a landmark report in 2004 by the federal Administrative Review Council,[7] of which the Ombudsman was a member along with representatives of courts, tribunals, government, professional organisations and the community. The Council published a set of Best Practice Principles that were designed to address the very problems that Robodebt exposed. The Council's work was influential, but clearly there is a need for a renewed and intense focus on this issue.[8] One Council recommendation that has not been implemented was the establishment of an independent interdisciplinary advisory panel to ensure that administrative law values are reflected in automated systems.

Operation Prospect: review of covert police investigation

In 2017 the NSW Ombudsman completed the largest single investigation to be undertaken by an Australian Ombudsman — Operation Prospect.[9] This investigation, spanning four years, was into allegations and complaints that were either about or connected to a covert investigation of serious police corruption conducted jointly by the NSW Crime Commission and the NSW Police Force between 1999 and 2001.

As that lengthy timeline indicates, some controversies rage for a long time. It is likely, as years pass and a controversy is unresolved, that they will enlarge by drawing in additional issues and people and fomenting greater bitterness. That is the story of Operation Prospect and the decade-old police corruption investigation that it examined.

The police corruption investigation, named Operation Mascot, followed the Wood Royal Commission into police corruption between 1994 and 1997.[10] The Wood Royal Commission confirmed that systemic police corruption existed and was embedded in New South Wales policing. This was highlighted a couple of years later, in December 1998, when a serving NSW Police Force officer approached the NSW Crime Commission and disclosed his knowledge and involvement in organised crime and corruption spanning over 15 years. He was quickly registered by the Crime Commission as an informant and became a central figure in the Mascot investigation that was established the following month as a joint Crime Commission—police task force.

The Mascot investigation was largely undertaken by the use of concealed listening devices and telephone interception. The listening devices were mostly concealed on the informant or in his briefcase and were activated when he engaged in conversation with fellow officers, frequently about past and sometimes contemporary corruption.

The strategy was highly successful. In 2000 the Mascot investigation was joined by the Police Integrity Commission that conducted both private and public hearings under the auspices of Operation Florida. The combined Mascot and Florida investigations resulted in findings against 27 officers, the prosecution of 13 officers and civilians, disciplinary action against at least 10 officers, and the resignation or dismissal of over 20 officers. The current high integrity of New South Wales policing is heavily based on that work and subsequent reforms.

But there was a problem. Concern surfaced publicly in 2002 that the Mascot investigation may have over-reached. In that year a Mascot listening device warrant became public after inadvertently being served in a prosecution brief that arose from the investigation. The warrant listed 114 people whose conversations could be covertly recorded, including former and serving police officers, a barrister and a journalist. Some people were listed as possible attendees at a retirement function for a police officer suspected of corruption.

Obvious questions were quickly raised in and outside of government. Why was my name on the warrant? Was I suspected of corruption? Is it feasible that scores of attendees at a social function were all implicated in corruption? Was the Supreme Court judge who issued the warrant properly advised and were the rigorous requirements of the *Listening Devices Act 1984* (NSW) followed? How many other listening device warrants were issued? And what became of the recordings and the transcribed conversations?

The internal response at the time to those questions was genuine but, with hindsight, inadequate. Internal briefings prepared for the Minister and the Inspector of the Police Integrity Commission justified the format of the listening device warrant and did not grapple with the larger questions that were being asked. In short, this internal — and guarded — response did not stem a brewing controversy. There was no public reporting on the listening device warrants and the Crime Commission refused to make available to the NSW Police Force the full records the Commission held about the Mascot investigation.

The controversy became a crisis for government in 2012 when roughly 2000 pages of confidential Crime Commission and NSW Police Force records reached the hands of at least eight journalists, parliamentarians and senior officers. It seemed that one or more law enforcement officers had acted on their discontent by leaking the Mascot-related records.

Two other developments played into the controversy. One was that some of the players in the Mascot events had since risen to senior rank in the police force. Three names frequently mentioned in the media were Deputy Commissioner Catherine Burn, who had earlier led the Mascot Task Force; Deputy Commissioner Nick Kaldas, who was suspected of having been investigated and recorded by the task force; and Police Commissioner Andrew Scipione, who was not involved in the Mascot investigations but held senior office when the controversy was developing and was unresolved.

The other development was that the NSW Crime Commission had long been an enigma but was facing questioning on multiple fronts. The Commission was established in 1985 as a criminal intelligence agency to combat drug crime, and its remit was later expanded to organised crime. It was regarded as an effective but highly secretive organisation. The title to one newspaper article was ‘The commission that is a law unto itself ... more secretive than ASIO’.[11] The Commission was headed for 15 years until 2011 by the same

Commissioner — Mr Phillip Bradley. A much-publicised incident in that period was a 19-year jail sentence imposed in 2011 on Assistant Commission Director Mark Standen for drug importation.

A Special Commission of Inquiry into the Crime Commission was established that year, headed by former Supreme Court Justice David Patten. The Patten report recommended extensive changes to the Commission's governance structure and oversight, noting the Commission's 'extraordinary powers', and the 'not inconsiderable criticism' that was summed up in one description of its work as 'the end justifies the means'.[12]

In November 2012, following the unauthorised release of Mascot-related documents, the New South Wales Government asked the NSW Ombudsman to conduct an inquiry into the disputed matters. The inquiry lasted four (long) years. It faced two Legislative Council inquiries, over one million documents were captured, 131 witnesses were examined over 89 days of hearings and interviews, and submissions were received from 35 parties comprising 1626 pages. The report that I tabled in December 2016 was a six-volume, 918-page report.

The report examined in great detail the work of the Mascot Task Force — for example, that it had obtained 475 listening device warrants to record 295 people, and 246 telephone interception warrants to record 95 people. Some of the warrants had a dragnet quality, naming as many as 119 people, many of whom could not possibly have been recorded during the life of the warrant and whose inclusion in the warrant was not explained in any supporting affidavit. The Ombudsman report reached 93 adverse findings against individual officers, the Crime Commission and the NSW Police Force.

The NSW Police Force quickly accepted the findings and made apologies to some officers. Others, including some officers, a former premier and attorney general, and the Crime Commission, rejected the report. Indeed, the Crime Commission handed a scathing response to the media before providing it to me. The Commission said it had done nothing wrong; that criticisms of its processes were 'misconceived', 'illogical', 'bizarre', 'ridiculous', 'patently erroneous' and 'biased'; and that the Commission would not apologise to 15 people as recommended in the report.[13]

I countered three months later with a further special report to the Parliament addressing each of the criticisms but also pointing out that the Crime Commission's hostility fitted a familiar pattern: powerful organisations often resist probing scrutiny of their administration when this first occurs.[14]

The major purpose of the Operation Prospect report was to examine and report publicly on disputed events between 1999 and 2012 that made up this controversy. The report also concluded with some takeaway messages. Two were the need for strict and faithful compliance with statutory requirements governing the use of coercive investigation powers; and the importance of preparing an accurate contemporary documentary record to explain why those powers are being used.

But the most important takeaway message is that deep-seated problems in agency systems are not resolved by assuming they do not exist. The report notes numerous opportunities during the long controversy for senior agency personnel to stand back and say 'Houston, we've got a problem'. The failure to do so led to the controversy expanding, becoming entrenched and bitter and requiring a four-year investigation more than a decade later.

University complaint handling

The growth and refinement of administrative law review in Australia owes much to the work of legal academics. However, at the institutional level universities were distinctly unenthusiastic about administrative law applying to them. In earlier days universities actively resisted the suggestion that they were public authorities that were amenable to external review, reasons requirements and freedom of information. The thrust of the university objection was that they were independent institutions and were self-governing. They claimed to be uniquely different to other public authorities because of the principle of academic freedom and the devolution of academic administration and decision-making to faculties and individual academics.

Soon after the new federal administrative law system commenced in the late 1970s the Australian National University (ANU) — a public authority established by an Act of the Australian Parliament — set upon a course of defensive combat. It was not without irony that the ANU was also the home at that time to many leading administrative law academics and reform proponents, notably Professors Harry Whitmore, Jack Richardson, Dennis Pearce, Leslie Zines and Jack Goldring.

In the first judicial review action brought against the ANU in 1982 under the new *Administrative Decisions (Judicial Review) Act 1977* (Cth),[15] the university successfully argued that the decision to terminate a professor's employment was not reviewable under that Act, as the decision was made under his contract of employment and not under the general statutory powers of the university to manage and appoint staff. The university was similarly successful a few years later in another case in arguing that decisions on promotion were not subject to administrative law review.[16]

The ANU equally resisted applications under the *Freedom of Information Act 1982* (Cth) for access to examiners' reports for honours and doctoral theses, arguing that it would be contrary to the public interest to release those reports to candidates.[17]

The ANU was not alone, of course, in arguing that it fell beyond the realm of administrative law. A leading Australian administrative law case is the 2005 decision of the High Court in *Griffith University v Tang*.[18] The university successfully took a jurisdictional objection to a judicial review action brought by a postgraduate student who had been excluded from her PhD studies.

It was likewise the experience of Australian Ombudsmen that universities resisted external scrutiny long after most other public authorities had accepted that a new age had dawned. The resistance culminated in work undertaken by the NSW Ombudsman between 2004 and 2006 to develop tailor-made guidelines on university complaint handling. The impetus, explained in an Ombudsman annual report, was a rising trend in university complaints from both staff and students, poor complaint handling by universities, and the resource-intensive nature of university complaint processes.[19] The new Ombudsman guidelines were developed in conjunction with New South Wales universities, including a survey and meetings of university staff, student organisations and unions.

The need for tailored guidelines of this nature was soon recognised to be a national need. In 2012 all Australian Ombudsman offices agreed there was a need for harmonised national guidelines. The result was the publication in January 2015 of a document entitled *Complaint Handling at Universities: Australasian Best Practice Guidelines*. The guidelines are explicitly based on an Australian Standard for complaint handling[20] but acknowledge that universities are unique institutions that require tailored guidelines. At the same time,

the guidelines explain why they are necessary to safeguard student interests, correct faulty decisions and improve university services and programs.

Three other developments illustrate how far the university sector has come in embracing the notion that complaint handling can foster a continuous cycle of review and improvement. The first is that the 10 public universities in New South Wales now participate in an annual complaint-handling forum hosted by the Ombudsman's office. The forum provides an opportunity to share experiences and strengthen institutional culture.

The second is that in October 2017 the NSW Ombudsman released a discussion paper entitled *Complaints About the Supervision of Postgraduate Students*. This paper, developed after discussion with New South Wales universities, recognises that refinements can be necessary to deal with particular complaint subsets. The Ombudsman receives a steady number of complaints about postgraduate supervision. A breakdown in the research relationship between a postgraduate student and a supervisor can be more complex, personal and bitterly contested. A common predicament is that both parties strive to make the relationship work, or at least do not confront signs of brewing tension, but in retrospect may become angry and accusatory. The tension inherent in a supervisory relationship is captured in the familiar observation that 'an ideal supervisor is positive, honest, caring, patient and brutal'. The NSW Ombudsman discussion paper explores a range of mechanisms and strategies that universities can put in place to deal with the distinctive issues in postgraduate supervision.

A third development is that all Australian universities are now required by national guidelines to develop complaint and appeal processes for overseas students — who are another distinct subset.[21] An allied development that recognises the vulnerabilities faced by overseas students was the conferral upon the Commonwealth Ombudsman in 2011 of a separate statutory role of Overseas Students Ombudsman.[22]

Conclusion

We strive for administrative perfection — but it is largely an illusory goal.

Australian public administration is already of a high standard, as recognised in international awards and rankings. The quality of New South Wales public administration is confirmed in the annual customer satisfaction surveys that the Customer Service Commissioner undertakes on behalf of government: the customer satisfaction index in 2017 was 79.3 per cent.[23]

No matter how high our standards and practices, things can go wrong. And they can go wrong unexpectedly in ways that were not anticipated or picked up by scenario planning, user testing or risk evaluation. The spectacular examples of institutional malfunction provide a lesson that mistakes can occur at any time and in any organisation. The level of expertise and resources that are thrown into planning a program or designing a product provides no guarantee that problems will be avoided.

In the 10 days following the opening of Heathrow Terminal 5 in 2008, over 42 000 bags went astray and many were never reconnected with their owners. The Australian Bureau of Statistics website for the 2017 Census, which was five years in the planning, was closed on the same day it opened. The Australian Taxation Office website crashed in the week following the end of the 2017 financial year as taxpayers tried to submit returns. The recent recall of Samsung mobile phones due to battery explosion is one of many product recalls that commenced shortly after an item went on sale. The Sydney Olympics ticketing saga was one in a long line of ticketing fiascos that failed to predict consumer behaviour. The

new $500 million St Helena airport that was closed before it was opened due a severe wind shear problem is neither the first nor the last infrastructure humiliation.

There are now sufficient examples of this kind that in June 2017 Sweden was able to open the Museum of Failure. The purpose of the museum is not entertainment as such but to encourage organisations to become better at learning from failure.

The comment is often made to me by agency leaders that their aim is to reach a position that the Ombudsman will no longer receive complaints about their agency. And I reply that a train crash is heading their way. We can minimise mistakes and complaints, but we cannot eliminate them.

The wise strategy is to anticipate that things will go wrong and that people will be unhappy and will complain. Take their feedback seriously. Have a clearly defined procedure that enables people to complain. Make sure that senior officers have visibility of what people are saying. Have an open and inquiring mind to the criticisms that come through the door. Above all, accept that we can learn from mistakes and build stronger systems.

One of Jack Goldring's great strengths was his inquiring nature. Jack was willing to test and dissect any proposition. He constantly took on new challenges, both doctrinally and also institutionally as he moved from one campus to another and from one branch of the legal profession to another. Jack's career spanned work in law schools, law reform commissions, the judiciary, official reviews and community-based organisations. A common belief in each of his pursuits was that law can improve administration. Jack's disposition to draw that connection can be inspiring to each of us.

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