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Solicitor-General of Queensland
Lecture 1 Brisbane 29 August 2006
Constitutional Writs

Mr Michael Sexton SC
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Lecture 2 Sydney 30 August 2006
Administrative Law: The New South Wales Landscape

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THE AIAL NATIONAL LECTURE SERIES ON ADMINISTRATIVE LAW

INTRODUCTION

The National Lecture Series on Administrative Law was established by the Australian Institute of Administrative Law (Institute) in 2001. The Lectures are delivered every two to three years by one or more prominent practitioners in the field of administrative law. The Series is one of the activities of the Institute which was set up in 1989 to promote knowledge of and interest in Australian administrative law.

The inaugural lectures were provided by Sir Anthony Mason AC KBE, a former Chief Justice of the High Court of Australia, and were delivered in 2001 through Chapters of the Institute in Perth, Canberra and Sydney. The National Lectures were titled: 'The Foundations and Limitations of Judicial Review', 'The Scope of Judicial Review', and 'Australian Administrative Law Compared with Overseas Models of Administrative Law'. They are to be found in (2001) *AIAL Forum* No 31 which is titled *The AIAL National Lecture Series on Administrative Law* No 1 (2001).

The second National Lectures were delivered by the Honourable James J Spigelman AC, Chief Justice of New South Wales, and were delivered in 2004 through Chapters of the Institute in Sydney, Adelaide and Brisbane. The National Lectures were titled 'The Integrity Branch of Government', 'Jurisdiction and Integrity', and Integrity and Privative Clauses'. They are published in *The AIAL National Lecture Series on Administrative Law* No 2 (2004).

The third National Lectures which are featured in this edition of the journal were delivered in Brisbane on 29 August 2006, in Sydney on 30 August 2006 and in Melbourne on 13 September 2006 respectively. The National Lecturers were three Solicitors-General, Mr Walter Sofronoff QC, Solicitor-General of Queensland, Mr Michael Sexton SC, Solicitor-General of New South Wales, and Mr David Bennett QC, Solicitor-General of the Commonwealth.

Mr Walter Sofronoff QC, was appointed as the Solicitor-General of Queensland, in 2005. Prior to that he was President of the Queensland Anti-Discrimination Tribunal from 2001-2005. He appears in the Supreme Court, Family Court, Federal Court and High Court of Australia. His specialty fields of practice include commercial, property and family law matters. He has also been a mediator of commercial disputes.

Mr Michael Sexton SC, Solicitor-General of New South Wales, was called to the Bar in 1984 and his principal fields of practice were defamation and media law, intellectual property law, professional liability law, administrative law, commercial law and general and common law. He was appointed NSW Solicitor-General in 1998. In addition, Mr Sexton is co-author of an Australian text on defamation law and the author of several books on Australian politics and history. Providing some commentary on Mr Sexton's paper is the President of the NSW Court of Appeal, the Hon Justice Keith Mason AC.

Mr David Bennett QC, has been Solicitor-General of the Commonwealth General since August 1998. He is a member of the NSW Bar and specialises in appellate advocacy. He practises in the areas of constitutional law, administrative law, revenue law, trade practices and competition law, among others. Mr Bennett served as both President of the NSW Bar Association and as President of the Australian Bar Association from 1995-97. He is a Council Member of the International Commission of Jurists, Australian Section.

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IS NATURAL JUSTICE BECOMING MORE RIGID THAN TRADITIONAL JUSTICE?[1]

David Bennett AO QC

Introduction

Practitioners and developers of the common law have learned of the need for a measure of flexibility. The most obvious example is the development of equity by the Lord Chancellor over many centuries. Equity grew primarily because the common law was seen as too rigid and it was necessary to develop a means of softening that rigidity.

Australia has always been in the forefront of the development of flexible doctrine. Every State has a provision in its criminal legislation enabling a court to find an offence proved but, without proceeding to conviction, to discharge the offender without penalty. This is necessary in a society where many criminal offences are defined sufficiently broadly to operate in situations where there is no, or virtually no, criminality. Another example is that the rules of every court in Australia, so far as I am aware, contain a provision authorising the court to dispense with any of the rules where it is expedient to do so. Many cynics, including myself, would regard this as the most important provision to be found in rules of court.

Until recently, the law took the same approach in relation to natural justice.

The hearing rule has been recognised as an aspect of natural justice for centuries. In *Commissioner of Police v Tanos*, Dixon CJ and Webb J pointed out that it was 'a deep-rooted principle of the law that before any one can be punished or prejudiced in his person or property by any judicial or quasi-judicial proceeding he must be afforded an adequate opportunity of being heard'.[2] They pointed out that the older authorities frequently referred] to a statement in Seneca's *Medea*, which translates as follows:[3]

> Whoever has made a decision, the other party being unheard, has not been just, although he has made a just decision.

The rationale for the hearing rule is to accord a measure of procedural fairness in decision-making. Perhaps no passage encapsulates its rationale better than Megarry J's statement in *John v Rees*:[4]

> As everybody who has anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases, which, somehow, were not; of unanswerable charges which, in the event, were completely answered; of inexplicable conduct which was fully explained; of fixed and unalterable determination that, by discussion, suffered a change.

The demands of the hearing rule, however, have never been rigid and unbending. It has long been clear that, depending on the circumstances, it may require different things. In *Haoucher v Minister for Immigration and Ethic Affairs*, for instance, Deane J explained:[5]

> [I]t is important to bear in mind that the recognition of an obligation to observe procedural fairness does not call into play rigid procedural rules which must be observed regardless of circumstances. Where the obligation exists, its precise content varies to reflect the common law's perception of what is necessary for procedural fairness in the circumstances of the particular case. In some cases where the requirements of procedural fairness are applicable, nothing less than a full and unbiased hearing of each affected individual's case will satisfy them. In other circumstances, something less may suffice.

In a similar vein, other judges in Australia have referred to the principles of natural justice as 'flexible'[6] and 'chameleon-like'.[7]

Indeed, even in courts, where the hearing rule is regarded as fundamental, it has always had some exceptions. *Ex parte* injunctions, proceedings in default of appearance by the defendant and consent orders are obvious examples.

It is therefore surprising to find the High Court, in the field of immigration law, demanding – or so it would seem – rigidity in the application of fair decision-making processes to decisions of the Refugee Review Tribunal (the RRT). This is in contrast to the approach of the Federal Court, which more closely reflects the traditional flexibility of the law.

I will discuss three cases concerning the interpretation of s 424A of the *Migration Act 1958* (Cth) (Migration Act), cases which have proven to be a boon for lawyers and perhaps their clients but a headache for everyone else, judges included.

Al Shamry

The first of the cases is the Full Federal Court's decision in *Minister for Immigration and Multicultural Affairs v Al Shamry*.[8]

As I have already said, the case turned on the requirements of s 424A of the Migration Act, which is found in Div 4 of Pt 7 of the Act. That Division is concerned with the conduct of a review by the RRT.

Section 424A at all relevant times has had three basic features. First, the RRT must give to the applicant particulars of any information[9] that the Tribunal considers would be the reason, or a part of the reason, for affirming the decision under review; it must ensure that the applicant understands its relevance; and it must invite the applicant to comment on it (s 424A(1)). Second, it must give the information and invitation by one of the methods specified in s 441A unless the applicant is in immigration detention (s 424A(2)(a)). For present purposes, this means that the information and invitation must be provided to the applicant in writing. Thirdly, these requirements do not apply to information that is simply about the class of persons of which the applicant or another person is a member (s 424A(3)(a)), and they do not apply to information that the applicant gave for the purpose of the application (s 424A(3)(b)). This last exception is critical to later cases.

The facts of *Al Shamry* can be described briefly: Mr Al Shamry arrived at Sydney Airport in June 1999 and was detained and interviewed. A record of the interview was made. Several days later, Mr Al Shamry applied for a protection visa which was refused by a delegate of the Minister. He then applied for review of the decision by the RRT. The Tribunal affirmed the delegate's decision to refuse the visa, relying on inconsistencies between Mr Al Shamry's statements in the airport interview and later statements. These inconsistencies, the Tribunal found, had undermined his credibility.

Mr Al Shamry successfully appealed the RRT's decision to a single judge of the Federal Court. The Minister then appealed to the Full Federal Court. The principal submission of the Minister was that the airport interview fell within the exception in s 424A for information given by the applicant for the purpose of the application.

The Full Court unanimously rejected this submission. Ryan and Conti JJ found that the airport interview did not come within the exception in s 424A(3)(b) claimed by the Minister. They reached this conclusion after referring to textual considerations. The exception, they pointed out, was found in Div 4 of Pt 7 of the Act. Section 423 commenced with the words 'An applicant for review by the Tribunal may give the Registrar'. This suggested that references to 'the applicant' in that Division were shorthand for an 'applicant for review by the Tribunal'. In their Honours' view, that construction was consistent with other provisions in Pt 7 of the Act.[10]

In addition, their Honours indicated that any ambiguity in s 424A(3)(b) should be construed in favour of the applicant, as s 424A was intended to be beneficial, and the purpose of the legislation supported their construction.[11]

Merkel J agreed with the construction given to the exception in s 424A. He indicated that this was the ordinary and natural meaning of the provision in the context in which it was intended to operate. He put it this way:[12]

> The relevant sections are all within Pt 7 of the Act, which deals with the review of protection visa decisions and, in particular, are within Div 4 of that Part, which deals with the conduct of the review. Part 7 is not concerned with, and contains no reference to, the original application for a protection visa made under s 45 of the Act.

Furthermore, his Honour indicated that the purpose of s 424A supported this construction. In his view, it was clear that s 424A enacted the natural justice hearing rule.[13] It was consistent with this beneficial purpose to take a narrow view of the exceptions in s 424A(3). As he explained:[14]

> An applicant may have no record of the information provided but, more importantly, may not be aware of the significance of the information to the review ultimately conducted by the RRT. It is therefore understandable that the legislature would require that, in fairness, any adverse information provided prior to review, the significance of which the applicant may be unaware, be disclosed to the applicant to enable him or her to respond to it.

The decision in *Al Shamry* was undoubtedly a blow to the Department and the Minister. By narrowly construing the exception for information given for the purpose of the application, the Full Federal Court had expanded the ambit of s 424A. However, the decision is reasonable and there is a textual justification for the result. In addition, subsequent decisions of the Federal Court emphasised its limited scope. In *Paul v Minister for Immigration and Multicultural Affairs*[15] and *VAF v Minister for Immigration and Multicultural and Indigenous Affairs*,[16] the Full Federal Court made it clear that s 424A would only be engaged if the role that the information had played in the decision was such that, in fairness, the information ought to be regarded as a part of the reasons for the decision. In *VCAT of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs*, moreover, the Full Federal Court suggested if there were no breach of the rules of natural justice, then the fact that the Tribunal had not complied with s 424A might be irrelevant, for relief might not be granted.[17] As interpreted and applied by the Federal Court, *Al Shamry* was thus far from rigid and mechanical.

SAAP

All this changed the day that the High Court handed down its decision in *SAAP v Minister for Immigration and Multicultural and Indigenous Affairs*.[18] The case also concerned s 424A of the Migration Act. The appellant, SAAP, applied for a protection visa but it was refused by the Minister's delegate. She subsequently applied to the RRT for review of that decision. She was in immigration detention in Woomera when the Tribunal member conducted a review of her application by video link. During the hearing, the Tribunal member took

evidence from the appellant's eldest daughter, who was in Sydney. The appellant was asked to leave while that evidence was given, but the appellant's migration adviser remained in the hearing room. The Tribunal member then put three aspects of the daughter's evidence to the appellant, but did not explain their relevance to the review. He later relied upon the evidence of the daughter to affirm the decision of the delegate.

The first question for the High Court was whether s 424A applied to the situation. In order to understand the argument about this, it is necessary to describe briefly some of the other provisions in Division 4 of Part 7 of the Migration Act.

Section 423 provides that the applicant and the Secretary of the Immigration Department may give, among other things, written arguments relating to the decision under review.

Section 424 provides for the RRT to seek additional information. It is immediately followed by s 424A.

Section 424B specifies what an invitation to give additional information or to comment on information must specify and provides time limits on the giving of the information.

Section 424C provides, in essence, that, if a person is invited but does not give the information within time, the RRT may make a decision on review without taking any further action to obtain the additional information or the person's views on the information.

Section 425 provides that the RRT must invite the applicant to appear to give evidence and present arguments, subject to three exceptions. One of these is that the applicant has been invited to provide additional information or to comment on information but has not done so within time (s 424C).

The remaining provisions dealt with matters concerning the hearing itself, and I need not deal with them here.

The Minister contended that s 424A did not apply to the information relied upon by the tribunal. She claimed that s 424A needed to be read in light of other provisions in the Act that made it clear that it had no application to a hearing. Put differently, she contended that the provisions in Division 4 of Part 7 of the Migration Act operated sequentially, and that the obligation imposed by s 424A was exhausted before the hearing took place in accordance with s 425.

There were thus three issues before the High Court. First, did s 424A and its incorporated requirement of writing apply to material which emerged at the hearing? Secondly, was the requirement of writing jurisdictional so that a failure to comply inevitably led to jurisdictional error remediable by prerogative writ? Thirdly, if so, did the court have a discretion to refuse prerogative relief if natural justice was in fact given (for example, orally)? One would be forgiven for thinking that the answers to these three questions were obviously no, no and yes respectively. Unfortunately, by a majority of three to two (McHugh, Kirby and Hayne JJ; Gleeson CJ and Gummow J dissenting), the High Court answered each of the questions in the other way.

McHugh J was heavily influenced by the consequence of the Minister's submissions. He suggested if the Minister were right, there would be no means for the tribunal to seek additional information or to seek comments from a person if information emerged just before or during a hearing. He described the situation thus:[19]

> If the Minister's construction of the Division were accepted…the Tribunal's powers to review decisions of the Minister's delegate would be substantially circumscribed. For example, if, either shortly before or

> at a hearing under s 425, the Tribunal learned of or realised the potential implications of certain information caught by s 424A, the Tribunal would be required "to cancel or adjourn the hearing without then exploring the significance of the information".

At least three other factors further influenced his Honour's conclusions. First, it was inconsistent with inquisitorial review for the Tribunal to be obliged to obtain all relevant information before invoking the hearing procedure under section s 425.[20] Secondly, information obtained before the hearing might become a reason for affirming the delegate's decision only after an applicant had responded to questions at a hearing; but it would be contrary to natural justice if the Tribunal were not obliged to invite the applicant to comment because it had already invited him or her to appear.[21] Finally, although it might appear unnecessary to require the Tribunal to provide particulars of adverse information in writing when the applicant was at the hearing, the applicant might not be able to understand the significance of that information. It was therefore in the applicant's interest to have the information in writing.[22] For these reasons, s 424A applied to information that emerged during a hearing.

Having rejected the Minister's contention, McHugh J then proceeded to examine whether a breach of s 424A led to jurisdictional error. He decided that it did. Because the Act compelled the tribunal to take certain steps in order to afford natural justice to the applicant, it would be anomalous to find that its decision was valid even if it had failed to comply with that obligation.[23] He rejected the approach of the Full Federal Court in *NAHV*, which had suggested that there would be no jurisdictional error in circumstances where nature justice had been afforded, even if s 424A had been breached. As he explained:[24]

> If the requirement to give written particulars is mandatory, then failure to comply means that the Tribunal has not discharged its statutory function. There can be no "partial compliance" with a statutory obligation to accord procedural fairness. Either there has been compliance or there has not.

McHugh J added that the privative clause in s 474 of the Act did not protect against breaches of s 424A, since it was settled that the privative clause did not protect against a failure to comply with the requirements of natural justice.[25]

The reasoning of Hayne J was similar. He too was concerned about the consequences of a sequential interpretation of the Division. He articulated that concern in these terms:[26]

> On the sequential understanding of the provisions, the step of seeking additional information must precede the invitation to appear, or at least precede the appearance. That is, if Div 4 is understood as providing for a sequence of procedural steps, the Tribunal's power to get any information that it considers relevant would no longer be available once it had issued an invitation to the applicant to appear before it, or had had the applicant appear to give and present arguments. No matter what information touching the decision under review emerged at or after the taking of steps under s 425, the Tribunal could not pursue it.

In addition, Hayne J regarded it as mistaken to view the hearing as the culmination of the review process. The provisions of Division 4 suggested that review was primarily a documentary process and the Act was silent about when the Tribunal could take evidence from a person named by the applicant.[27] Furthermore, review was an exercise of executive, not judicial, power by inquisitorial methods, and the provisions of the Act were not made to regulate an adversarial contest that culminated in the trial of issues joined between parties.[28] All this suggested that s 424A could apply to a hearing conducted under s 425 of the Act.

For Hayne J, as for McHugh J, a failure to comply with s 424A was a jurisdictional error. The essence of his reasons was expressed in these terms:[29]

> Where the Act prescribes steps that the Tribunal *must* take in conducting its review and those steps are directed to informing the applicant for review (among other things) of the relevance to the review of the information that is conveyed, both the language of the Act and its scope and objects point

> inexorably to the conclusion that want of compliance with s 424A renders the decision invalid. Whether those steps would be judged to be necessary or even desirable in the circumstances of a particular case, to give procedural fairness to that applicant, is not to the point. The Act prescribes what is to be done in every case.

Justice Kirby agreed with the reasons of Hayne J as they related to the language and structure of the Act but added some reasons of his own for rejecting the Minister's contention.[30] He questioned the soundness of finding that the review provisions operated sequentially, indicating that the chronological sequence might be no more than a convenient drafting device.[31] He said that there was no express limitation on s 424A's operation to the steps before a hearing was conducted, and it would have been easy for Parliament to say so.[32] He pointed to the purpose of s 424A – to provide 'scrupulous fairness for the often vulnerable persons invoking the Tribunal's jurisdiction'[33] – to support his view, asking what would be the purpose of the Parliament in denying the application of that provision to a hearing conducted under s 425.[34] He also pointed to the emphatic terms of s 424A[35] and claimed that his favoured interpretation would uphold the Refugee Convention.[36]

His Honour agreed with Hayne J on the issue of jurisdictional error.[37]

The majority decision in *SAAP* is remarkable. It dispensed with the idea that natural justice operated flexibly; instead, it read s 424A as demanding rigid adherence by the Tribunal, with failure to adhere amounting to jurisdictional error. In so deciding, their Honours rejected the approach that the Federal Court had developed in *Paul*, *VAF* and *VCAT of 2002*, an approach that was based on flexibility and on avoiding practical injustice.

SZEEU

This much was apparent from the series of appeals to the Full Federal Court reported as *SZEEU v Minister for Immigration and Multicultural Affairs*.[38] In that case, the Minister attempted the Herculean task of persuading the Full Federal Court that *Al Shamry* was 'plainly wrong' and should be overruled. She argued that the word 'application' in s 424A(3)(b) included all the information that had been provided by an applicant for a protection visa, not simply the information provided by the applicant for review. A review before the RRT was a hearing de novo, with the Tribunal standing in the shoes of the decision-maker. Section 424A was also couched in terms very similar to those of s 57 of the Act, which obliged the Minister to give relevant particulars of relevant information to an applicant and to afford an opportunity to comment. These facts, she said, supported the view that the application process should be treated as one continuous exercise rather than as two discrete and unconnected steps.

The Full Federal Court refused to depart from *Al Shamry*. While some members of the Court indicated that they had sympathy for the Minister's argument,[39] none of them regarded the decision in the earlier case as plainly wrong. They therefore confirmed that the exclusion of information that the applicant gave for the purpose of the application in s 424A(3)(b) did not include information that the applicant gave to the Department for the initial protection visa application. By a majority of two to one (Weinberg and Allsop, Moore J dissenting), they also overruled *Paul* and *VAF*, decisions of the Federal Court limiting the obligation in s 424A to information that, in fairness, should be regarded as a part of the reasons for the decision.[40] From now on, even a minor issue that had been fully discussed at the RRT hearing could require written notice to the applicant. As Weinberg J put it:[41]

> Were it not for *SAAP*, it would matter little whether any notice, in compliance with a duty to act fairly, was given orally or in writing. Indeed, in some cases it might not matter whether such notice was given at all. The Tribunal's duty would be simply to ensure that it acted fairly. If it failed to give the applicant the requisite notice, but it could be convincingly shown that this had made not the slightest difference, the decision would be allowed to stand…

> However, since *SAAP*, fairness is no longer the touchstone. Indeed, it may be regarded as being only marginally relevant. The requirements of the section have been construed as being imperative, and accordingly, must be met, whatever the circumstances may be. The only limiting requirement is that the information in question be "a part of the reason" for affirming the decision. The causal connection must be real, but need not be great. It is not necessary to show that "but for" the information in question the result would have been different. It is sufficient simply to show that the "information" contributed in some way, which renders it an operative causal link, to the decision itself.

Critique

It will probably come as no surprise, given the title of my paper, that I regard the decision in *SAAP* as being erroneous. The reasoning of the majority has a number of serious problems.

The first is their unfounded assertion that the Minister's construction would severely curtail the powers of the Tribunal. Hayne J reasoned that, on the sequential understanding of the provisions, the tribunal's power to get any information that it considered relevant would not be available after it had issued an invitation to the applicant to appear before it, or the applicant had in fact appeared to give and present arguments. With respect, there is no textual justification for this view. Subsection 415(1) of the Act provides:

> The Tribunal may, for the purposes of an RRT-reviewable decision, exercise all the powers and discretions that are conferred by this Act on the person who made the decision.

As Gummow J pointed out, under s 56 of the Act, the Minister may 'get any information that he or she considers relevant', and this power is also shared by the Minister's delegate.[42] If, as the Minister contended, s 424A did not apply because it was exhausted before the hearing, then why could the RRT not rely on s 415(1) and s 56 of the Act to get further information? Hayne J did not address the issue, let alone explain why the power would be unavailable.

The second, and more significant, problem is the majority's assumption that s 424A at the time embodied the requirements of the hearing rule in its entirety.[43] McHugh J said that it would be contrary to natural justice if the Tribunal were not obliged to invite the applicant to comment because it had already invited him or her to appear. This only makes sense if one assumes that without s 424A the Tribunal would not be obliged to afford natural justice. With respect, however, the assumption has no basis. In *Miah*, a majority of the Court, including McHugh J, found that a self-described 'code of procedure' for decision-making did not exclude the requirements of natural justice; in other words, the hearing rule continued to apply. If that is so, why assume that a Division dealing with review, but which did not purport to be a code, exhaustively provided for natural justice? The point was well made by Gummow J in response to the suggestion that, on the Minister's construction, the Tribunal could not seek comments from the applicant but would have to adjourn or cancel the hearing. His Honour said:

> Such a result [that is, that the Tribunal must adjourn or cancel the hearing] assumes there are no other powers to present adverse information to the applicant and, crucially, ignores the obligations to accord procedural fairness that are enlivened upon the giving of the invitation to appear before the RRT. Likewise, it would be wrong to assume that the RRT would not be required to provide to the applicant any adverse information which emerged when a third person gave evidence to the RRT at a hearing.

The majority does not appear to have grappled with this issue.

The third problem lies in the incongruous results of the majority's view. It has long been accepted that consequences are relevant to the interpretation of statutes. As Cardozo J once put it: 'Consequences may not alter statutes, but may help to fix their meaning.'[44] The majority's view entails some very strange consequences. As Gleeson CJ observed, it would mean that if adverse information were to arise at a hearing, the Tribunal would have to

adjourn the proceedings, issue particulars of the information to the applicant in writing, and await a response within a certain timeframe. This would be so even if the applicant were present at the hearing, were represented by a lawyer, completely understood the substance of the matters put to him or her, and could answer then and there. The potential to disrupt the hearing and to prolong the review process is self-evident. This is particularly serious in an area where one side frequently perceives that it has a vested interest in delay. In the context of an obligation to provide natural justice, and the Act's statement that the Tribunal is to pursue the objective of providing a review mechanism that is 'fair, just, economical, informal and quick',[45] it is hard to believe that such an interpretation of s 424A was ever intended by Parliament.

McHugh J's response to the argument that particulars in writing might be unnecessary strikes me, with respect, as inadequate. His Honour suggested that it is in the interests of fairness that the applicant should have the information in writing and be given the opportunity to comment, because an applicant might not understand the significance of the information if present at a hearing. However, as Gleeson CJ pointed out, in some circumstances natural justice may require the tribunal to adjourn, to provide an explanation (perhaps even a written explanation) to the applicant, and to give the applicant an opportunity to seek evidence or advice.[46] Furthermore, the applicant might not be able to understand the particulars in English and might have to rely on an oral translation of them, thus limiting the benefit of receiving material in writing. The possibility that in some cases writing might help applicants therefore does not justify imposing a straitjacket on the tribunal's conduct of reviews.

The fourth problem, which is confined to Kirby J's reasons, is that it is difficult to see how the use of emphatic language in s 424A or the purpose of upholding the Refugee Convention had any bearing on the question before the court. The use of the term 'must' instead of 'may' does not logically have anything to do with the question of whether s 424A operates at a hearing or whether the more flexible requirements of natural justice instead apply. Nor does the Refugee Convention dictate which interpretation is preferable.

This leads me to the second problem, the issue of jurisdictional error. Even if s 424A were to apply to hearings conducted under s 425, it does not follow that a breach of it would necessarily amount to jurisdictional error. The reason that McHugh J gave for treating a breach of s 424A as a jurisdictional error was that the Act compelled the Tribunal to take certain steps to accord natural justice to the applicant, so it would be anomalous to find that the tribunal's decision was valid if those steps were not followed. Hayne J's views were similar. However, the object of s 424A is to impose obligations additional to the requirements of natural justice. Given this object, there is no good reason for concluding that, if natural justice is in fact afforded, and the applicant has not been deprived of any opportunity to comment on adverse information, *any* breach of s 424A should be treated as a jurisdictional error. The argument appears to depend upon the following syllogism:

- Any denial of natural justice is jurisdictional error (major premise).
- The requirement of writing incorporated by s424A is a rule of natural justice (minor premise).
- Therefore it is jurisdictional (conclusion).

The problem is that both the major and the minor premise are erroneous. First, the flexibility of natural justice means that not every breach, however trivial or insignificant, is jurisdictional. Secondly, the requirement of writing is not part of the rules of natural justice but additional to them. This leaves little of the syllogism.

Conclusion

It is no exaggeration to say that immigration law has driven the development of much of Australian administrative law. The modern law relating to jurisdictional error, the constitutional writs of mandamus and prohibition, and private clauses – all have sprung from cases involving the Migration Act. Until now, however, it could not be said that these developments had included calcifying the requirements of natural justice. Indeed, in several cases, the High Court emphasized the flexibility of natural justice and the fact it was not confined to the terms of the statute.

The judgment in *SAAP*, in many ways, marks a bizarre turnaround. Suddenly, fairness and flexibility, the key concerns of natural justice, have been left to one side. The procedure in s 424A has been elevated to an end in itself. Not surprisingly, the consequences for review have been unsatisfactory. In combination with *Al Shamry*, *SAAP* has led to over 500 consent determinations setting aside decisions of the RRT and the reduction of natural justice to a rule of procedure permitting absolutely no exceptions. How all this can be said to have been for the public good is unclear.

It may be possible to dismiss *SAAP* as a one-off, a case which turned on the construction of less than pellucid provisions of the Migration Act, and which may soon be remedied legislatively. One can only hope that is the case. If it heralds a new approach to the construction of statutory provisions and natural justice, however, then it bodes ill for those who think that fairness does not require the imposition of rigid or unalterable procedures that take no account of practicalities.

Endnotes

1 I am indebted to my counsel assisting, Gim del Villar, for his assistance with this paper.
2 (1958) 98 CLR 383 at 395.
3 *Medea*, lines 199-200. The lines are uttered by Medea in conversation with Creon.
4 [1970] Ch 345 at 402.
5 (1990) 169 CLR 648 at 652. See also *Re Refugee Tribunal; ex parte Aala* (2000) 204 CLR 82 at 109 [60] (Gaudron and Gummow JJ).
6 *Kioa v West* (1985) 159 CLR 550 at 563 (Gibbs CJ).
7 *Kioa v West* (1985) 159 CLR 550 at 612 (Brennan J). The sentiment is referred to with approval in *Re Minister for Immigration and Multicultural Affairs; ex parte Miah* (2001) 206 CLR 57 (Miah) at 94 [129] (McHugh J), 115 [190] (Kirby J). Other examples of judicial support for the varying content of natural justice can be found in *Russell v Duke of Norfolk* [1949] 1 All ER 109 at 118 (Tucker LJ); *Mobil Oil Australia Pty Ltd v Federal Commissioner of Taxation* (1963) 113 CLR 475 at 504 (Kitto J); *R v Commonwealth Conciliation and Arbitration Commission; ex parte Angliss Group* (1969) 122 CLR 546 at 552-553; *Wiseman v Borneman* [1971] AC 297 at 308 (Lord Reid), 309 (Lord Morris), 311 (Lord Guest), 314-315 (Lord Donovan); and *National Companies and Securities Commission v Nationwide News* (1984) 156 CLR 296 at 311 (Gibbs CJ).
8 (2001) 110 FCR 27.
9 'Information' in this context means knowledge of relevant facts or circumstances communicated to or received by the RRT: see *SZEEU v Minister for Immigration and Multicultural and Indigenous Affairs* [2006] FCAFC 2 at [18] (Moore J) (referring to propositions from the authorities).
10 (2001) 110 FCR 27 at 34 [18].
11 ibid at 34 [20].
12 ibid at 39 [36].
13 ibid at 40 [39].
14 Ibid at 40 [40].
15 (2001) 113 FCR 396.
16 (2004) 206 ALR 471.
17 (2003) FCAFC 141 at [45]-[46]. See also *Lu v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 141 FCR 346 at 355-356 [45]-[46] (Sackville J) (indicating that 'trivial' procedural unfairness might be regarded as being consistent with the practical content of natural justice and even a breach of natural justice might not entitle a person to relief if did not deprive the person of the possibility of a successful outcome).
18 (2005) 215 ALR 162.

19 Ibid at 176 [54].
20 ibid at 176 [55].
21 ibid at 177 [56].
22 ibid at 178 [63].
23 ibid at 183 [77].
24 ibid at 183 [77].
25 ibid at 183 [79].
26 ibid at 206-207 [190].
27 ibid at 207 [192]-[196].
28 ibid at 208 [197].
29 ibid at 211 [208] (original emphasis).
30 ibid at 199 [154].
31 ibid at 199-200 [155]-[158].
32 ibid at 200-201 [159]-160].
33 ibid at 201 [161].
34 ibid at 201 [162].
35 ibid at 202 [166].
36 ibid at 202 [168]-169].
37 ibid at 203 [173].
38 [2006] FCAFC 2.
39 [2006] FCA 2 at [153] (Weinberg J), [197] (Allsop J).
40 ibid at [155] (Weinberg J), [215] (Allsop J).
41 ibid at [181]-[182].
42 (2005) 215 ALR 162 at 193 [126].
43 There is no dispute that the provisions of Div 4 of Part 7 are now exhaustive: s 422B of the Migration Act. However, that provision was not before the High Court in *SAAP*.
44 *In re Rouss* (1917) 116 NE 782 at 785.
45 Migration Act s 420(1).
46 (2005) 215 ALR 162 at 167 [17].

CONSTITUTIONAL WRITS

Walter Sofronoff QC*

In a paper delivered at the University of Melbourne in 1935 Dixon J said:

> The fundamental conceptions, which a legal system embodies or expresses, are seldom grasped or understood in their entirety at the time when their actual influence is greatest. They are abstract ideas usually arrived at by generalisation and developed by analysis. But it is a mistake to regard such ideas as no more than philosophic theories supplied *ex post facto* to explain a legal structure which has already been brought into existence by causes of some other and more practical nature ... [W]hen such conceptions have once taken root they seldom disappear. They persist long after the conditions in which they originated have gone.[1]

Administrative law is the interface between the executive and the judiciary. It is the place where the power exercised by the servants of the executive, and by its organs and institutions, collides with the restraints upon that power found in the law as interpreted by the courts.

Until recently the administrative law cases which came to the High Court for decision originated in varied circumstances. Thus, *Annetts v McCann*[2] concerned the right of parents of a deceased to be heard at a coronial inquest. *Attorney General (NSW) v Quin*[3] concerned a decision not to reappoint a stipendiary magistrate. *Ainsworth v Criminal Justice Commission*[4] concerned the right to be heard before an Anti-Corruption Commission published a report which contained adverse comments about the plaintiff. Many decisions were concerned mainly with the nature and scope of review under the *Administrative Decisions (Judicial Review) Act 1977* (*Cwlth*)[5].

However, since 1999 the High Court has decided a succession of cases which have required it to consider the very foundations of administrative law in the federal arena. These cases emerged as a result of various restrictions which the Commonwealth Parliament has sought to place upon aggrieved parties seeking remedies in connection with their claims under the *Migration Act 1958*. The limitations which Parliament has placed upon remedies that could be sought elsewhere have driven litigants to the High Court to seek prohibition or mandamus under s 75(v) of the Constitution.

These migration cases have had a number of important consequences. First, they have provided the occasion for successive reviews of administrative law at the highest level and, moreover, before a Constitutional Court which is keenly sensitive to protect against any illegitimate incursions into Chapter III of the Constitution and in elucidating the nature of the judicial power of the Commonwealth. Second, in requiring a re-examination of administrative law principles in the context of the Constitution itself, the migration cases have resulted in the Court emphasising limitations placed by the Constitution upon executive action and upon the legislative power of the Parliament to enact laws authorising such action. Third, they have completed a process which arguably began with the ***Engineers' Case***[6] by which Australian constitutional concepts have been underpinned by Australian foundations – sourced in the language of the Constitution itself rather than in English constitutional theory.

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Section 75(v) of the Constitution states:

> In all matters:
>
> (v) in which a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth;
>
> the High Court shall have original jurisdiction.

Section 75(v) was almost eliminated from the Constitution. It had originally been included as part of Clause 61 of the first official draft of the Constitution Bill drafted by Griffith, Inglis Clark and Kingston[7] and it was also included in Clause 6 of the report of the judiciary committee (of which Inglis Clark was chairman[8]) which reported to the convention in Sydney in 1891. Largely in that form it emerged as the final draft adopted in Sydney in 1891.[9]

It was considered by the convention in Melbourne in January 1898. There was a very brief debate about it on 31 January 1898 in which Barton expressed concern that the inclusion of only mandamus and prohibition of all the prerogative writs might result in the provision being read as containing words of limitation. He moved that the provision be struck out. Isaacs, uncharacteristically, was uncertain of the provenance of the provision and said that it was better to omit the sub-section and so the convention resolved to strike out the clause.[10]

However a few weeks later, on 4 March 1898, Barton moved that the sub-section be re-inserted. He reminded the delegates that in *Marbury v Madison*[11] the United States Supreme Court had concluded that it did not have original jurisdiction under the Constitution to grant mandamus. In that case, four justices of the peace, who had been appointed by the former President who had signed their commissions, sought mandamus in the original jurisdiction of the Supreme Court of the United States to compel the Secretary of State to issue them their commissions. The Court concluded that it was a plain case for mandamus[12] but that the Court possessed no original jurisdiction to grant that remedy.

Barton considered that as a matter of prudence the clause should be inserted in the Constitution to ensure that the High Court did have such a jurisdiction as part of its original jurisdiction. There ensued a debate in which he was opposed in this motion by most speakers including Isaacs. The latter believed that there was no point in inserting a provision which merely appeared to confer power to grant a particular remedy. He thought that the provision which gave the High Court original jurisdiction in all matters in which the Commonwealth is a party, or a person suing or being sued on behalf of the Commonwealth is a party,[13] was sufficient to confer the necessary jurisdiction and that the appropriate remedy would be implicit. But Barton persisted and finally persuaded the convention to agree to the insertion of the provision. He emphasised the limited scope of the proposed clause. He said:

> I want honourable members to bear in mind that this is simply a provision conferring jurisdiction. It does not confer ... upon any person any new right. It does not give anybody a right to pursue in any way an officer of the Commonwealth, except such right as arises out of the known principles of law …
>
> … I would, therefore, point out ... that it does not enable the High Court to grant prohibition or a mandamus or an injunction against an officer of the Commonwealth unless the law already enables that to be done.[14]

The 'law' to which he referred must have been the common law.

> Another subject of debate was whether the High Court's original jurisdiction should be entrenched or whether it should be subject to amendment by Parliament.[15] Isaacs was insistent upon the entrenchment of the High Court's original jurisdiction. Perhaps he feared the fate of a federation in which the High Court's jurisdiction might be encroached upon by parochial State interests. In any event, Isaacs insisted that:

The jurisdiction of the High Court is not to be touched except by this Constitution, and except as in s 74, where express power is given to the Parliament to except from the appellate jurisdiction of the High Court.[16]

As a result, the right to seek remedies by way of prerogative writ or injunction against officers of the Commonwealth came to be entrenched.

What was it that was thus entrenched into the Constitution? The prerogative writs had their origins in the function of the earliest courts, including the King's Council and King's Bench, in supervising inferior tribunals and as well as persons or corporations performing public duties.[17]

The essential nature of the prerogative writs was explained by Willes J in *Cox v Mayor London* as follows:[18]

> All lawful jurisdiction is derived from and must be traced to the Royal authority. Any exercise, however fitting it may appear, of jurisdiction not so authorised is an usurpation of the prerogative and a resort to force unwarranted by law. Upon both grounds, viz., the infringement of the prerogative and the unauthorised proceeding against the individual, 'prohibitions by law are to be granted at any time to restrain a court to intermeddle with or execute anything which by law they ought not to hold plea of. And they are much mistaken that maintain the contrary'.

Brett J summarised the nature of the prerogative writs in *Worthington v Jeffries*[19] as follows:

> These authorities shew that the ground of decision, in considering whether prohibition is or is not to be granted, is not whether the individual suitor has or has not suffered damage, but is, whether the royal prerogative has been encroached upon by reason of the prescribed order of [should this be 'or'?] administration of justice having been disobeyed. If this were not so, it seems difficult to understand why a stranger may interfere at all.

Thus, the writs protected against an excess of authority. Most authority was conferred by virtue of the Royal prerogative – the inherent executive power of the Monarch.[20]

Of course, by the time the Constitution was adopted in 1901 one of the sources of Executive power, and consequently a source of the limitations upon executive action, may be a statute. Nevertheless, in Britain it remained correct to base the prerogative writs in the protection of the Royal prerogative at the instance of the King because not only was the supreme authority over the law the King in Parliament[21] but the courts retained their history as the King's Courts.[22] Further, in England, where Parliament is supreme and where it is the function of courts of law to give unquestioned effect to the authentic expression of the legislative will[23] it lies merely for the court to determine the scope and intent of Parliament's expression of the law.

In Australia, however, the establishment of a legislature by an Imperial Act, the adoption of the Constitution, meant that Parliament in this country was not supreme. As Dixon J pointed out:

> We treat our organs of government simply as institutions established by law, and we interpret their powers simply as authorities belonging to them by law.[24]

As has been observed, the leading Australian constitutional lawyers in 1901 were familiar with *Marbury v Madison* in the course of which the Supreme Court had established that a legislative act which was contrary to the Constitution was not law and was void.[25] And the nature of a legislature with limited powers was in any case not new to English lawyers – or to Australian ones, for that matter. Dealing with the powers of the Indian Legislature, the Privy Council had said *R v Burah*[26]:

> The Indian Legislature has powers expressly limited by the act of the Imperial Parliament which created it, and it can, of course, do nothing beyond the limits which circumscribe these powers … The established Courts of Justice, when a question arises whether the prescribed limits have been exceeded, must of necessity determine that question; and the only way in which they can properly do so, is by looking to the terms of the instrument by which affirmatively, the legislative powers were created, and by which, negatively, they are restricted.[27]

The adoption of the Constitution, with its legislature of limited powers, thus began a process of change in legal thinking:

> [U]ntil lawyers became accustomed to the working of a federal system, the conception of parliamentary supremacy over the law dominated their thoughts. The rival conception of the supremacy of the law over the legislature is the foundation of federalism. Under that system, men quickly depart from the tacit assumption to which a unitary system is apt to lead that an act of parliament is from its very nature conclusive. They became accustomed to question the existence of power and to examine the legality of its exercise. Nothing has had so profound an influence upon legal ideas in this country as the establishment of the federal Constitution – the greatest event in our political and legal development.[28]

For present purposes, this was the first new fundamental conception that emerged after 1901: that not only might Executive action fall outside the law declared by Parliament, but that Parliament itself was limited in the scope it could lawfully give to executive action.

However, the notion that legal terms of art used in the Constitution, the very terms which would regulate and limit Parliament's powers and those of the Executive under its laws, might take their meaning primarily from the constitutional text in which they were found rather than from the antecedent common law, naturally took much longer to emerge – almost another hundred years. Our formal education is, to a large extent, an unconscious stricture upon us and the common law as the compass of legal thinking in a lawyer's daily life is a difficult bearing to abandon. Sir Owen Dixon saw the common law as giving meaning to the Constitution. Indeed, in 1957 he even delivered a paper entitled 'The Common Law as an Ultimate Constitutional Foundation', in which he said:

> Federalism means a rigid Constitution and a rigid Constitution means a written instrument. It is easy to treat the written instrument as the paramount consideration, unmindful of the part played by the general law, notwithstanding that it is the source of the legal conceptions that govern us in determining the effect of the written instrument.[29]

In the immediate context of s 75(v), as late as 1979, Barwick CJ would say:

> The use of the word "prohibition" in s 75(v) imports into this Court's jurisdiction the law appertaining to the grant of prohibition by the King's Bench. Some aspects of that law are, in my opinion, presently relevant. The essential nature of the writ of prohibition as described by Brett J in *Worthington v Jeffries* in a passage cited by Griffith CJ in the *Tramways Case* [No 1] is of relevant and fundamental importance.[30] *(Citations omitted)*

However, as cases requiring a consideration of s 75(v) continued to come before the High Court, the constitutional text of which it was a part – rather than the original common law context in which the prerogative writs had been developed – began to assume importance. For example, at common law an inferior tribunal cannot conclusively determine its own jurisdiction and the prerogative writs could be used to correct an erroneous assumption of jurisdiction. This is also true under the Constitution for such a determination, if it were conclusive, would involve an exercise of the judicial power of the Commonwealth and this inferior tribunals cannot do. Yet, the High Court has decided that federal judges are 'officers of the Commonwealth' and it followed that s 75(v) applied to them.[31] But such judges exercise the judicial power of the Commonwealth and, in the course of its exercise, may make a conclusive determination of jurisdiction. How did this conform to the old remedy by

way of prerogative writ directed to 'inferior tribunals'? In 1984, in *R v Ross-Jones; Ex parte Green*[32] Brennan J observed:[33]

> In my opinion, the nature of this Court's jurisdiction to issue prohibition to a superior federal court under s 75(v) and the purpose of the exercise of that jurisdiction distinguish it from the ordinary common law jurisdiction to issue prohibition to an inferior court. The jurisdiction of a superior federal court to determine the constitutional limits of its own substantive jurisdiction and to determine those limits conclusively subject only to the intervention of this Court must be exercised whenever an application is made to that court ... If that view be right, it is not appropriate to invoke the s 75(v) jurisdiction of this Court until an excess of jurisdiction has actually occurred or is likely to be asserted.
>
> No doubt the common law provides the matrix of principle by reference to which the s 75(v) jurisdiction is to be exercised, but the principles affecting the issuing of prohibition to federal superior courts may require some modification of the common law rules.[34]

One other feature of common law prerogative writs is that they can be sought on the application of a stranger because what primarily is in issue is the dignity of the Crown rather than the private rights of litigants; for that reason the Court may act irrespective of the source from which it took notice of the breach of Crown prerogative.[35] In 1986, in *re Grimshaw; Ex parte Australian Telephone and Phonogram Officers' Association*[36] Mason, Brennan and Dawson JJ, referring to the discretion to refuse the grant of relief when it was sought by a stranger, observed that the jurisdiction of the High Court to grant prohibition was not necessarily governed by the same principles as those which govern the common law jurisdiction of a superior court to grant prohibition to an inferior court. The nature of the difference, and the reasons for it, were not explored in that case, but twelve years later, Gaudron, Gummow and Kirby JJ pointed out that in the Constitutional context questions of standing are subsumed within the constitutional requirement of a 'matter', a constitutional term in Chapter III.[37]

Other differences between the jurisdiction of the courts in the United Kingdom and the jurisdiction of the High Court were also revealed because of the entrenchment of s 75(v). Parliament's power to limit the right to seek relief was itself limited:

> Clearly enough, and regardless of whether jurisdiction to entertain such proceedings is also possessed by some other court, the Parliament could not validly deprive such a citizen of the constitutional right to invoke the jurisdiction of this Court under s 75(v) to entertain an action for an injunction against the particular officer. Nor could the Parliament denude that jurisdiction of effective content by precluding the Court from determining whether the impugned conduct is or is not in fact unlawful. Thus, the Parliament could not, consistently with s 75(v), enact that, in a case where the citizen exercises the constitutional right to institute proceedings for injunctive relief to restrain unlawful conduct by an officer of the Commonwealth, there shall be an irrebuttable presumption that the impugned conduct is lawful. Unlike a law prescribing a merely prima facie presumption, such a law could not properly be seen as a rule of procedure or evidence to be observed in the exercise of jurisdiction. It would constitute a pro tanto denial or withdrawal of the constitutional jurisdiction to hear and determine a matter in which an injunction is sought against an officer of the Commonwealth.[38]

Over the last decade, particularly since 1995, there has been a distinct shift in constitutional interpretation in favour of an overriding emphasis upon the feature that words used in the Constitution draw their meaning from their place in that document rather than from the antecedent common law.[39] The shift began subtly. In 1995, in *re McJannet; Ex parte Minister for Employment, Training and Industrial Relations (Q)*[40], Toohey, McHugh and Gummow JJ emphasised that in the context of Chapter III the word 'jurisdiction' was not simply a concept of the general law but was a constitutional term. The word 'matter', their Honours said, was also a constitutional term.[41] As such, those words derive their content not from the general law but from their constitutional context. Then, in 1998, Gaudron, Gummow and Kirby JJ pointed out that care was required in translating to the legal structure and practical circumstances applying in Australia doctrines which in England have been identified as 'constitutional'.[42]

These developments have had a powerful impact upon our understanding of the remedies referred to in s 75(v).

The common law rules relating to mandamus and prohibition were hedged with technicalities. Principal among these is that relief is only available to correct jurisdictional errors as distinct from errors within jurisdiction.[43] In the context of inferior courts, Brennan, Deane, Toohey, Gaudron and McHugh JJ explained the nature of jurisdictional error as follows:

> An inferior court falls into jurisdictional error if it mistakenly asserts or denies the existence of jurisdiction or if it misapprehends or disregards the nature or limits of its functions or powers in a case where it correctly recognises that jurisdiction does exist … ,where it makes an order or decision … which is based upon a mistaken assumption or denial of jurisdiction, or a misconception or disregard of the nature or limits of jurisdiction.
> …
> If, for example, it is an essential condition of the existence of jurisdiction with respect to a particular matter that a certain event or requirement has in fact occurred or been satisfied, as distinct from the inferior court's own conclusion that it has, there will be jurisdictional error if the court or tribunal purports to act in circumstances where that event has not in fact occurred or that requirement has not in fact been satisfied even though the matter is the kind of matter which the court has jurisdiction to entertain. Similarly, jurisdictional error will occur where an inferior court disregards or takes account of some matter in circumstances where the statute or other instrument establishing it and conferring its jurisdiction requires that that particular matter be taken into account or ignored as a pre-condition of the existence of any authority to make an order or decision in the circumstances of the particular case. Again, an inferior court will exceed its authority and fall into jurisdictional error if it misconstrues that statute or other instrument and thereby misconceives the nature of the function which it is performing or the extent of its powers … [44]

There has been some pressure to expand these boundaries. In 1999, in *Abebe v The Commonwealth,*[45] Gaudron J observed that s 75(v) also refers to injunctions and that while 'in general terms' relief by way of mandamus or prohibition was available only to correct jurisdictional errors as distinct from errors within jurisdiction, the jurisdiction to grant an injunction against an officer of the Commonwealth might be wider and might be based on an error even if that error is not jurisdictional.[46]

Two years later, in *Re Minister for Migration and Multicultural Affairs*; *Ex parte Miah*[47] Kirby J referred to Gaudron J's dictum and observed that the foundation for the availability of relief by way of prohibition or mandamus was not finally settled.[48] He observed that if an injunction might be granted even though the error was not a jurisdictional error, there may be no rational foundation for confining relief by way of mandamus or prohibition to cases of jurisdictional error. He said:

> In England, the former distinction between jurisdictional and non-jurisdictional error, once of great significance in cases concerned with the prerogative writs, has now been abandoned. The precise scope of error classified as "jurisdictional" was always uncertain. In contemporary Australian law, the boundary between error regarded as "jurisdictional" and error viewed as "non-jurisdictional" is, to say the least, often extremely difficult to find.[49] (*Citations omitted.*)

Nevertheless, in *Plaintiff S157/2002 v Commonwealth* Kirby J joined in a majority judgment in which the proposition was reaffirmed.[50] Later cases appear to demonstrate that this is one boundary that cannot shift for the reasons identified by McHugh and Gummow JJ in *Re Minister for Immigrations and Multicultural and Indigenous Affairs v Lam*[51], namely that it is no part of the function of a Chapter III court either to legislate or to engage in the executive function of administration.[52] Correcting errors within jurisdiction would involve the Court in an administrative, and not a judicial, function.[53] Further, as Callinan J has pointed out, the omission of certiorari in s 75(v) strongly suggests that the ambit of the remedies – including injunctions - referred to in it is confined to jurisdictional errors.[54]

The inclusion of a remedy by way of injunction nevertheless raises questions about the scope of that particular remedy. In *Bateman's Bay Local Aboriginal Council v The Aboriginal Community Benefit Fund,*[55] Gaudron, Gummow and Kirby JJ referred to the use of equitable remedies to vindicate public rights[56] and said that when an injunction was sought in a constitutional context, because more is in issue than private rights, *locus standi* would be easier to demonstrate. This, of course, echoes the similar doctrine at common law under which a stranger could invoke the Court's jurisdiction to vindicate the prerogative. The flexibility of equitable remedies gives them an undoubted and important role in public law[57] but reference to injunctions in s 75(v) raises other questions. To what extent is the grant of that remedy tied to a demonstrated jurisdictional error? Is the remedy merely ancillary to the grant of mandamus or prohibition, as Callinan J has suggested?[58] On the other hand, does the omission of declaration or certiorari, other ancillary remedies, imply that an injunction is to be regarded as a free standing remedy?[59] These questions remain open.

In *Re Refugee Review Tribunal; Ex parte Aala*[60] Gaudron and Gummow JJ pointed out that it would be wrong to regard the terms 'prohibition' and 'jurisdiction' as simply institutions or concepts of the general law.[61] They said that these were 'constitutional expressions', citing the reasons of Toohey, McHugh and Gummow JJ in *Re McJannet*. The theory which underlay the prerogative writs, that the writs were issued to protect the prerogative of the Crown, is inapposite to remedies referred to in a Constitution in which the Crown is not an element of the judicature established by Chapter III.[62] The Court's jurisdiction did not depend upon a role in vindicating the prerogative of the Monarch. Instead, the right of an affected person to approach a Chapter III court for relief against an invalid purported exercise of Commonwealth legislative power or executive authority arose from statute, namely, covering Clause 5 of the Constitution which, relevantly, states:

> This Act, and all laws made by the Parliament of the Commonwealth under the Constitution, shall be binding on the Courts, Judges and the people of every State and of every part of the Commonwealth, notwithstanding anything in the laws of any State …

In order to distinguish between common law concepts which are inapposite to the Australian constitutional scene, it would be better, their Honours said, to use the expression 'constitutional writ' rather than 'prerogative writ'.[63]

Thereafter, with some exceptions,[64] that is the term that has been employed in the High Court to describe the writs of prohibition and mandamus referred to in s 75(v). This is more than a change of nomenclature. It signals an abandonment of the common law as the ultimate constitutional foundation and, instead, a requirement that the scope of the writs is to be determined ultimately by a consideration of the terms of the Constitution and the necessary implications to be drawn from it – that is to say, that the Constitution itself is the ultimate foundation of Australian law.

The reasons of Kirby J were to the same effect. He said:

> In my respectful view, it is also an error to describe the writs appearing in s 75(v) of the Constitution as "prerogative". It is an error that has persisted for a century, which is quite enough time for lawyers to correct it. There is nothing "prerogative" about the constitutional writs created by, and deriving their force from, the terms of s 75(v) of the Constitution. Conceiving of the constitutional writs as "prerogative writs" is liable to leave those who make that error to the mistake of burdening an important Australian constitutional remedy, needlessly, with all the limitations, restrictions and procedural convolutions found in the history of English prerogative writs.[65] (*Citations omitted.*)

Hayne J pointed out that the grounds for issue of mandamus or prohibition are not frozen according to the practices prevailing at 1900.[66] He said:

> Once it is accepted that the Constitution did not intend to freeze at 1900 the development of the common law regulating the issue of any of the prerogative writs, the question whether a departure

> from the requirements of procedural fairness will ground the issue of prohibition depends upon the closeness of the analogy between that departure and other errors that will ground the writ.[67]

All members of the Court (except McHugh J) concluded that a denial of procedural fairness by an officer of the Commonwealth might result in a decision made in excess of jurisdiction.

Barton had thought that no remedy could be granted under s 75(v) unless 'the law' already enabled that to be done. He was referring, of course, to the common law. But if the common law is not the ultimate foundation of the Constitution, then where in the Constitution does one find, for example, a right to have a decision made fairly?

The original source of the rules of natural justice is undiscoverable but the Book of Genesis is, at least, a starting point. In 1722 in *R v The Chancellor, Masters and Scholars of the University of Cambridge*[68] the Court of King's Bench had to consider whether to grant mandamus to require a university to restore to an academic the degrees of which he had been deprived in the university's disciplinary jurisdiction. The university had failed to give notice to the academic of its intention to proceed against him. Fortescue J said:[69]

> ... the objection for want of notice can never be got over. The laws of God and man both give the party an opportunity to make his defence, if he has any. I remember to have had heard it observed by a very learned man upon such an occasion, that even God himself did not pass sentence upon Adam, before he was called upon to make his defence. Adam (says God) "Where art thou? Hast thou not eaten of the tree, whereof I commanded thee that thou shouldst not eat?" And the same question was put to Eve also.[70]

It is therefore not surprising that Kirby J said in *Re Minister; Ex parte Epeabaka*[71] that the obligations to comply with the rules of natural justice run deep in the pre-suppositions of the Australian Constitution and of the entire legal system of the Commonwealth.[72] It is settled that in certain respects the rules of natural justice are indeed entrenched. They are an inherent part of the arbitration power referred to in s 51(xxxv) of the Constitution. A law which enabled a body of persons to settle a dispute without any hearing or determination between the disputants would not be a law with respect to conciliation and arbitration for the prevention and settlement of industrial disputes and would not be authorised by s 51(xxxv) of the Constitution.[73]

It has also been observed that the duty to act fairly and impartially is an inherent part of the obligation to act judicially. It follows that there is implicit in the judicial power of the Commonwealth a requirement that the Courts which exercise that power exhibit the essential attributes of a court and, therefore, apply the rules of natural justice.[74] The implications from Chapter III have the result that State Courts must also, as actual or potential repositories of the judicial power of the Commonwealth, conduct themselves in accordance with the judicial requirements of independence and impartiality.[75]

Since the decision of the House of Lords in *Ridge v Baldwin*[76] and its acceptance in Australia[77] it has been accepted that the duty to observe natural justice is implicit in the exercise of power which affects rights. As Lord Denning has said, the duty to act fairly:

> … is the simple precept which now governs the administrative procedure of all public bodies.[78]

In Australia it has long been settled that it would require very clear legislative provisions to relieve an adjudicative statutory body from the obligation to comply with the rules of nature justice.[79]

This raises the question whether Parliament can validly confer a power to affect rights upon a Commonwealth officer and at the same time, by express enactment, relieve that officer from any obligation to act either reasonably or fairly.

In *Re Refugee Tribunal; Ex parte Aala*, Gaudron and Gummow JJ said:

> It follows that, if an officer of the Commonwealth exercising power conferred by statute does not accord procedural fairness and if that statute has not, on its proper construction, relevantly (*and validly*) limited or extinguished any obligation to accord procedural fairness, the officer exceeds jurisdiction in a sense necessary to attract prohibition under s 75(v) of the Constitution.[80] (C*itations omitted, emphasis added*.)

That dictum was referred to with approval by Kirby J in *Re Minister; Ex parte Epeabaka*:

> The requirements of natural justice cannot contradict those provisions, *so long as they are valid*.[81] (*Emphasis added*.)

The arbitration power and judicial power apart, when might Parliament lack power to limit or to extinguish an obligation to accord procedural fairness?

There has been a difference in views as to whether the requirement to accord natural justice is to be seen as a common law duty or an implication from a statute. In *Kioa v West*[82] Mason J expressed the view that the rules were part of the common law.[83] Brennan J preferred the view that the requirements were implied by the statute.[84] The principles of statutory interpretation are, of course, judge-made and so are the rules of natural justice and so the distinction tends to disappear when it is remembered that in *Annetts v McCann*[85] Brennan J said:[86]

> [T]he common law will usually imply a condition that a power be exercised with procedural fairness to parties whose interests might be adversely affected by the exercise of power. This is the foundation and scope of the principles of natural justice.

Whether the common law is said to import the rules of natural justice or whether they are said to derive from an implication in the statute the result is, in either case, the same.

The requirement to act reasonably is a corollary. As Brennan J said in *Kruger v The Commonwealth*[87]:

> Moreover, when a discretionary power is statutorily conferred on a repository, the power must be exercised reasonably, for the legislature is taken to intend that the discretion be so exercised. (C*itation omitted.*)[88]

The requirement to act reasonably has been equated to the obligation to act judicially in cases where that obligation exists.[89] A duty to act judicially, that is to say a duty to act in accordance with the requirements of natural justice, excludes the right to decide arbitrarily, irrationally or unreasonably.[90] If a statute requires a Commonwealth officer to act judicially then it appears to follow that that requirement will import not only the two principal rules of natural justice, the obligation to give an opportunity to be heard and to be impartial, but also the obligation to act reasonably in the *Wednesbury*[91] sense.

One could suppose a law under which an officer of the Commonwealth was obliged to make a decision affecting rights but which expressly freed the officer from any obligation to hear any party, to take any particular matters into account, or to refrain from taking any matters into account. Acting irrationally and arbitrarily, such an officer would be free to assume jurisdiction even where a necessary fact grounding jurisdiction did not exist or upon a mistaken conclusion of law.

Such an example is not as far-fetched as it sounds. In *Plaintiff S157 of 2002 v The Commonwealth*[92] the Commonwealth actually did submit that it 'would be open to Parliament to say all immigration shall depend solely on the Minister's discretion or that of his delegate' and that 'there is no reason why Parliament cannot delegate to the Executive branch the

power to exercise a totally open-ended discretion as to what aliens can and what aliens cannot come to and stay in Australia.'[93]

Constitutional obstacles to such a law abound. Any valid law must be supported by a head of power and any exercise of power under such a law must also be supported in the same way. A law that purported to permit an officer of the Commonwealth to make a general decision based upon no legislatively supplied criteria would fail because it could not claim to be supported by a head of power. The legislation struck down in the *Australian Communist Party Case*[94] was invalidated for that reason. A law that depended for its supposed connection with a particular head of power upon the conclusion of an officer of the Commonwealth about matters concerning which the law itself did not provide any objective criteria would lack any connection with the head of power.[95]

Moreover, it would arguably not even answer the description of a law:[96]

> The true distinction, therefore, is, between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring an authority or discretion as to its execution, to be exercised under and in pursuance of the law.[97]

Alternatively, in the absence of a defined connection in the legislation itself, it would fall to the Court, in attempting to confine the exercise of power within the Constitution, to make the necessary connection. That would involve the Court impermissibly in legislating.

A law of that kind may also require an officer of the Commonwealth to decide questions of law: in the context of migration, for example, whether on a particular construction of the Refugees Convention a person was or was not a refugee. Any error of law would be unexaminable and would result in the officer possessing the right to make conclusive determinations of law affecting jurisdiction. This would involve an impermissible exercise of the judicial power of the Commonwealth.

In any event, under a Constitution in which the rule of law is the basal assumption and in which it is 'emphatically the province of the judicial department to say what the law is',[98] a law which prevented a judicial determination concerning whether a decision made under it fell within a constitutional head of power would subvert the entrenched jurisdiction under s 75(v) to grant relief against excesses of power.

Further, in a case where a statute circumscribes the scope of power, a decision that is unreasonable in the *Wednesbury* sense might fail to answer the description of a decision under the enactment; it may also be a decision that is irrelevant to the asserted head of legislative power and be unsupportable on that ground also.[99] In *R v Hickman; Ex parte Fox and Clinton*[100] Dixon J said:

> It is equally impossible for the legislature to impose limits upon the quasi-judicial authority of a body which it sets up with the intention that any excess of that authority means invalidity, and yet, at the same time, to deprive this Court of authority to restrain the invalid action of the court or body by prohibition.

A provision of an Act that attempted to validate unreasonable decisions might be one which purported to validate decisions which in truth were not made for the authorised purpose. Such a decision would involve an abuse of power.[101]

In *Minister for Immigration v Eshetu*[102] the Court assumed, without expressly deciding, that unreasonableness could be a basis for relief under s 75(v).[103] That case, however, suggested that there might be a narrowing of the scope of application for the principle of *Wednesbury* unreasonableness. Gummow J said:

> It may be that there should be accepted some stricter view as to what must be shown in such a case by an applicant seeking relief under s 75(v) of the Constitution.[104]

Of course, it is one thing to assert a requirement to act reasonably; it is another to demonstrate that a decision is unreasonable, particularly where the decision is based not upon the actual existence of a fact or state of affairs but the satisfaction of the decision maker that that fact or state of affairs exists.[105]

Conclusion

The almost accidental inclusion in the Constitution of s 75(v) and the deliberate entrenchment of the original jurisdiction of the High Court has had far reaching effects. As Callinan J has pointed out, the founders could not have foreseen the increasing role and importance of administrative law, and the extension of the reach of the prerogative remedies.[106] Further, they could not have foreseen the modern approach to constitutional interpretation expressed, for example, by Gleeson CJ, Gummow, Hayne and Heydon JJ in *Attorney-General (WA) v Marquet:*[107]

> Now, however, it is essential to begin by recognising that constitutional arrangements in this country have changed in fundamental respects from those that applied in 1889. .... First, constitutional norms, whatever may be their historical origins, are now to be traced to Australian sources. ... Those constitutional norms accord an essential place to the obligation of the judicial branch to assess the validity of legislative and executive acts against relevant constitutional requirements.

As Gaudron, McHugh, Gummow, Kirby and Hayne JJ emphasised in *Plaintiff S157/2002 v The Commonwealth*, these issues are not merely issues of a technical kind:

> [Section 75] and specifically s 75(v), introduces into the Constitution of the Commonwealth an entrenched minimum provision of judicial review ... The provision of the constitutional writs and the conferral upon this Court of an irremovable jurisdiction to issue them to an officer of the Commonwealth constitutes a textual reinforcement for what Dixon said about the significance of the rule of law for the Constitution in *Australian Communist Party v The Commonwealth.* In that case, his Honour stated that the Constitution:

is an instrument framed in accordance with many traditional conceptions, to some of which it gives effect, as, for example, in separating the judicial power from other functions of government, others of which are simply assumed. Among these I think that it may fairly be said that the rule of law forms an assumption.

> The reservation to this Court by the Constitution of the jurisdiction in all matters in which the named constitutional writs or an injunction are sought against an officer of the Commonwealth is a means of assuring to all people affected that officers of the Commonwealth obey the law and neither exceed nor neglect any jurisdiction which the law confers on them. The centrality, and protective purpose, of the jurisdiction of this Court in that regard places significant barriers in the way of legislative attempts (by privative clauses or otherwise) to impair judicial review of administrative action.[108]

The migration cases show that a number of issues remain live for examination in future cases because of the requirement that constitutional norms, including those that support the remedies referred to in s 75(v) must be traced to Australian sources. These issues include:[109]

(a) Is the remedy of injunction, so far as it is entrenched in the Constitution, available in cases of errors within jurisdiction?
(b) What is the scope otherwise of injunctions?
(c) Is a requirement to accord procedural fairness entrenched in the Constitution to any extent?
(d) Is the *Wednesbury* principle entrenched in the Constitution to any extent?

Endnotes

1 (1935) LQR 590 at 590-591.
2 (1990) 170 CLR 596.
3 (1990) 170 CLR 1.
4 (1992) 175 CLR 564.
5 Eg Ioannou v Fowell (1984) 156 CLR 328; Chan v Minister for Migration and Ethnic Affairs (1989) 169 CLR 379; Minister for Migration and Ethnic Affairs v Mayer (1985) 157 CLR 290; Yates v Wilson (1989) 168 CLR 338.
6 (1920) 28 CLR 129.
7 Williams, The Australian Constitution, A Documentary History, Melbourne University Press, 2005 at 134, 151. It had not been in Kingston's draft: Williams ibid at 127.
8 Williams, ibid at 360.
9 Williams, ibid at 451.
10 31 January 1898, Official Record of the Debates of the Australasian Federal Convention, Third Session, Melbourne 1898, Volume IV at 321.
11 (1803) 5 US 137.
12 Supra at 173.
13 Section 75(iii).
14 Official Record of the Debates, Melbourne 1898, Volume V at 1883-5.
15 Debates, 31 January 1898, at 348.
16 Ibid at 349.
17 See A History of English Law, Sir William Holdsworth, Volume 1 at 226-231; Volume 14 at 245-247.
18 (1867) 2 LRHL 239 at 254.
19 (1876) 10 LRCP 379 at 382.
20 See eg, Council of Civil Service Unions v Minister for Civil Service (1985) AC 374 at 379 per Lord Fraser of Tullybelton. The term 'prerogative' has, of course, a number of other meanings: see The Royal Prerogative, Evatt, Law Book Company, 1987, at 10-11.
21 Dixon, op. cit. at 594, 595.
22 Holdsworth, op. cit. at 226.
23 Dixon op. cit. at 596.
24 Dixon, op. cit. at 597.
25 Supra, at 177.
26 (1877) 3 App Cas 889 at 904.
27 Isaacs was keenly aware of this dictum. He had, of course, been a Victorian delegate to the Constitutional Conventions. Later, he was to cite this dictum repeatedly as counsel and also to rely upon it as a judge: see D'Emden v Pedder (1904) 1 CLR 91 at 596; The Railway Servants' Case (1906) 4 CLR 488 at 519; The King v Barger (1908) 6 CLR 41 at 85; The Engineers' Case (1920) 28 CLR 129 at 150.
28 Dixon, op. cit. at 604.
29 (1957-58) 31 ALJ 240 at 241.
30 (1978-79) 143 CLR 190 at 201.
31 Tramways Case [No1] (1913) 18 CLR 54; R v Watson; Ex parte Armstrong (1976) 136 CLR 248; R v Federal Court of Australia; Ex parte Pilkington ACI (Operations) Pty Ltd (1978) 142 CLR 113 at 127;
and see the discussion per Callinan J in Plaintiff S157/2002 v Commonwealth (2003) 211 CLR 476 at 524 [128].
32 (1984) 156 CLR 185.
33 Ibid at 217.
34 See also R v Federal Court of Australia; Ex parte Pilkington ACI (Operations) Pty Ltd (1978) 142 CLR 113 at 127.
35 Worthington v Jeffries (supra) at 382.
36 (1986) 60 ALJR 588 at 594.
37 See Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund (1998) 194 CLR 247 at 262 [37]; Australian Conservation Foundation v The Commonwealth (1987-1980) 146 CLR 493 at 550 per Mason J.
38 Deputy Commissioner of Taxation v Richard Walter Pty Ltd (1994-95) 183 CLR 168 at 206 per Deane and Gaudron JJ).
39 See eg The Constitution: Ultimate Foundation of Australian Law? Justice WMC Gummow AC, (2005) 79 ALJ 167.
40 (1995) 184 CLR 620.
41 'That is a wonderful word,' said George Reid, Premier of New South Wales, when the subject of the High Court's jurisdiction was being discussed at the Convention on 31 January, 1898.
42 Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd (1998) 194 CLR 247 at 262.
43 Darling Casino Ltd v NSW Casino Control Authority (1997) 191 CLR 602 at 633.
44 Craig v South Australia (1994-95) 184 CLR 163 at 177-178.
45 (1999) 197 CLR 510 at 551.
46 Ibid at 551-552.
47 (2001) 206 CLR 57.

48 Ibid at 122.
49 Ibid at 122-123.
50 Plaintiff S157/2002 v Commonwealth (2003) 211 CLR 476 at 508.
51 (2003) 214 CLR 1 at 24-25.
52 This idea dates back at least to Coke's conflict with James I: Holdsworth, A History of English Law, Volume 14 at 202-203.
53 Corporation of the City of Enfield v Development Assessment Commission (1999) 199 CLR 135 at 153-154 [44].
54 Plaintiff S157/2000 v Commonwealth, supra, at 524-5 [131].
55 (1998) 194 CLR 247
56 Ibid at 267 [50], [51].
57 Corporation of the City of Enfield v Development Assessment Commission (1999) 199 CLR 135 at 157 [57], [58] per Gaudron J.
58 Plaintiff S157/2000 v Commonwealth, supra, at 524-5 [131].
59 I am indebted to the Hon Justice Atkinson for this observation.
60 (2000) 204 CLR 82.
61 Ibid at 92.
62 Ibid at 92.
63 Ibid at 93.
64 See eg per Callinan J in Aala, (supra) at 149 [198] and in Plaintiff S157/2002 v Commonwealth (supra) at 524 [128].
65 Ibid at 133-134.
66 Ibid at 141.
67 Ibid at 143.
68 (1722) 93 ER 698.
69 Ibid at 704.
70 Or, for those with a classical preference, the (much later) authority of Seneca's Medea, referred to by Dixon CJ and Webb J in Commissioner of Police v Tanos (1957) 98 CLR 383 at 395. See also Holdsworth's discussion in A History of English Law, Volume 14 at 199 et seq.
71 (2001) 206 CLR 128.
72 Ibid at 147.
73 Australian Railways Union v Victorian Railways Commissioner (1930) 44 CLR 319 at 385 per Rich, Starke and Dixon JJ; The Queen v Moore; Ex parte Victoria (1976-77) 140 CLR 92 at 102 per Gibbs J.
74 See per Deane and Toohey JJ in Leeth v The Commonwealth (1991-92) 174 CLR 455 at 486-7; Johnson v Johnson (2000) 201 CLR 488 at 500 per Kirby J; Ebner v Official Trustee (2000) 205 CLR 337 at 362 per Gaudron J at 373 per Kirby J.
75 Ebner v Official Trustee, supra, per Gaudron J at 363, per Kirby J at 373; Kable v Director of Public Prosecutions (NSW) (1996) 189 CLR 51 at 95, 102, 114, 136 and 143.
76 (1964) AC 40.
77 Banks v Transport Regulation Board (Vic) (1968) 119 CLR 222, especially at 231 per Barwick CJ.
78 Payne v Lord Harris of Greenwich (1981) 1 WLR 754 at 757.
79 Re Minister; Ex parte Epeabaka (supra) at 147 per Kirby J.
80 Supra at 101.
81 Supra at 147 citing Aala at 109.
82 (1985) 159 CLR 550.
83 Supra at 584.
84 Supra at 615.
85 (1990) 170 CLR 596.
86 Supra at 604-605.
87 (1997) 190 CLR 1 at 36.
88 Supra at 36.
89 Australian Broadcasting Tribunal v Bond (1990) 170 CLR 321 at 367 per Deane J; Abebe, supra, at 554 [115] per Gaudron J.
90 Australian Broadcasting Tribunal v Bond , supra, per Deane J at 367.
91 Associated Provincial Picture Houses Ltd v Wednesbury Corporation (1948) 1 KB 223 at 229-231.
92 Supra.
93 See Transcript, 3 September, 2002, page 64.
94 Australian Communist Party v The Commonwealth (1950-51) 83 CLR 1.
95 cf Dixon J in Australian Communist Party Case at 193.
96 It would in truth involve the delegation of law making power.
97 JW Hampton Junior & Co v United States (1928) 276 US at 407; cited with approval per Latham CJ in The Commonwealth v Grunseit (1943) 67 CLR 58 at 82; Plaintiff S157/2002 v Commonwealth of Australia (supra) at 513 per Gaudron, McHugh, Gummow, Kirby and Hayne JJ.
98 Marbury v Madison, supra, at 177.
99 cf per Gaudron J in Abebe v The Commonwealth (supra) at 554.
100 (1945) 70 CLR 598.
101 Per Gummow J in Eshetu, supra, at 649 [124].

102 (1999) 197 CLR 611.
103 Ibid at 640 per Gaudron and Kirby JJ, at 650 per Gummow J, and at 669 per Callinan J.
104 Eshetu, supra, at 657 [146]; repeated by McHugh and Gummow JJ in Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002 (2003) 77 ALJR 1165 at 1172 [36]; a proposition doubted by Kirby J at 1191 [154].
105 See the discussion by Gummow J in Eshetu, supra, at 654-657.
106 Plaintiff S157/2002 v Commonwealth, supra, at 522[123].
107 (2003) 217 CLR 545 at 570
108 Supra, at 513[103], [104].
109 To these may be added the incidentally interesting question, how does s 91X of the Migration Act, which prohibits Chapter III courts publishing the name of a litigant, and requires instead the use of a depersonalising number, conform to the requirement of open justice that is otherwise inherent in the exercise of the judicial power of the Commonwealth: cf Russell v Russell (1976) 134 CLR 495 at 521 per Gibbs J. In Plaintiff S157/2002 v Commonwealth, supra, at 496, footnote 72, the majority observed that '[i]n the absence of any direct challenge, it will be assumed that s 91X is constitutionally valid.'

ADMINISTRATIVE LAW: THE NEW SOUTH WALES LANDSCAPE

*MG Sexton SC SG**

Introduction

A distinctive feature of the landscape of administrative law in New South Wales is the number of institutions that apply, interpret and develop its principles. These include the Supreme Court, the Administrative Decisions Tribunal (ADT), the Privacy Commissioner, the Auditor-General, the Police Integrity Commission (PIC), the Independent Commission Against Corruption (ICAC) and the Ombudsman. In recent years, some of the most significant administrative law cases in this State have concerned the powers, and limitations on the powers, of three investigative bodies: PIC, ICAC and the Ombudsman.

The activities of these institutions often receive widespread legal and public attention, due not only to the misconduct, corruption and maladministration they uncover, but also to concerns about the impact their wide-ranging powers may have on persons under investigation, particularly on their individual reputations. In this paper, I want to provide a sketch of the New South Wales administrative law landscape by giving an overview of the case law regarding these three investigative bodies. In doing so, I will traverse a series of topics familiar to administrative lawyers: excess of jurisdiction; the *Hardiman* principle; procedural fairness; disclosure of and access to information; privative clauses; and the availability of relief.

Overview of functions and powers of the three investigative bodies

Police Integrity Commission

PIC is a statutory corporation established under the *Police Integrity Commission Act 1996* (the PIC Act).[1] The principal functions of PIC include preventing, detecting and investigating serious police misconduct and other police misconduct.[2] 'Police misconduct' is defined, inter alia, to mean 'misconduct (by way of action or inaction or alleged action or inaction) of a police officer', whether or not it also involves non-police participants or occurs while the police officer is officially on duty.[3] PIC has power to do all things necessary to be done for, in connection with or reasonably incidental to the exercise of its functions.[4]

PIC may conduct an investigation on its own initiative or on a complaint made or referred to it.[5] For the purposes of an investigation, PIC may hold hearings in public or in private.[6] In doing so, it is not bound by the rules of evidence and can inform itself on any matter and in such manner as it considers appropriate.[7] PIC has power to require a public authority or official to produce a statement of information,[8] to require a person to produce any document or thing,[9] and to enter public premises to inspect the premises or any document or thing.[10] In addition, PIC may summon a person to appear to give evidence or produce documents,[11] may issue a warrant for the arrest of a witness who fails to attend in answer to a summons[12] and may issue a search warrant if it is satisfied that there are reasonable grounds for doing so.[13] Where a witness has been summonsed, he or she is not entitled to refuse to answer a question or produce a document on the ground of self-incrimination.[14] PIC may also refer a matter to any authority it considers to be appropriate in the circumstances.[15]

Section 16(1) of the PIC Act provides that, on the basis of its investigations, PIC may make assessments and form opinions as to whether 'police conduct or other misconduct' may have occurred, be occurring or be about to occur. It may also make recommendations for the taking of any action it considers appropriate, such as whether consideration should be given to the prosecution of, or the taking of disciplinary action against, persons under the *Police Act 1990*. However, s 16(2) provides that PIC may not make a finding or form an opinion that a specified person is guilty of or has committed a criminal or disciplinary offence, or make a recommendation that a person be prosecuted for such an offence.

PIC is authorised to prepare reports in relation to any matter that has been investigated, and is obliged to do so when a public hearing has been conducted, which are to be furnished to the Presiding Officer of each House of Parliament.[16] Section 97(1) provides that, in its reports, PIC may include statements as to any of its assessments, opinions and recommendations. Section 97(2) also requires PIC to include, in respect of each 'affected' person, a statement as to whether, inter alia, it is of the opinion that consideration should be given to prosecuting the person for a criminal offence or to the taking of disciplinary action. 'Affected person' is defined to mean 'a person against whom, in the Commission's opinion, substantial allegations have been made' in the course of or in connection with an investigation.[17]

Independent Commission Against Corruption

ICAC is a statutory corporation established under the *Independent Commission Against Corruption Act 1988* (the ICAC Act).[18] Its principal functions include investigating any allegation or complaint, or circumstances which imply, that corrupt conduct, conduct encouraging corrupt conduct or conduct connected with corrupt conduct may have occurred; investigating any matter referred to it by both Houses of Parliament; and communicating the results of its investigations to appropriate authorities.[19] Other functions include assembling evidence that may be admissible in prosecuting a person for a criminal offence connected with corrupt conduct and furnishing it to the Director of Public Prosecutions (the DPP) or other authority.[20] ICAC has power to do all things necessary to be done for, in connection with or reasonably incidental to the exercise of its functions.[21]

'Corrupt conduct' is defined broadly in s 8 of the ICAC Act, subsection (1) of which provides:

> (1) Corrupt conduct is:
>
> (a) any conduct of any person (whether or not a public official) that adversely affects, or that could adversely affect, either directly or indirectly, the honest or impartial exercise of official functions by any public official, any group or body of public officials or any public authority, or
>
> (b) any conduct of a public official that constitutes or involves the dishonest or partial exercise of any of his or her official functions, or
>
> (c) any conduct of a public official or former public official that constitutes or involves a breach of public trust, or
>
> (d) any conduct of a public official or former public official that involves the misuse of information or material that he or she has acquired in the course of his or her official functions, whether or not for his or her benefit or for the benefit of any other person.

Section 8(2) lists a series of actions that may adversely affect the exercise of official functions, such as bribery, blackmail, fraud and theft, which also constitute corrupt conduct. However, s 9(1) of the ICAC Act provides that '[d]espite section 8, conduct does not amount to corrupt conduct unless it could constitute or involve' a criminal offence; a disciplinary offence; reasonable grounds for dismissing, dispensing with the services of or otherwise terminating the services of a public official; or, in the case of a Minister or a Member of a House of Parliament, a substantial breach of an applicable code of conduct.

ICAC has very similar powers to those of PIC. It may conduct an investigation on its own initiative or on a complaint, report or reference made to it.[22] For the purposes of an investigation, ICAC may conduct a compulsory examination or public inquiry if it considers it to be in the public interest.[23] In doing so, it is not bound by the rules of evidence and can inform itself on any matter and in such manner as it considers appropriate.[24] ICAC has power to require a public authority or official to produce a statement of information,[25] to require a person to produce any document or thing,[26] and to enter public premises to inspect the premises or any document or thing.[27]

In addition, ICAC may summon a person to appear to give evidence or produce documents at a compulsory examination or public inquiry,[28] may issue a warrant for the arrest of a witness who fails to attend in answer to a summons[29] and may issue a search warrant if it is satisfied that there are reasonable grounds for doing so.[30] Where a witness has been summonsed, he or she is not entitled to refuse to answer a question or produce a document on the ground of self-incrimination.[31] ICAC may also refer a matter to any authority it considers to be appropriate in the circumstances.[32]

ICAC has power to make findings and form opinions in respect of any conduct, circumstances or events with which its investigations are concerned and to formulate recommendations for the taking of any action it considers appropriate.[33] However, it may not make a finding that a person has engaged or is engaging in corrupt conduct unless it is satisfied that the person has engaged in conduct of a kind described in s 9(1).[34] Further, it must not make a finding or form an opinion that a specified person is guilty of or has committed a criminal offence or disciplinary offence, or make a recommendation that a person be prosecuted for such an offence.[35]

ICAC may prepare reports in relation to any matter that has been investigated and is obliged to do so when a matter has been referred to it by both Houses of Parliament and when a public hearing has been conducted. The reports are to be furnished to the Presiding Officer of each House of Parliament.[36] In its reports, it may include statements as to any of its findings, opinions and recommendations, subject to the exceptions outlined above.[37] ICAC is also required to include, in respect of each 'affected' person, a statement as to whether, inter alia, it is of the opinion that consideration should be given to obtaining the advice of the DPP with respect to prosecuting the person for a specified criminal offence or to the taking of disciplinary action.[38]

Ombudsman

A person is appointed to the office of Ombudsman under the *Ombudsman Act 1974*.[39] Subject to some limited exceptions, any person may complain to the Ombudsman about the conduct of a 'public authority'.[40] The Ombudsman has power to investigate the conduct of a public authority when a valid complaint has been made or could have been made,[41] and where it appears that the conduct may be contrary to law; unreasonable, unjust, oppressive or improperly discriminatory; based wholly or partly on improper motives, irrelevant grounds or irrelevant considerations; based wholly or partly on a mistake of law or fact; conduct for which reasons should have been given; or otherwise wrong.[42]

Where the Ombudsman finds that the conduct falls within any of those categories, the Ombudsman must prepare a report giving his or her reasons for that finding. Reports are to be given to the responsible Minister, the head of the public authority whose conduct is the subject of the report and, in some circumstances, the Premier's Department.[43] The Ombudsman may recommend that any step be taken, including that action be taken to rectify the conduct, that reasons be given for the conduct or that compensation be paid to any person.[44] If the Ombudsman is of the opinion that a public authority is or may be guilty of misconduct to such an extent as may warrant dismissal, removal or punishment, the

Ombudsman is obliged to report the opinion, and the reasons for that opinion, to various persons.[45] Where the Ombudsman is not satisfied that sufficient steps have been taken in due time in consequence of a report, the Ombudsman may make a report to the Presiding Officer of each House of Parliament, following which the responsible Minister must make a statement to Parliament in response to the report.[46] The Ombudsman may also make a special report to the Presiding Officer of each House of Parliament at any time.[47]

Investigations conducted by the Ombudsman must be made in the absence of the public.[48] For the purposes of an investigation, the Ombudsman may require a public authority to prepare a statement of information or produce any document or thing[49] and to enter public premises to inspect the premises or any document or thing.[50] The Ombudsman also has power to deal with a complaint by conciliation[51] and to hold inquiries, in which case he or she will have some of the powers, authorities, protections and immunities conferred on a Royal Commissioner.[52] The Ombudsman may, at any time, furnish information obtained in discharging his or functions to the DPP, ICAC or any other public authority.[53]

In addition, the Ombudsman has particular functions in relation to child protection under Part 3A of the Ombudsman Act. Designated government agencies and non-government agencies, including non-government schools and agencies providing residential care for children,[54] are obliged to notify the Ombudsman of any 'reportable allegation' or 'reportable conviction' against an employee of the agency.[55] Those terms are defined to mean allegations or convictions of an offence involving 'reportable conduct', which includes a sexual offence or sexual misconduct committed against a child; any assault, ill-treatment or neglect of a child; or any behaviour that causes psychological harm to a child.[56] The Ombudsman is required to keep under scrutiny the systems for preventing reportable conduct by employees of designated agencies and other public authorities and the systems for handling and responding to reportable allegations and convictions.[57] The Ombudsman has power to monitor an investigation conducted by a designated agency into a reportable allegation or conviction,[58] as well as power to conduct an investigation into a reportable allegation or conviction or any inappropriate handling of or response to these matters.[59]

Exceeding jurisdiction

There are various cases in which the courts have considered whether ICAC, PIC or the Ombudsman have exceeded their jurisdiction, the outcomes of which frequently turn on the application of principles of statutory interpretation. Some of these principles have particular application to investigative bodies that have coercive powers, such as the principle that an intention to abrogate or curtail common law rights and freedoms must be manifested by clear and unambiguous language. While the task of statutory construction is ultimately dependent on the language used in the relevant statute, my view is that the courts have adopted three different approaches in interpreting the powers of PIC, ICAC and the Ombudsman. In the case of ICAC, a very strict approach has been taken in interpreting its powers. In the case of the Ombudsman, a broad approach has been adopted. In the case of PIC, the courts have adopted the ordinary and natural meaning of its powers.

The first significant case concerning the scope of and limitations on the powers of a NSW investigative body was *Balog v ICAC*.[60] In that case, the High Court held that ICAC was not entitled to include in a report a statement of any finding by it that a person was guilty of corrupt conduct or a criminal offence, as opposed to merely reporting the results of its investigations. The Court held that, although there might be a 'fine line' between the two categories in theory, a distinction could be drawn in practice between the revelation of material that may support a finding of corrupt conduct or the commission of an offence and the actual expression of a finding that the material may or does establish those matters.[61] Their Honours emphasised that ICAC was primarily an investigative body whose investigations were intended to facilitate the actions of others in combating corrupt conduct;

it was not a law enforcement agency and exercised no judicial or quasi-judicial functions. The objects of the legislation, and the investigative powers it conferred, contained with them no implication that ICAC should be able to make findings of corrupt conduct or criminal behaviour.[62] The ICAC Act was subsequently amended to authorise ICAC to make findings of corrupt conduct, but to prohibit it from making findings of guilt of a criminal offence.

In coming to its conclusion in *Balog,* Mason CJ, Deane, Dawson, Toohey and Gaudron JJ stated:

> Although the pernicious practices at which the Act is aimed no doubt call for strong measures, it is obvious that the Commission is invested with considerable coercive powers which may be exercised in disregard of basic protections otherwise afforded by the common law. Were the functions of the Commission to extend to the making of findings, which are bound to become public, that an individual was or may have been guilty of corrupt or criminal conduct, there would plainly be a risk of damage to that person's reputation and of prejudice in any criminal proceedings which might follow. If the legislation admits of a wider interpretation than that which we have given to it (and we do not think that it does), then the narrower construction is nevertheless to be adopted upon the basis that where two alternative constructions of legislation are open, that which is consonant with the common law is to be preferred. [63]

Dr Allars has expressed the view that this statement is an 'extended and specialised version' of the basic principle that courts do not impute to the legislature an intention to abrogate or curtail certain common law rights and freedoms unless such an intention is clearly manifested by unambiguous language.[64] In Allars' opinion, the '*Balog* principle of statutory interpretation' applies in the context of interpreting provisions that confer coercive powers on investigative tribunals which have the capacity to damage reputations. It applies whenever two interpretations of a statutory provision are theoretically available – including when a statute clearly and unambiguously overrides fundamental common law rights – and 'operates to restrict the scope of the coercive power so as to bring the position closer to the preservation of the fundamental common law rights'.[65]

In my view, the High Court in *Balog* was merely restating the basic principle of statutory interpretation referred to above. Indeed, it is difficult to imagine how the principle identified by Allars would apply in practice. Where a statutory provision clearly and unambiguously overrides fundamental common law rights, the meaning of the provision will not, by definition, be ambiguous. To put it another way, in construing a provision that unambiguously overrides common law rights and freedoms, a principle of interpretation that is enlivened where two alternative constructions of the provision are open will not apply. This conclusion is supported by the fact that the Court's statement in *Balog* does not appear to have been relied on as an independent principle of statutory interpretation in subsequent cases regarding investigative bodies, at least in NSW.

The next case in which ICAC was held to have exceeded its jurisdiction was *Greiner v ICAC*.[66] That case arose out of an ICAC report which included a finding that both the then Premier and Minister for Environment had engaged in 'corrupt conduct' within the terms of the ICAC Act. The report had been published following a reference by the Parliament requesting ICAC to investigate the resignation of a parliamentarian, Dr Metherell, and his subsequent appointment to a senior position in the Environmental Protection Authority. The Commissioner concluded that the appellants had arranged for Dr Metherell to be appointed to that position for reasons that advantaged them, including improving the government's numbers in the Legislative Assembly, without complying with relevant statutory procedures. They had engaged in conduct that involved, inter alia, a partial exercise of their functions as public officers and a breach of trust in contravention of s 8 of the ICAC Act. Their conduct was not excluded by s 9(1) of the ICAC Act because, in the words of subsection (c), it 'could constitute or involve … reasonable grounds for dismissing' the appellants.

Gleeson CJ began by making a number of comments about the ICAC Act and determinations made under that Act. His Honour stated:

> The ICAC Act contains a definition of corrupt conduct which is both wide and, in a number of respects, unclear. One of the most striking aspects of the legislative scheme is that a conclusion that a person has engaged in corrupt conduct, which is unconditional in form, is necessarily based upon a premise which is conditional in substance. Part of the definition of corrupt conduct is that it must be conduct which "could" constitute or involve a criminal offence, a disciplinary offence or reasonable grounds for dismissing or terminating the services of a public official. … In the public perception, the conditional nature of the premise upon which it is based could easily be obscured by the unconditional form of such a conclusion.[67]

His Honour also noted that there was no right of appeal against, or a procedure for a review of the merits of, determinations of ICAC, even though they could have devastating consequences for individuals. This had a bearing on the approach that should be taken to the meaning of the ICAC Act and the way in which the decision-making functions of ICAC should be performed.[68]

Gleeson CJ accepted that the appellants' conduct could fall within the definition of 'corrupt conduct' in s 8 of the ICAC Act, but identified three errors ICAC had made in applying s 9(1)(c). First, the Commissioner did not enunciate and apply objective standards to the facts of the case. Rather than identifying any objective criteria by reference to which his conclusion that there were reasonable grounds for dismissing the appellants could be tested, the Commissioner approached the question as though the matter was to be determined by his personal and subjective opinion. In that respect, he exceeded his jurisdiction.[69] Secondly, the Commissioner did not correctly state the issue that arose for decision by the way he formulated the test under s 9(1)(c).[70] Thirdly, given the Commissioner's factual findings – which included that the appellants believed that what they were doing was lawful and that their conduct would be seen by a notional jury to be in accordance with recognised standards of honesty and integrity – it was not open to him as a matter of law to conclude that those facts constituted reasonable grounds for the Governor to dismiss the appellants.[71]

Priestley JA also expressed some concern about the definition of 'corrupt conduct' in the ICAC Act and stated that ICAC's procedures and the publicity surrounding them could easily lead to its pronouncements being confused with those of the courts, even though its findings had no final and binding effect on the rights of the parties.[72] His Honour interpreted the word 'could' in s 9(1) to mean 'would, if the facts were found proved at a trial', so that ICAC should have considered whether the facts, if proved at a trial, would constitute reasonable grounds for dismissal.[73] Priestley JA found that the Commissioner's conclusions were not based on any standard of corrupt conduct established or recognised by law.[74] Further, only a criminal offence would be likely to constitute reasonable grounds for the Governor to dismiss a Minister.[75] Mahoney JA dissented, holding that the Commissioner's conclusion that there were reasonable grounds for dismissing the appellants under s 9(1)(c) was open to him. These grounds were to be assessed by reference to the seriousness of the conduct and by reference to 'contemporary standards', one of which was that public power should not be utilised for private gain.[76] It should be noted that the majority judgments in *Greiner* have not gone without critical comment.[77]

The final case in which ICAC has been held to have exceeded its jurisdiction is *Woodham v ICAC*.[78] The proceedings arose out of a report in which ICAC found that the plaintiff, an officer of the Department of Corrective Services, had engaged in corrupt conduct by drafting two letters to the Corrective Services Commission which commended the actions of a prisoner in assisting authorities, but did not refer to the prisoner's criminal activities While incarcerated. The letters were written for the purpose of assisting the prisoner when being sentenced by the Supreme Court of Victoria. The ICAC report concluded that the plaintiff

had engaged in corrupt conduct through a partial exercise of his functions and a misuse of information within the terms of the ICAC Act.

Like the majority in *Greiner*, Grove J expressed concern about the definition of the word 'corrupt' in the ICAC Act. In his Honour's words:

> It is important to emphasize that "corrupt" is used in the legislation in an expanded sense to include a range of potential activity which would never fit that description in the usage of that word in the language … The choice of a word conveying a common meaning which is pejorative and vituperative but which, by force of statute, can be attached to conduct which is not of that character with the resultant licence for uninhibited public repetition is open to criticism. I respectfully commend the consideration of selection of more apt language to describe whatever is sought to be effected by the statute.[79]

His Honour stated that there was no indication in the report as to where ICAC had deduced the standard requiring the plaintiff to set out the criminal conduct of the prisoner. The letters did not purport to provide a condensed prisoner history, but were expressed to have a commendatory purpose. There was no suggestion that the plaintiff had ignored a directive or practice relevant to the writing of such letters.[80] Grove J concluded that there was no objective basis upon which to conclude that the conduct of the plaintiff could be characterised as improper. Neither the contents of the letters, nor the circumstances surrounding their preparation, was capable of sustaining a determination that the plaintiff had engaged in corrupt conduct. Applying *Greiner,* his Honour stated that the statute 'does not authorise the Commissioner to create standards to coordinate with his subjective views with the adverse consequence to any affected person who might have behaved otherwise'.[81] Accordingly, the ICAC report was made without or in excess of jurisdiction and was a nullity and the determination as to corrupt conduct was wrong in law.

Balog, Greiner and *Woodham* demonstrate that the courts have adopted a strict approach in construing ICAC's powers. There appear to be a number of concerns that have informed the courts' interpretation of the ICAC Act. First, as outlined above, the courts have expressed considerable uneasiness about the artificial definition of 'corrupt conduct' in the ICAC Act. Secondly, various judges have referred to the considerable publicity that ICAC's determinations receive and the misrepresentation of those determinations in the media. In *Greiner*, for example, Priestley JA referred to the fact that he had seen newspaper headlines the day after the ICAC report was published stating 'Greiner corrupt' – words which 'oversimplified the true position to the point of inaccuracy' – a fault his Honour attributed not only to the media, but also to the ICAC Act itself.[82] Thirdly, references have been made to the lack of appeal processes and procedures for reviewing the merits of determinations by ICAC. Fourthly, the courts have expressed significant concern about the potential impact that ICAC's investigations have on individual reputations.

However, the courts have taken a very different approach in interpreting the Ombudsman Act. The first significant case concerning the scope of the Ombudsman's powers was *Botany Council v The Ombudsman*.[83] In that case, the Court of Appeal considered whether the trial judge had erred in upholding the lawfulness of an inquiry and report by the Ombudsman under the FOI Act. The complainants had sought access to, and had requested amendment of two documents held by the Council that allegedly contained misstatements about them. The Council had refused to grant access to or to amend those documents, following which the complainants lodged a complaint with the Ombudsman under s 52 of the FOI Act. The Council alleged that the Ombudsman was confined to the terms of the complaint that had been made to him and was constrained to the remedies provided under the FOI Act.

Kirby P, with whom Sheller and Powell JJA agreed, held that the Council's submissions were based on a misunderstanding of the Ombudsman's powers. His Honour stated:

> Those powers, as the Ombudsman Act reveals, are, as they ought to be, extremely wide. They are not powers which this Court should read down. They are beneficial provisions designed in the public interest for the important object of improving public administration and increasing its accountability … Sadly, the experience of the past (and not only the past) has been of the occasional misuse and even oppressive use of administrative power. One modern remedy against such wrongs has been the creation by parliaments in all jurisdictions of Australia of the office of Ombudsman. While it may be expected that the Ombudsman will conform to the statute establishing his office, a large power is intended. The words of the Ombudsman Act should be an given ample meaning.84

The Court concluded that in conducting an investigation and providing a report under the FOI Act, the Ombudsman was not constrained to the terms of the complaint made or the remedies available under that Act, as he had power to investigate the matter under the Ombudsman Act. Therefore, there was no foundation for the contention that the Ombudsman lacked power to conduct the investigation or to make the findings and recommendations he did.[85]

The Supreme Court also declined to read down the Ombudsman's powers in *K v NSW Ombudsman*.[86] In that case, the plaintiff sought declarations that the Ombudsman did not have jurisdiction to conduct an investigation into her conduct or the conduct of the NSW Department of Education and Training in relation to the investigation and subsequent determination of allegations of child abuse made against the plaintiff, who was a teacher in a public school. As noted above, the Ombudsman has particular powers and responsibilities in relation to child protection under Part 3A of the Ombudsman Act, s 25G(1) of which empowers the Ombudsman to conduct an investigation concerning any child abuse allegation against an employee of a designated agency. The plaintiff argued that s 25G(1) did not invest the Ombudsman with power to investigate whether or not child abuse had in fact been perpetrated. She argued that its construction should be informed by the 'traditional' role performed by the Ombudsman of 'improving public administration and increasing the accountability of public administrators'.[87] The Ombudsman argued that Part 3A contained functions and powers additional to those he ordinarily exercised, which should be read broadly in view of the fact that they were for a beneficial purpose.[88]

Whealy J noted that the powers of the Ombudsman had been broadly interpreted and afforded considerable importance and, accordingly, should be given ample meaning.[89] Section 25G appeared in the 'context of the widest import in relation to the question of child abuse'.[90] This context and the language of s 25G suggested that the Ombudsman could consider the question whether the fact of child abuse had in fact occurred and was not confined to investigating the acts or omissions of public administrators.[91]

These cases reveal that the courts have taken a much broader approach in construing the Ombudsman's powers than they have in construing the powers of ICAC. Far greater emphasis has been placed on the importance of the Ombudsman's role and functions in investigating and reporting misconduct and on the beneficial purposes for which the Ombudsman's powers have been conferred. The difference in the courts' approach may be partly attributed to the fact that the Ombudsman does not have equivalent coercive powers to ICAC; that the Ombudsman's investigations are conducted in private; that the Ombudsman is not required to furnish his or her reports to each House of Parliament; and that most of the Ombudsman's powers are limited to investigating the conduct of public authorities and their employees. However, there are also various similarities between the two investigative bodies. The Ombudsman has some of the coercive powers possessed by ICAC, such as the power to require a public authority to prepare a statement of information or produce any document and to enter public premises to inspect the premises or any document or thing. While the Ombudsman's investigations are conducted in private, the Ombudsman may furnish his or her reports to each House of Parliament. Such reports clearly have the capacity to damage individual reputations. Under Part 3A of the Ombudsman Act, the Ombudsman has powers and duties concerning child protection with

respect not only to public agencies, but also to non-government agencies. Therefore, the very different approaches that the courts have taken in construing the powers of the Ombudsman and ICAC cannot be explained entirely on the basis of the differences between the two entities.

Yet another approach can be identified regarding the interpretation of the powers of PIC, which have only been subject to judicial scrutiny very recently. In *PIC v Shaw*,[92] the Court of Appeal considered whether the trial judge, Young CJ in Eq, had erred in declaring that PIC and its Commissioner would be exceeding their jurisdiction if they were to make a report to Parliament, in which they made an assessment or expressed a conclusion or opinion that the respondent had engaged in misconduct, for the purposes of ss 16(1)(a) or 97 of the PIC Act. The proceedings arose out of an investigation into the conduct of police officers and other persons involved in events following a motor vehicle accident, which included the disappearance of one of the respondent's blood samples. A public hearing was conducted, towards the conclusion of which counsel assisting PIC submitted that it should find that there was no police misconduct. The respondent's counsel subsequently contended that PIC no longer had jurisdiction to make a report that included an assessment, conclusion or opinion about the respondent. That submission was rejected by PIC.

The respondent's claims were summarised by Basten JA. As his Honour noted, the respondent's argument centred around the contention that the PIC Act created a body whose object was to investigate police misconduct and that 'the powers conferred on it should be read as limited by this controlling statutory purpose'. It followed, in the respondent's submission that the PIC powers did not extend to identifying and assessing the conduct of persons other than police officers where there was no police misconduct, except to the extent necessary to justify or explain that conclusion.[93] The respondent's claims also depended upon the general principle of statutory interpretation that provisions conferring coercive powers that may diminish common law rights and freedoms should be construed restrictively.[94] Basten JA noted that the trial judge had invoked a similar principle in stating that the PIC Act and the ICAC Act established 'rather extraordinary bodies with extraordinary powers for particular public purposes'.[95]

Crucial to the analysis of Young CJ in Eq was his interpretation of s 16(1)(a) of the PIC Act, which provides that PIC may 'make assessments and form opinions … as to whether police misconduct or **other misconduct** has or may have occurred' (emphasis added). For his Honour, the term 'other misconduct' was conduct that was 'intimately connected with the misconduct or potential police misconduct' that was being investigated, as opposed to conduct that was 'peripheral to or innocently co-incidental with' alleged police misconduct.[96] His Honour found that PIC, by the statement of its counsel assisting, had eliminated the question of police misconduct before it considered the respondent's involvement in the disappearance of the blood sample. Accordingly, the respondent's conduct was entirely peripheral to conduct said to amount to police misconduct, so that it was beyond the scope of PIC's jurisdiction to investigate and comment upon it.[97]

The Court of Appeal unanimously rejected the trial judge's reasoning. Giles JA, with whom Hodgson JA agreed, held that PIC could make assessments, opinions and recommendations about the conduct of persons other than the police where the conduct of those persons was relevant to the investigation of police misconduct, subject to the limitations in s 16(2).[98] Section 16(1) expressly referred to 'other misconduct' and an assessment or opinion as to misconduct underpinned what PIC could do in exercising some of its functions, including assembling evidence and referring matters to other agencies.[99] The link or connection was not one of closeness or intimacy. For their Honours, it was sufficient that the subject matter of the investigation was police misconduct and that the conduct of other persons was relevant to that misconduct.[100] The fact that PIC could include an assessment, opinion or recommendation as to a person who was not a police officer was

made plain by the fact that s 97(4) of the PIC Act authorised PIC to report on the conduct of an 'affected person'.[101] Giles and Hodgson JJA also rejected the finding that the submission of counsel assisting constituted a finding of PIC itself.[102]

Basten JA was similarly of the view that the statutory language did not support the respondent's claims. His Honour noted that the PIC Act contained provisions that directly conflicted with fundamental common law rights[103] and referred to the principle that a statute should not be construed to infringe such rights unless it did so with irresistible clearness. However, Basten JA quoted statements of McHugh J concerning the need for caution in applying this principle universally; a much surer guide to legislative intention was to give the statutory language its natural and ordinary meaning, having regard to its context.[104]

His Honour considered that 'other misconduct' was clearly intended to cover misconduct of persons who were not police officers, albeit that s 16 suggested that 'misconduct' was confined to conduct which could constitute a criminal or disciplinary offence.[105] The respondent's assumption that it was necessary for an investigation under the PIC Act to be directed primarily to the existence of police misconduct was false.[106] Basten JA concluded:

> So long as the investigation is directed to, or is reasonably incidental to, the exercise of a function, it would not matter that the investigation was not directly or primarily concerned with police misconduct. Equally, it cannot follow that an investigation which is directed towards police misconduct at the outset will exceed the powers of the Commission if it were continued after the Commissioner became satisfied that there was in fact no police misconduct.[107]

The existence of police misconduct was not a jurisdictional fact upon which the powers of PIC depended for their valid exercise.[108]

It appears that the Court of Appeal in *Shaw* did not adopt a broad or strict construction of the powers of PIC. As stated by Basten JA, it appears that their Honours considered it preferable to adopt the ordinary and natural meaning of the PIC Act. In that sense, the approach taken in *Shaw* may be contrasted to the broad approach the courts have taken in construing the Ombudsman's powers and the strict approach the courts have taken in construing ICAC's powers. Given the numerous similarities between the powers of ICAC and PIC, this inconsistency appears somewhat curious. The different approach taken in *Shaw,* including the minimal emphasis placed on the potential damage that PIC's coercive powers may have on individual reputations, may be partly due to the fact that the respondent in that case was seeking to restrain PIC from exceeding its jurisdiction, rather than claiming that PIC had already done so. Of course, these varying approaches may also be partly attributed to the differences in the legislative schemes. However, my view is that the inconsistencies in approach cannot be explained entirely on these bases. A more consistent approach to interpreting the coercive powers of such investigative bodies may, of course, emerge in the future.

Investigative bodies as parties to litigation

In *The Queen v Australian Broadcasting Tribunal; Ex parte Hardiman*,[109] Gibbs, Stephen, Mason, Aickin and Wilson JJ indicated that when judicial review is sought of a decision of a tribunal, the tribunal should usually enter a submitting appearance, rather than actively oppose the application for review. According to their Honours:

> If a tribunal becomes a protagonist in this Court there is the risk that by so doing it endangers the impartiality which it is expected to maintain in subsequent proceedings which take place if and when relief is granted. The presentation of a case in this Court by a tribunal should be regarded as exceptional and, where it occurs should, in general, be limited to submissions going to the powers and procedures of the tribunal.[110]

However, in *Fagan v Crimes Compensation Tribunal*[111] Brennan J qualified the *Hardiman* principle, stating:

> where the proceedings before the tribunal are not inter partes, and where the Attorney-General cannot or does not intervene to represent the public interest … and neither a law officer nor a public official is heard by the court … it may be desirable that the tribunal should appear by counsel to make such submissions as it thinks calculated to assist the court and, in an appropriate case, to argue against the applicant's case.[112]

If a tribunal does actively participate in an application for judicial review of one of its decisions, and the reviewing court considers that it should not have done so, the court may penalise the tribunal when exercising its discretion as to costs. When an application for judicial review of a tribunal decision is successful, for example, the court may make an order of costs against the tribunal. When an application for judicial review of a tribunal decision is unsuccessful, the court may decline to award costs to the tribunal on the basis that it should have done no more than enter a submitting appearance.

In *Shaw* the respondent contended in oral submissions that the Commissioner of PIC should have entered a submitting appearance in the appeal, rather than participating as an active party who was seeking to assert an expansive view of his powers. He argued that a distinction could be drawn between the Commissioner of PIC, who was conducting the relevant investigation and whose impartiality might be endangered by participation in the proceedings, and PIC itself. In response, the appellants argued that the Commissioner should not have been joined as a defendant in the court below and that no prior objection had been made to PIC or the Commissioner actively defending their powers.

Giles JA, with whom Hodgson JA agreed, accepted the appellants' submissions. Accordingly, their Honours could see no reason why the appellants should not have their costs in the ordinary way.[113] In contrast, Basten JA was of the view that PIC and its Commissioner should not have played an active role in the appeal. His Honour rejected the argument that a distinction could be drawn between PIC and the Commissioner, as the relevant functions and powers at issue in the proceedings were conferred on PIC, rather than the Commissioner, in the PIC Act.[114] Basten JA held that for either appellant to play an active role was inconsistent with the proper approach of neutrality on the part of a decision-maker, particularly in view of the fact that the appellants had continuing functions that might be exercised adversely to the respondent.[115] In his Honour's view:

> Both the Commission and the Commissioner, being active parties, may be seen to be defending an opinion they have expressed in relation to jurisdiction, pursuant to which they had accepted submissions made by counsel assisting the investigation and had rejected submissions made for the Respondent. An active role may be seen to be of particular concern in circumstances where counsel assisting had opened in a manner which the primary judge described as "unfortunate", as having a "sensationalist flavour" and as carrying a tone of "jury rhetoric" rather than disinterested inquiry: see *Shaw v Police Integrity Commission* [2005] NSWSC 782 at [11].[116]

Basten JA stated that the proper defendant in the proceedings below, and the proper appellant in the current proceedings, was the Attorney General and that PIC and its Commissioner should have entered submitting appearances.[117] Accordingly, his Honour concluded that although the appellants should have their costs of the appeal and in the court below, their costs should be limited to an assessment on the basis that the appellants had entered submitting appearances.[118] It is interesting to note that his Honour came to this conclusion even though all the factors identified by Brennan J in *Fagan* were satisfied: the proceedings before PIC were not *inter partes*, the Attorney General had not intervened and neither a law officer nor a public official was heard by the court.

The different approaches of Giles and Hodgson JJA, on the one hand, and Basten JA on the other, reflect uncertainties about the application and scope of the *Hardiman* principle.

Indeed, there is no unified approach in the case law as to when the principle applies. At the federal level, for example, a Full Court of the Federal Court has held that the Australian Securities Commission properly advanced submissions relating to the Court's jurisdiction and the interpretation of provisions of the Corporations Law, including those conferring power upon the Commission.[119] In contrast, the Federal Court has criticised the role that the Human Rights and Equal Opportunity Commission ('HREOC') has played in judicial review proceedings.[120] More recently, the uncertainties regarding the application of the principle have been highlighted in the context of the Cole inquiry. Commissioner Cole applied to have Federal Court orders requiring him to join the Commonwealth in contesting AWB's claim of legal professional privilege over 1,300 documents vacated, on the basis that '[t]he Commissioner is concerned that taking any active role in the hearing … would be to open himself to allegations of bias, or lack of independence from the Commonwealth'.[121]

The varying approaches that the courts have taken regarding the *Hardiman* principle may be partly attributed to, and a reflection of, the competing policy considerations that underpin the question of whether tribunals should participate in judicial review proceedings. Factors which support tribunals having an active role in judicial review proceedings include the fact that the tribunal is likely to have greater familiarity with its empowering statute, role and functions than a private party defending a tribunal decision; the fact that the private respondent is likely to be principally interested in the outcome of the particular proceedings, rather than the importance of the decision as a precedent; the fact that the private respondent may not have the means or preparedness properly to expose all the issues in the case; and the fact that the tribunal is likely to be more able to draw the court's attention to the broader, public interest considerations relevant to the particular decision. Factors that do not support tribunals having an active involvement in judicial review proceedings include the possibility that the independence and impartiality of the tribunal may be compromised and that the tribunal's participation may add to the costs of the applicant for judicial review.[122]

Two fundamental questions regarding the *Hardiman* principle have not been answered with any precision: to which bodies does the principle apply and when, and to what extent, is it permissible for decision-makers to participate in judicial review proceedings? In relation to the first question, it is clear that the principle has application to quasi-judicial tribunals, such as the then Australian Broadcasting Tribunal and HREOC. The principle has also been applied to a variety of other statutory bodies and office holders, including the Queensland Information Commissioner, in the context of a review of a decision under the Queensland FOI Act;[123] the Forestry Commission, a Commonwealth body established to investigate whether particular forests should be listed as protected areas under world heritage conservation legislation;[124] the Commissioner of Patents;[125] and the Australian Securities Commission.[126] However, it is uncertain whether the *Hardiman* principle applies to decision-makers that do not exercise any adjudicatory functions, such as government departments and local councils.

In *Vidler v Secretary of the Department of Social Security*[127] the Federal Court held that the principle did not to apply to the Secretary of the Commonwealth Department of Social Security in defending a decision to refuse an application for the grant of a benefit where there was no other party opposing the application.[128] The High Court appeared to take a different view regarding the application of the principle to a local council in *Oshlack v Richmond River Council*.[129] In that case, the appellant had challenged the validity of a planning permit issued by the Council in the NSW Land and Environment Court. The challenge to the planning permit was unsuccessful, but the trial judge had declined to order costs against him on public interest grounds. Following a successful appeal on the question of costs in the Court of Appeal, a majority of the High Court held that the trial judge had not erred in exercising his discretion not to award costs against Mr Oshlack. In a joint judgment, Gaudron and Gummow JJ referred to *Hardiman* and stated:

> It might have been expected that the council would submit to such order as the court might make and that it would not become a protagonist, lest by doing so it endanger the impartiality it would be expected to maintain upon any subsequent applications which might ensue were relief granted to the appellant.[130]

Kirby J also stated:

> [I]n many cases it will be unnecessary, and would be inappropriate for councils to incur significant legal costs in defending 'public interest' litigation in the Land and Environment Court. It is true that sometimes, as a planning authority with perspectives that may go beyond those of the protagonists, councils may have a legitimate interest to defend, which justifies their participation in the litigation. However, it would often be appropriate for them to submit to the orders of the court. The dispute would then go forward as one between the applicant invoking the 'public interest' and the body against which relief is sought.[131]

The dicta in *Oshlack* suggest that the *Hardiman* principle may apply to decision-makers that do not exercise adjudicatory functions. Indeed, the rationale of the principle – maintaining the impartiality of the decision-maker in the event that future decisions have to be made regarding the applicant for judicial review – supports the extension of the principle to government departments and local councils. However, it may be argued that the principle need only extend to bodies which exercise adjudicatory functions in an adversarial context, such as PIC and ICAC; it is their quasi-judicial nature which requires them not only to maintain strict standards of impartiality, but also to appear to be impartial. Further, where judicial review is sought of decisions made by government departments and local councils, it will often be highly impractical for the decision-maker not to participate actively in the proceedings, given that there will regularly be no other contradictor. Clearer guidance is required regarding the bodies to which the *Hardiman* principle applies.

In relation to the second question, some of the factors that appear to be relevant to the issue of when, and to what extent, decision-makers should actively participate in judicial review proceedings are as follows:

(i) whether there is a contradictor in the proceedings;

(ii) the possible outcome of the litigation. In particular, it will be relevant whether the matter might be remitted to the decision-maker and whether the decision-maker has continuing functions in relation to the applicant for judicial review;

(iii) the extent to which the decision-maker is able to make a meaningful contribution to the issues raised in the proceedings. This may be affected by whether the decision-maker has provided written reasons for its decision, the complexity of the issues in the case and the resources of any other respondent in the proceedings;

(iv) whether the case raises important public interest considerations; and

(v) the ground on which judicial review is sought. As noted in *Hardiman* itself, it may be appropriate for a decision-maker to make submissions about its powers and procedures. However, it may not be appropriate for a decision-maker to make submissions about other issues, such as whether it failed to take into account relevant considerations or denied a party procedural fairness.[132]

As Basten JA suggested in *Shaw*, it may be preferable for the Attorney General to intervene in some cases, particularly where the decision-maker is the only contradictor. Where the Attorney General does intervene, his or her involvement will ensure that the impartiality of the decision-maker is not compromised. However, it should be noted that the Attorney General may not always be willing to intervene in support of an impugned tribunal decision,

particularly where the applicant for judicial review is a government department. One option for standardising this procedure would be to enact statutory provisions which required parties to give notice to the Attorney General in judicial review proceedings where there was no contradictor other than the decision-maker, and which conferred a right of intervention on the Attorney General in such cases. Provisions of this nature already exist in the *Judiciary Act 1903* (Cth) in relation to cases arising under the Commonwealth Constitution or involving its interpretation.[133] Regardless of whether such reform occurs, the divergent views in *Shaw* demonstrate the need for clarification of the applicability and scope of the *Hardiman* principle.

Procedural fairness

In *Annetts v McCann*[134] Mason CJ, Deane and McHugh JJ held that it 'could now be taken as settled that, when a statute confers power upon a public official to destroy, defeat or prejudice a person's rights, interests or legitimate expectations, the rules of natural justice regulate the exercise of that power unless they are excluded by plain words of necessary intendment'.[135] The Court held that a coronial inquiry was subject to procedural fairness, the requirements of which were not excluded by the WA Coroners Act. Personal reputation was an interest which entitled the appellants to have an opportunity to demonstrate why an adverse finding that may affect their reputations should not be made.[136]

Following this decision, the High Court held in *Ainsworth v Criminal Justice Commission*[137] that when determining whether a duty to accord procedural fairness exists, what is decisive is the nature of the power, not the character of the proceeding which attends its exercise.[138] Reputation, whether personal, business or commercial, was an interest that attracted the rules of procedural fairness. The Queensland Criminal Justice Commission had a duty to observe procedural fairness in preparing its report, which was not affected by the fact that the Commission did not have power to implement its recommendations or that the appellants could challenge the adverse recommendations before a parliamentary committee.[139]

The obligations of ICAC to comply with the requirements of procedural fairness have been considered in a number of cases. In *Glynn v ICAC* [140] the Supreme Court held that ICAC was bound to observe the rules of natural justice and that a party potentially affected by an adverse finding should have the opportunity to meet it by submissions and evidence.[141] However, natural justice did not require ICAC to formulate and notify the parties of its precise tentative conclusions at the commencement of either the inquiry or the presentation of oral submissions, or to follow formal rules of pleadings and particulars as would be the case in adversarial proceedings.[142] Similarly, the Court of Appeal accepted in *Dainford v ICAC*[143] that ICAC was obliged to observe the requirements of procedural fairness, but held that because the parties had been given the opportunity to make submissions in relation to ICAC's tentative conclusions, there was no denial of procedural fairness in not being provided with a copy of ICAC's report prior to its publication.[144]

The application of the requirements of procedural fairness to ICAC was given more detailed consideration in *ICAC v Chaffey.*[145] In that case, the Court of Appeal considered whether procedural fairness required the evidence of a witness who had made allegations about police corruption to be heard in private, on the basis that the witness was highly unreliable and was unwilling to disclose certain information, such as the identity of other criminal associates, which would permit his allegations to be properly tested. The trial judge had declared that it was contrary to the principles of natural justice for ICAC to permit its counsel assisting to disclose the substance of the witness' allegations about the respondents in opening submissions and to permit the witness to give evidence in public in circumstances where ICAC was aware that the witness was likely to refuse to answer material questions.

The Court of Appeal recognised that there were clear competing interests in the case. In the words of Mahoney JA:

> It is undesirable that apparently respectable people holding positions of public responsibility should be subjected to the ordeal of facing serious allegations from witnesses who begin the hearing at least with no bank of credit as it were, allegations which might seriously affect or even destroy the career of their subject and which can only be met by a simple contest of oath against oath. On the other hand, particularly having regard to the charter of this Commission in exposing corruption in the public office, it may be that some allegations are so serious and go so deeply to the heart of the administration of the law in this State that it would be unconscionable for the Commission to take, of its own accord, the decision to suppress them rather than allowing them to be made and contested in the public forum.[146]

Gleeson CJ also commented that, While it should not be assumed that what is required in a court is also necessary for an administrative body, there were 'powerful reasons why curial justice is administered openly, even if that involves damage to reputation'.[147] Those reasons included the need for public confidence in the operations of ICAC and the assistance that the publicity potentially surrounding the hearing might bring to the investigative process.[148]

Gleeson CJ was of the view that s 31 of the ICAC Act conferred an open discretion on ICAC to determine whether the hearing was conducted in public or in private, subject to the statutory qualification that regard must be had to the protection of the public interest.[149] His Honour concluded that although the potential damage to reputation caused by a public hearing enlivens the requirement to observe the rules of natural justice, ideas of fairness in judicial procedure did 'not encompass a requirement to protect people from adverse publicity'.[150] ICAC had consciously weighed the public interest in openness of proceedings against the potential harm to reputation that could result, so that there had not been a denial of procedural fairness.[151] Mahoney JA came to the same conclusion.[152]

Kirby P dissented in the matter, holding that procedural fairness required the witness' evidence to be heard in private. Given that there were known limitations on the procedures by which the respondents would be able to defend their reputations, there was only one available way in which ICAC could lawfully exercise its discretion to conduct the hearing in public or in private.[153] His Honour concluded by making a strong statement about the importance of giving appropriate weight to the potential impact upon citizens' reputations in applying the requirements of procedural fairness in this context, as follows:

> The public interest upholds the work of the ICAC to investigate "corrupt conduct". But it equally defends the reputations of citizens who are accused by a convicted multiple offender who gives his evidence under conditions that expose those accused to calumny and vilification While limiting significantly their ability to test and answer such accusations. I do not accept that our law is without a remedy in such circumstances. Parliament envisaged, for such cases, that the hearing should be in private or the names protected. Procedural fairness required nothing less. Natural justice forbade, in the circumstances, the conduct of an inquiry in public in which a notorious criminal secured a free kick against persons whom he accused in public but denied the chance of fully testing and answering in public those accusations. This Court should defend the entitlement of those accused to be protected from such harm.[154]

Although I consider the view of the majority in *Chaffey* to be the preferable one, this case demonstrates the difficult balancing exercise that is required to be undertaken in considering the requirements of procedural fairness in the context of investigative bodies.

Disclosure of and access to information held by investigative bodies

Various limits are placed on the disclosure of information by investigative bodies. Subject to some listed exceptions, the Ombudsman and officers of the Ombudsman may not disclose any information[155] and are not competent or compellable to give evidence or produce any document in legal proceedings in respect of information obtained in the course of their office.[156] Officers of PIC must not generally make a record of, nor divulge or communicate to

any person, information acquired in exercising their functions, except for the purposes of the PIC Act.[157] Further, those officers cannot be required by a court to produce any document or other thing that has come into their possession in exercising their statutory functions, nor to divulge any matter or thing that has come to their notice, except for specified purposes.[158] The ICAC Act contains almost identical provisions to those in the PIC Act.[159] ICAC, PIC and the Ombudsman are also exempt from the operation of the *Freedom of Information Act 1999* ('the FOI Act') in relation to specified functions, including their complaint handling, investigative and reporting functions.[160]

The provisions exempting ICAC from the operation of the FOI Act were considered by the Appeal Panel of the ADT in *McGuirk v ICAC*.[161] The appellant had requested access to a report of an ICAC Committee under the FOI Act. ICAC had declined to make a determination as to whether to grant access to the report under s 24 of the FOI Act, relying on s 9, which provides that any body specified in Schedule 2 is exempt from the operation of that Act in relation to such functions as are specified therein. ICAC is listed in Schedule 2 in relation to its 'corruption prevention, complaint handling, investigative and report functions'. At first instance, the ADT found that the requested report related to ICAC's specified functions, so that the application for access to the document attracted the operation of s 9. Accordingly, it concluded that it did not have jurisdiction to hear the matter.

The Appeal Panel stated that s 9 is 'a general provision which exempts ICAC from the operation of the FOI Act in relation to certain functions'.[162] However, it held that because ICAC was an 'agency' within the terms of s 6 of the FOI Act, it was subject to every provision in the FOI Act relating to agencies. This included its obligation to determine whether access to a document should be given or refused under s 24 of the FOI Act.[163] The Appeal Panel concluded that, given s 53(1) of the FOI Act provides that a person who is aggrieved by a determination made by an agency made apply to the ADT for a review of that determination, the ADT had jurisdiction to hear the matter. The consequence of this decision appears to be that all bodies listed in Schedule 2 of the FOI Act must comply with the provisions in that Act relating to agencies, even with respect to their exempt functions. In my view, there is considerable doubt about the correctness of this decision. A summons appealing against it has been filed in the Supreme Court.

Privative clauses

Neither the ICAC Act nor the PIC Act contains privative clauses. However, the *Ombudsman Act 1974* contains a privative clause, s 35A, the meaning and scope of which has been considered in a number of cases. That section provides:

(1) The Ombudsman shall not, nor shall an officer of the Ombudsman, be liable, whether on the ground of want of jurisdiction or on any other ground, to any civil or criminal proceedings in respect of any act, matter or thing done or omitted to be done for the purpose of executing this or any other Act unless the act, matter or thing was done, or omitted to be done, in bad faith.

(2) Civil or criminal proceedings in respect of any act or omission referred to in subsection (1) shall not be brought against the Ombudsman or an officer of the Ombudsman without the leave of the Supreme Court.

(3) The Supreme Court shall not grant leave under subsection (2) unless it is satisfied that there is substantial ground for the contention that the person to be proceeded against has acted, or omitted to act, in bad faith.

However, s 35B of the Ombudsman Act provides that where any question arises as to the jurisdiction of the Ombudsman to conduct an investigation, the Ombudsman, or any interested party, may apply to the Supreme Court for a determination of that question.

In *Ainsworth v Ombudsman*,[164] it was argued that the term 'civil proceedings' in s 35A(1) did not encompass judicial review proceedings, so that the plaintiff was not precluded from seeking judicial review of the Ombudsman's decision not to investigate further complaints the plaintiff had made regarding the conduct of a number of police officers. In interpreting those words, Enderby J had regard to a decision of the UK Court of Appeal, *Ex parte Waldon*[165] in which it was concluded that the words 'civil proceedings' in a privative clause in the *Mental Health Act 1983* (UK) did not apply to proceedings for judicial review and that the respondent was not 'liable to' those proceedings through his exposure to prerogative or declaratory relief. Enderby J also referred to the High Court case of *Cheney v Spooner*,[166] in which Starke J interpreted the term 'civil proceedings' in the *Service and Execution of Process Act 1901-1924* (Cth) to include 'any application by a suitor to a court in its civil jurisdiction for its intervention or action'.[167]

Enderby J distinguished *Waldron* on the basis that the UK legislation, which was concerned with a loss of civil liberties, including detention orders, was fundamentally different from the Ombudsman Act. His Honour emphasised that the office of the Ombudsman was a unique institution that did not deal directly with legal rights:

> It has always been considered that the efficacy of his office and his function comes largely from the light he is able to throw on areas where there is alleged to be administrative injustice and where other remedies of the courts and the good offices of members of the parliament have proved inadequate. … When intervention by an Ombudsman is successful, remedial steps are taken not because orders are made that they be taken but because the weight of its findings and the prestige of the office demands that they be taken.[168]

Although his Honour noted that the courts construe privative clauses strictly,[169] he could see 'no reason at all' – when regard was had to the nature and role of the office of the Ombudsman – why the operation of s 35A should be read down in the way it had been done in *Ex parte Waldron*.[170] The legislation considered in *Cheney v Spooner* was 'light years closer by way of analogy than the United Kingdom Mental Health Act and the problem it addresses'.[171] His Honour construed s 35B of the Ombudsman Act to apply only where there was doubt about the jurisdiction of the Ombudsman to embark upon a contemplated investigation. Section 35A prevented all other civil proceedings being brought against the Ombudsman.[172] As discussed below, there has been some indication that the courts may be willing to re-open this issue.

In *The Ombudsman v Koopman*[173] the Court of Appeal considered a different challenge to the applicability of s 35A, namely whether it was impliedly repealed by s 55 of the *Privacy and Personal Information Protection Act 1998* ('the PPIP Act'). The case arose out of a complaint that the Ombudsman had unlawfully disclosed the respondent's personal information in the course of conducting an investigation. Following an unsuccessful – for the respondent – review by the Ombudsman's Office of the Ombudsman's conduct, the respondent lodged an application in the ADT pursuant to s 55 of the PPIP Act. That section provides that a person who is not satisfied with the findings of an internal review or action taken by a public sector agency in relation to an alleged contravention of the PPIP Act may apply to the ADT for review of that conduct. The ADT held that s 35A must be read subject to the PPIP Act, so that it had jurisdiction to hear the case. It was not in dispute that the ADT proceedings were 'civil proceedings' within the terms of s 35A.

Mason P, Meagher and Santow JJA held that s 55 of the PPIP Act did not expressly or impliedly repeal s 35A of the Ombudsman Act, nor modify the general immunity that it conferred. Indeed, their Honours concluded that the provisions were not inconsistent,

because it was possible to comply with both Acts. Section 35A merely imposed a condition precedent to the utilisation of the process in s 55 of the PPIP Act by requiring leave to be obtained from the Supreme Court to bring proceedings against the Ombudsman.

More recently, in *The Ombudsman v Laughton*[174] the Court of Appeal considered whether an appeal to the Government and Related Employees Appeal Tribunal ('GREAT') under s 20 of the GREAT Act 1980 was prohibited by s 35A of the Ombudsman Act. The respondent was an unsuccessful applicant for a position in the office of the Ombudsman. The successful applicant for the vacant office was appointed under s 17 of the Public Sector Employment and Management Act 2002 ('PSEM Act'). Section 20 of the GREAT Act provides that an employee, being an officer within the meaning of the PSEM Act, may appeal to GREAT against a decision of an employer to appoint another officer to fill a vacant office. Section 32(1) of the Ombudsman Act provides that staff may be employed by the Ombudsman 'under and subject to the *Public Sector Management Act 1988'*, which is to be read as a reference to the PSEM Act.[175]

Spigelman CJ noted that there was a tension between ss 32 and 35A of the Ombudsman Act, given that 'employment under and subject to' the PSEM Act, as provided for in s 32, brought with it a right of appeal against a decision of the Ombudsman under s 20 of the GREAT Act. If such an appeal fell within s 35A of the Ombudsman Act, in the sense that they were 'civil proceedings in respect of a … thing done … for the purpose of executing' the power of appointment in s 17 of the PSEM Act, then the staff of the Ombudsman's office would be employed under the PSEM Act, but with no right to appeal to GREAT. In that sense, the staff would not be 'employed under and subject to' the PSEM Act as required by s 32 of the Ombudsman Act.[176]

The Ombudsman argued that there was no tension or inconsistency between ss 32 and 35A of the Ombudsman Act. He submitted that s 35A merely imposed a precondition on the exercise of the right of appeal under s 20 of the GREAT Act, namely that leave of the Supreme Court must be obtained. In contrast to the Court's acceptance of the equivalent argument in *Koopman*, Spigelman CJ rejected the argument that there was no tension or inconsistency between the two provisions, on the basis that the very limited circumstances in which the Supreme Court was able to grant leave were such as to deprive the right of appeal under s 20 of the GREAT Act of almost all of its intended content.[177] His Honour also noted that, While the efficacy of an appeal to GREAT may be affected by other sections in the Ombudsman Act – that prevented the Ombudsman and his officers from disclosing information, giving evidence or producing documents in legal proceedings obtained in the course of their office[178] – this factor was not of determinative weight when considering whether s 35A precluded an appeal to GREAT.[179]

Spigelman CJ stated that the tension between the two provisions could be resolved by reading the Ombudsman Act as a whole and applying the principle that Parliament intends that different sections of the same Act will operate harmoniously, requiring a process of reconciliation.[180] His Honour also relied on the maxim of statutory construction *generalia specialibus non derogant*, which, he stated, applies with particular force where a tension arises between two sections of the same Act.[181] His Honour considered that, although there is sometimes a 'difficulty in deciding which is the general and which is the special provision' for the purposes of applying this maxim, s 35A was a general provision granting the Ombudsman immunity from suit and s 32 was a specific provision with respect to the employment of staff.[182] Spigelman CJ concluded that s 35A was 'concerned with the exercise by the Ombudsman of his or her statutory powers and functions with external effect',[183] the purpose of which was to protect the Ombudsman's substantive functions, such as his investigatory and reporting functions. Section 32, which was concerned with the internal employment of staff, was not of that nature. Accordingly, his Honour concluded that an appeal under s 20 of the GREAT Act was not a civil proceeding in respect of a thing done

'for the purpose of executing this or any other Act', so that it was not prohibited by s 35A. Handley JA took a similar approach to the Chief Justice.

Basten JA agreed with the conclusions of Spigelman CJ and Handley JA, but stated that the maxim *generalia specialibus non derogant* was difficult to apply, preferring to apply the provisions of the *Interpretation Act 1987*.[184] His Honour referred to various cases in support of the proposition that the courts should construe privative clauses jealously, noting that it would be surprising if a privative clause were interpreted to override the protections generally applicable to public service employment.[185] Interestingly, Basten JA also noted his tentative view that an appeal under s 20 was not a 'civil proceeding' to which the Ombudsman was 'liable' for the purposes of s 35A.[186] His Honour distinguished *Ainsworth v Ombudsman* on the basis that it concerned judicial review proceedings relating to a statutory function.

Despite the fact that Basten JA distinguished *Ainsworth,* there is some doubt, in my view, as to whether a court would now consider the Ombudsman to be 'liable' not only to proceedings before GREAT, but also to judicial review proceedings, particularly in view of the strict approach that has been taken to privative clauses in recent years.[187] This view is supported by the statements made by Kirby P in *Botany Council*, with whom Sheller and Powell JJA agreed, who appeared to consider the meaning and applicability of ss 35A and 35B to judicial review proceedings to be open questions, expressing the view that they were 'sufficiently controversial to warrant postponing those questions to an appeal where the application of the sections must be decided'.[188]

Availability of relief

The relief available in judicial review proceedings is often criticised as being inadequate in protecting against or redressing unlawful administrative action, particularly where the interest that is about to be or has been damaged is a person's reputation.[189] This is particularly the case in relation to the actions of investigative tribunals, because not all of the prerogative writs are available.

Certiorari

In *Ainsworth v Criminal Justice Commission*,[190] Mason CJ, Dawson, Toohey and Gaudron JJ held that although the appellants had been denied natural justice by the Criminal Justice Commission, and its report was likely to have devastating consequences for the appellants' personal and business interests, there was no legal effect or consequence attaching to the report. Therefore, certiorari did not lie to correct the failure of the Commission to comply with its duty to proceed in a way that was procedurally fair to the appellants.[191] *Ainsworth* was applied by the NSW Court of Appeal in *Greiner.* Gleeson CJ explained the unavailability of certiorari to quash the report of ICAC in the following terms:

> That is because, technically, determinations of the Commission, although they may be extremely damaging to the reputations of individuals, do not have legal consequences. A determination of the Commission does not create or affect legal rights or obligations.[192]

Accordingly, certiorari does not lie to quash the report of an investigative body where it merely exposes misconduct for the purpose of informing the public. Certiorari will only lie where a report or other action of an investigative body has immediate legal consequences or alters rights, interests or liabilities, including where an action of an investigatory body is a pre-condition to or prevents another course of action being taken.[193]

Aronson, Dyer and Groves describe the High Court's decision in *Ainsworth* as a 'major setback for certiorari law'. They note three 'puzzling' aspects of the High Court decision in that case, as follows:

> First, the court had already acknowledged that the applicant's interests were sufficiently affected to warrant the imposition of an obligation to observe procedural fairness. Why demand any greater impact, or more tangible rights, when it comes to the test for certiorari? Secondly, the court granted declaratory relief. It is difficult to understand why a court will refuse to quash that which it is prepared to condemn. Thirdly, and most remarkable of all, the court said that prohibition would have gone to prevent the commission from presenting an adverse report in violation of its natural justice obligations if the applicant had been able to sue early enough.[194]

In my view, these criticisms regarding the test for certiorari are well-founded. If the appellants' interests in their reputations were sufficient to sustain granting declarations and prohibition, it is difficult to discern why they were not sufficient to sustain granting certiorari. In *Shaw*, Basten JA noted these concerns, but proceeded on the basis that, if PIC prepared a report that was damaging to the respondent's reputation, the respondent would not be able to obtain certiorari after it had been published. His Honour noted, however, that this assumption was favourable to the respondent in that case, because it provided a powerful discretionary reason for granting prohibition if an excess of jurisdiction were threatened.[195]

Prohibition

In *Shaw* Basten JA considered whether it was premature to grant restraining orders to prevent PIC from taking a specific step that it was contended would be beyond power, on the basis that PIC might decide not to take the relevant step or may think it inappropriate for other reasons. His Honour noted that those factors have been treated primarily as being relevant to the court's discretion as to whether to grant relief, as opposed to precluding the exercise of the court's supervisory jurisdiction.[196] Basten JA went on to state:

> Where there is a concern that a tribunal may be about to exceed its jurisdiction, it may be appropriate to craft relief in a manner which does not prohibit the carrying out of the statutory powers, but merely imposes a limit to prevent jurisdiction being exceeded. The declarations made by the primary judge in the present case were designed to have that effect. Sometimes this course may not be appropriate, but where, as is arguably the case in this matter, no effective relief will be available if jurisdiction is exceeded and the Tribunal has indicated that it is considering acting in a manner which may exceed jurisdiction, such relief can be appropriate.

The occasion for granting relief in this form in the present case is that a report of the Commission is not subject to any form of appeal and, because it is not a precondition to any exercise of any power, will not be subject to quashing by certiorari, once made.[197]

In *Balog* the High Court restrained ICAC from including in its report a statement of any finding by it that the appellants were or may have been guilty of a criminal offence or corrupt conduct, although it did so in the form of a declaration.

Mandamus

In *Ainsworth v Criminal Justice Commission*[198] the High Court held that mandamus was not available to compel the Criminal Justice Commission to conduct a further investigation that did comply with the requirements of procedural fairness, as the Commission had no statutory duty to conduct an investigation. The Court stated:

> The Court should not make an order which constrains the Commission's freedom to decide that it will not pursue an investigation when the Court can make an order which will otherwise sufficiently protect the appellants. In saying that a declaration will otherwise sufficiently protect the appellants, we are mindful that this is not a case in which the appellants seek a writ of mandamus to compel the

> performance of a duty to do something which, if done, will or could result in the appellants obtaining a tangible benefit or entitlement such as a licence or franchise.[199]

As Allars notes, this position accords with the general reluctance of judges to interfere with discretionary decisions regarding the allocation of resources of administrative bodies,[200] including PIC, ICAC and the Ombudsman.

Declarations and injunctions

The High Court held that declaratory relief was available in *Ainsworth v Criminal Justice Commission*. The Court stated:

> It is now accepted that superior courts have inherent power to grant declaratory relief. It is a discretionary power which "[i]t is neither possible nor desirable to fetter … by laying down rules as to the manner of its exercise." However, it is confined by the consideration which mark out the boundaries of judicial power. Hence, declaratory relief must be directed to the determination of legal controversies and not to answering abstract or hypothetical questions. The person seeking relief must have "a real interest" and relief will not be granted if the question "is purely hypothetical", if relief is "claimed in relation to circumstances that [have] not occurred and might never happen" or if "the Court's declaration will produce no foreseeable consequences for the parties".[201]

Given that the report had practical consequences for the appellants' reputations, the question in that case was not purely hypothetical. Therefore, their Honours concluded that it was appropriate to issue a declaration that the appellants were denied natural justice.

The cases reveal that declaratory orders are the usual form of relief where NSW investigative bodies have or are about to exceed their jurisdiction. Declaratory orders have been made by the High Court in *Balog,* the Court of Appeal in *Greine,r* and the Supreme Court in *Woodham,* and at first instance in *Shaw.* In contrast, the courts have been reluctant to grant injunctions restraining investigative bodies from performing their functions.[202]

Conclusion

This sketch of the landscape of administrative law in New South Wales has been conducted through the prism of the case law regarding PIC, ICAC and the Ombudsman. It suggests that the courts have taken very different approaches in interpreting the powers of these three bodies. Indeed, it appears that the courts have adopted a strict approach in construing the ICAC Act, a broad approach in interpreting the Ombudsman Act and an 'ordinary and natural meaning' approach in construing the PIC Act. The cases also reveal, amongst other things, continuing uncertainties regarding the application and scope of the *Hardiman* principle; the difficult balancing exercise involved in applying the requirements of procedural fairness to investigative bodies; the inadequacy of relief to redress unlawful administrative action undertaken by their officers, particularly due to the unavailability of certiorari to quash their reports; and questions about the interpretation of particular statutory provisions, such as the privative clause in the Ombudsman Act and the sections exempting entities from the operation of the FOI Act.

The case law also reveals the striking impact that policy considerations may have on the exercise of statutory interpretation, such as judicial concern about the potential impact of coercive powers on individual reputations, the misrepresentation of determinations made by investigative bodies in the media and the importance of the role and functions of investigative bodies in exposing misconduct, corruption and maladministration. Given the clear competing interests at stake in this context, this is not surprising. As Claude Monet once said, a 'landscape does not exist in its own right, since its appearance changes at every moment; but the surrounding atmosphere brings it to life'.[203]

Endnotes

1 PIC Act s 6(1),.
2 PIC Act., s 13(1),
3 PIC Act s 5(1),.
4 PIC Act s 22(1),.
5 PIC Act ss 23(1) and (2),. PIC also has power under s 24 to conduct a preliminary investigation for various purposes, including for the purpose of assisting PIC to discover or identify conduct that might be the subject of a more complete investigation.
6 PIC Act ss 32 and 33
PIC Act ss 20(1)
8 PIC Act s 25
9 PIC Act s 26. Note, however, that in some circumstances, PIC must set aside a requirement to produce any statement, document or thing where it appears that a person has a ground of privilege and the person does not appear to consent to compliance with the requirement. See ss 27 and 28.
10 PIC Act s 29,. However, in some circumstances, PIC must not exercise its powers under that section where it appears that a person has a ground of privilege and the person does not appear to consent to the inspection of the premises or the production of the document or thing. See ss 29(3) and 29(4).
PIC Act s 38.
12 PIC Act s 39, PIC Act.
13 PIC Act s 45.
14 PIC Act s 40(2). However, s 40(3) provides that such evidence is not to be used against the person in any civil or criminal proceedings, subject to the exceptions in ss 40(3) and(4).
15 PIC Act s 83. In particular, PIC may refer the matter for investigation to the Commissioner of Police under s 77 PIC Act.
16 PIC Act s 96,.
17 PIC Act s 97(3)
18 ICAC ACT s 4(1).
19 ICAC Act s 13(1)
20 ICAC Act s 14(1)
21 ICAC Act.s 19(1),
22 ICAC Act.s 20. ICAC also has power under s 20A to conduct a preliminary investigation for various purposes, including for the purpose of assisting ICAC to discover or identify conduct that might be the subject of a more complete investigation.
23 ICAC Act.ss 30 and 3.
24 ICAC Act s 17(1).
ICAC Act s 21.
ICAC Act. s 22.. Note, however, that in some circumstances, ICAC must set aside a requirement to produce any statement, document or thing where it appears that a person has a ground of privilege and the person does not appear to consent to the inspection of the premises or the production of the document or thing. See ss 24 and 26.
27 ICAC Act.s 23. However, in some circumstances, ICAC must not exercise its powers under s 23 where it appears that a person has a ground of privilege and the person does not appear to consent to the inspection of the premises or the production of the document or thing. See s 25.
28 ICAC Act s 35.
29 S ICAC Act.s36..
30 ICAC Act. S 40.
31 ICAC Act. a 37(2). However, s 37(3) provides that such evidence is not to be used against the person in any civil, criminal or disciplinary proceedings, subject to the exceptions in s 37(4).
ICAC Act, s 53.
ICAC Act. s 13(3).
ICAC Act s 13(3A).
35 ICAC Act.ss 13(4) and 74B(1),.
36 S ICAC Act.s 74..
37 ICAC Act.s 74A(1). However, there are greater restrictions on the matters about which ICAC may report in relation to a Minister or a member of a House of Parliament: see ss 13(4) and (5) of the ICAC Act.
38 ICAC Act.Section 74A(2), ICAC Act. 'Affected person' is defined in s 74A(3) to mean a person described as such in the reference made by both Houses of Parliament or against whom, in ICAC's opinion, substantial allegations have been made in the course of or in connection with the investigation concerned.
39 Ombudsman Act , se6(1).
40 Section 5(1) defines 'public authority' to include any person holding a statutory office, any department or public servant employed by the department and any statutory body representing the Crown.
Ombudsman Act s 13(1). The Ombudsman also has power under s 13AA to conduct a preliminary investigation for various purposes, including deciding whether to make particular conduct the subject of an investigation.
42 See s 26(1), Ombudsman Act.
43 Ombudsman Act ss 26(1) and 26(3).

44 Ombudsman Act s 26
45 Ombudsman Act s 28,.
46 Ombudsman Act s 27.
47 Ombudsman Act s 31.
48 Ombudsman Act s 17.
49 Ombudsman Act s 18,.
50 Ombudsman Act s 20. Note, however, that in some circumstances, the Ombudsman must set aside a requirement to produce a statement, document or thing, or to exercise his or her powers under s 20, where it appears that a person has a ground of privilege and the person does not appear to consent to compliance with the requirement. See ss 21, 21A and 21B. See also s 22, which concerns Cabinet documents.
51 Ombudsman Act s 13A,.
52 Ombudsman Act s 19.
53 Ombudsman Act ss 31AB and 31AC.
54 See the definitions of 'designated government agency' and 'designated non-government agency' in s 25A of the Ombudsman Act.
55 Ombudsman Act s 25C.
56 See the definitions of 'reportable allegation', 'reportable conviction' and 'reportable conduct' in s 25A Ombudsman Act.
57 Ombudsman Act s 25B.
58 Ombudsman Act s 25E. Under s 25F, the results of an investigation monitored by the Ombudsman must be reported to him or her.
59 Ombudsman Act s 25G.
60 (1990) 169 CLR 625.
61 Ibid at 635.
62 Ibid at 636.
63 Ibid at 635-636.
64 M Allars, 'Reputation, Power and Fairness: A Review of the Impact of Judicial Review upon Investigative Tribunals' (1996) 24 Federal Law Review 235 at 249.
65 Ibid.
66 (1992) 28 NSWLR 125.
67 Ibid at 129-130.
68 Ibid at 129-130.
69 Ibid at 147.
70 Ibid at 146-147.
71 Ibid at 147-148.
72 Ibid at 180.
73 Ibid at 186.
74 Ibid at 179 and 192.
75 Ibid at 192-193.
76 Ibid at 173-174.
77 See M Allars, 'In Search of Legal Objective Standards: The Meaning of Greiner v Independent Commission Against Corruption' (1994), 6(1) Current Issues in Criminal Justice 107.
78 (1993) 30 ALD 390.
79 Ibid at 394.
80 Ibid at 395.
81 Ibid at 397.
82 (1992) 28 NSWLR 125 at 180.
83 (1995) 37 NSWLR 357.
84 Ibid at 367-368.
85 Ibid at 368-369.
86 [2000] NSWSC 771.
87 Ibid at [43].
88 Ibid at [56].
89 Ibid at [35] and [61].
90 Ibid at [80].
91 Ibid at [83].
92 [2006] NSWCA 165.
93 Ibid at [52].
94 Ibid at [90].
95 Shaw v PIC (2005) 155 A Crim R 345 at 349, quoted in ibid at [91].
96 Shaw v PIC (2005) 155 A Crim R 345 at 361.
97 Ibid at 362.
98 PIC v Shaw [2006] NSWCA 165 at [26]. Section 16(2) provides that PIC may not make a finding or recommendation that a person is guilty of or has committed a criminal offence or disciplinary offence.
99 Ibid at [26].
100 Ibid at [17] and [26]-[32].
101 Ibid at [27]-[28].

102 Ibid at [33].
103 Ibid at [95]. By way of example, his Honour referred to the restriction on witnesses relying on the privilege against self-incrimination.
104 Ibid at [92]-[93], quoting McHugh's statements in Malika Holdings Pty Ltd v Stretton (2001) 204 CLR 290 at 298.
105 Ibid at [76].
106 Ibid at [103].
107 Ibid at[103].
108 Ibid at [104].
109 (1980) 144 CLR 13.
110 Ibid at 35-36.
111 (1982) 150 CLR 666.
112 Ibid at 681.
113 Ibid at [36].
114 Ibid at [40].
115 Ibid at [41].
116 Ibid at [42].
117 Ibid at [43].
118 Ibid at [111].
119 BTR PLC v Westinghouse Brake and Signal Company (Australia) Ltd (1992) 34 FCR 246.
120 See Shadforths Ltd v Human Rights and Equal Opportunity Commission (1991) 32 FCR 303; Commonwealth v Human Rights and Equal Opportunity Commission (1995) 41 ALD 27.
121 Extracted from a letter from Commissioner Cole to the Court, quoted in 'Cole to challenge role in AWB court case', The Sydney Morning Herald, 25 July 2006.
122 For a further discussion of the relevant policy considerations, see E Campbell, 'Appearances of Courts and Tribunals as Respondents to Applications for Judicial Review' (1982) 56 Australian Law Journal 293.
123 Cairns Port Authority v Albietz [1995] 2 Qd R 470.
124 Australian Conservation Foundation Inc v Forestry Commission (1988) 19 FCR 127.
125 Merck & Co Inc v Sankyo Co Ltd (1992) 23 IPR 415.
126 BTR PLC v Westinghouse Brake and Signal Company (Australia) Ltd (1992) 34 FCR 246.
127 (1995) 61 FCR 370 at 382-384.
128 For a further discussion of the bodies to which the Hardiman principle has been applied, see E Campbell, 'Role of Respondents to Applications for Judicial Review' (1998) 6 Australian Journal of Administrative Law 5 at 6-8.
129 (1998) 193 CLR 72.
130 Ibid at 77-78.
131 Ibid at 126.
132 For a discussion of the circumstances in which Lockhart and Hill JJ considered it appropriate for the Australian Securities Commission actively to defend its decisions, see BTR PLC v Westinghouse Brake and Signal Company (Australia) Ltd (1992) 34 FCR 246 at 265.
133 Sections 78A and 78B of the Judiciary Act.
134 (1990) 170 CLR 596.
135 Ibid at 598 per Mason CJ, Deane and McHugh JJ.
136 Ibid at 608 per Brennan J.
137 (1992) 175 CLR 564.
138 Ibid at 576.
139 Ibid at 577-579.
140 (1990) 20 ALD 214.
141 Ibid at 215.
142 Ibid at 218.
143 (1990) 20 ALD 233.
144 Ibid at 234-235.
145 (1993) 30 NSWLR 21.
146 Ibid at 56.
147 Ibid at 29.
148 Ibid at 30.
149 Ibid at 26. His Honour also noted that the ICAC Act required ICAC to regard the protection of the public interest and the prevention of breaches of public trust as its paramount concerns in exercising its functions.
150 Ibid at 29.
151 Ibid at 31.
152 Ibid at 58.
153 Ibid at 49.
154 Ibid at 52-53.
155 Sections 35(2) of the Ombudsman Act 1976.
156 Section 35(8) of the Ombudsman Act 1976.
157 Section 56(2) of the PIC Act. See also the exceptions listed in s 56(4).
158 Section 56(3) of the PIC Act. See also the exceptions listed in s 56(4).

159 Section 111 of the ICAC Act.
160 Sections 9 and Sch 2 of the FOI Act.
161 [2006] NSWADTAP 17.
162 Ibid at [13].
163 Ibid.
164 (1988) 17 NSWLR 276.
165 [1986] QB 824.
166 (1929) 41 CLR 532.
167 Ibid at 538. Isaacs and Gavan Duffy JJ also stated at 536-537 that a 'proceeding' was 'merely some method permitted by law for moving a Court or judicial officer to some authorised act, or some act of the Court or judicial officer'.
168 Ainsworth v Ombudsman (1988) 17 NSWLR 276 at 283-284.
169 Ibid at 282.
170 Ibid at 287.
171 Ibid at 288.
172 Ibid.
173 (2003) 58 NSWLR 182.
174 (2005) 64 NSWLR 114.
175 See cl 2(b) of Sch 4 to the PSEM Act.
176 (2005) 64 NSWLR 114 at 116-117.
177 Ibid at 117.
178 See ss 34 and 35 of the Ombudsman Act.
179 (2005) 64 NSWLR 114 at 117-118.
180 Ibid at 118, citing Institute of Patent Agents v Lockwood [1894] AC 347 at 360 and Ross v The Queen (1979) 141 CLR 432 at 440.
181 Ibid at 118, citing Automobile Club v Sydney City Council (1992) 27 NSWLR 282 at 294. Spigelman CJ also commented that, although this maxim applies where two provisions cannot be reconciled, this does not prevent the underlying principle being invoked in determining whether a conflict is irreconcilable.
182 Ibid.
183 Ibid at 119.
184 Ibid at 120. His Honour specifically referred to s 33 of the Interpretation Act, which provides that a construction of a provision which would promote its underlying purpose or object is to be preferred.
185 Ibid at 121.
186 Ibid at 122.
187 See, for example, Mitchforce v Industrial Relations Commission (2003) 57 NSWLR 212, in which the Court of Appeal held that a privative clause restricting review of decisions, including purported decisions, of the NSW Industrial Relations Commission, did not entirely extinguish the Court's supervisory jurisdiction. The Court could still review decisions made in breach of one of the conditions set out in R v Hickman; Ex parte Fox and Clinton (1945) 70 CLR 598.
188 (1995) 37 NSLW 357 at 358. See also His Honour's comments at 366.
189 M Allars, 'Reputation, Power and Fairness: A Review of the Impact of Judicial Review Upon Investigative Tribunals' (1996) 24 Federal Law Review 235 at 278-279.
190 (1992) 175 CLR 564.
191 Ibid at 277-278.
192 (1992) 28 NSWLR 125 at 148.
193 See Ainsworth v Criminal Justice Commission (1992) 175 CLR 564 at 580-581; Mahon v Air New Zealand [1984] AC 808; (1983) 50 ALR 193.
194 Aronson, Dyer & Groves, Judicial Review of Administrative Action (3rd ed, 2004) at 709.
195 [2006] NSWCA 165 at [66]-[67].
196 Ibid at [58]. See also Aronson, Dyer & Groves, Judicial Review of Administrative Action (3rd ed, 2004) at 696-697.
197 Ibid at [64]-[65].
198 (1992) 175 CLR 564.
199 Ibid at 580.
200 M Allars, 'Reputation, Power and Fairness: A Review of the Impact of Judicial Review Upon Investigative Tribunals' (1996) 24 Federal Law Review 235 at 280.
201 (1992) 175 CLR 564 at 581-582.
202 See M Allars, 'Reputation, Power and Fairness: A Review of the Impact of Judicial Review Upon Investigative Tribunals' (1996) 24 Federal Law Review 235 at 280-281.
203 "Un paysage, pour moi, n'existe point en tant que paysage, puisque l'aspect en change à chaque moment; mais il vit par ses alentours, par l'air et la lumière, qui varient continuellement": W G C Byvanck, Un Hollandais à Paris en 1891 (1892) at 176

ADMINISTRATIVE LAW: THE NEW SOUTH WALES LANDSCAPE

The Hon Justice Keith Mason AC*

Exploring the genuine differences between judicial review in State and Federal matters would be an interesting topic for a thesis.

Judicial review is a child of the common law that grew up in the untidy garden of the prerogative writs into which there were later plantings in dedicated plots, by Equity in the form of injunctions and statute in the form of declaratory relief.

By contrast, a plaintiff nowadays commences a single proceeding and defers selection of the correct remedy until the final stages of the litigation. Procedural distinctions no longer trouble us in a fused system of justice that concentrates on substance, not form. The modern law of judicial review in Australia is also more articulate about the rule of law principles that underpin it as well as the broad constitutional restraints upon the judicial arm intruding without legislative authority into the affairs of the Executive branch. Merits review and the review of fact finding *per se* are not part of judicial review. Errors of law must be jurisdictional or such as to attract the extraordinary remedies of declaratory or injunctive relief before they become cognisable by the Supreme Court other than in the exercise of appellate power conferred by statute.

Statute has itself modified the tools of trade of judicial review in this State. Part 5 of the *Supreme Court Act 1970* sweeps away the ancient procedures of the prerogative writs and makes substantive changes as well, as with the modifications to the power to quash for error of law on the face of the record found in s 69(3) and (4).

These provisions ensure that the record includes the reasons expressed by the court or tribunal for its ultimate determination. Of course, an error of law must be dispositive before the Supreme Court will concern itself with quashing the decision on which it is based.

The academic thesis that I referred to at the outset would need to consider whether the gentle codification of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) has had any substantive impact on the scope of federal administrative law compared to the situation in States such as ours. I frankly doubt it. I have not overlooked s 13 with its power to require an administrator to provide reasons. In my experience, administrators nearly always leave a paper trail from which reasons (good or bad) can readily be discerned. It would be both rare and 'courageous' (in Sir Humphrey Appleby's sense) to call a Minister to give evidence as to the reasons for a decision. But usually there is a senior public servant who can fill in the gaps in the paper work, if necessary. A government defendant that chose to stand mute in the defence of an improbable decision would be taking a major forensic risk.

The real differences between State and federal administrative law stem from the constitutional underpinning found in s 75 of the Constitution with its reference to what have become known as the 'constitutional writs'. This significant entrenchment of the power of

* *President of the NSW Court of Appeal. Commentary on M G Sexton's paper. AIAL Seminar, Banco Court, Supreme Court of NSW, 30 August 2006.*

judicial review has required the High Court of Australia to maintain a substantial caseload of original jurisdiction in federal matters. Such a load is a cause of concern to observers other than productivity bean counters and those branches of the fourth estate whose role it is to track and expose slackness in the judiciary.

More significantly, s75(v) of the Constitution places certain, as yet not fully revealed, restraints on the power of the Federal Parliament to immunise the federal executive from judicial review.[1]

There is no such toehold in the New South Wales Constitution. It follows that Parliament in this State is generally free to fashion the structure and limits of administrative law as it wishes. Any right of appeal from a body or tribunal is statutory and can therefore be withheld or qualified. In the area of judicial review, the remedies themselves have been changed as already indicated.

But Parliament can go further. It has always been able to ratify excessive or doubtful exercises of executive power. It can also indicate in advance the consequences of departure from the substantive or procedural commands in its enactments. Several statutes contain a provision stipulating that the failure to comply with the Act is to be treated as an irregularity and not to nullify any step in proceedings or the decision that emerges from the proceedings. You will see differing views about the scope and application of such a provision in *Attorney General v World Best Holdings Ltd.*[2]

More traditional privative clauses can still take many forms. Issues have recently cropped up in areas as diverse as adjudication certificates under the *Building and Construction Industry Security of Payments Act 1999*,[3] development consents under the *Environmental Planning and Assessment Act 1979*[4] and medical assessors' certificates under the *Motor Accidents Compensation Act 1999.*[5]

Some privative clauses directly extend executive power beyond the limits of the common law, as with provisions that clearly abrogate the common law duties of basic rationality or procedural fairness. My all time favourite is the clause found in a schedule to the *State Owned Corporations Act 1989* that permits the Governor, on the direction of the voting shareholders of a statutory SOC to: 'remove a director of the SOC from office at any time for any or no reason and without notice'.

One can only imagine how a statutory obligation to provide reasons would operate in relation to a power said to be exercisable for no reason at all.

Other privative clauses work their way through the possible remedies available to dissatisfied citizens, attempting to exclude them one by one in an exhaustive list.

A third technique (and these are not mutually exclusive) is to arm the identified decision itself with a penumbra of immunity, declaring it to be 'final', 'not subject to review' etc. The judicial response to this technique has been to declare that a decision vitiated by jurisdictional error or want of procedural fairness is no decision at all, in the eye of the law. This is the application of the principle of strict construction of privative clauses discussed by Spigelman CJ in *Woolworths Ltd v Pallas Newco Pty Ltd.*[6]

Parliament's riposte to such a reading-down of its statute as regards the Industrial Commission of New South Wales was to extend the judicial exclusion zone to 'purported' decisions. Everyone in this room will be familiar with the jurisprudence commencing with *Mitchforce Pty Ltd v The Industrial Relations Commission of New South Wales*[7] and culminating with the High Court decision in *Fish v Solution 6 Holdings Ltd.*[8] The Court of Appeal was held entitled to make a pre-emptive strike, by way of an order in the nature of

prohibition, to prevent a clearly excessive assumption of jurisdiction. In the course of this saga, the privative clause (s 179 of the *Industrial Relations Act 1996*) was wound back by Parliament, with the consequence that the Court of Appeal will now only have to consider the impact of a 'purported decision' in the unlikely event of contemplated judicial review of a decision of the Commission on an issue of jurisdiction that has not gone to the Full Bench of the Commission in Court Session.

Thus far, the courts have not had to grapple with the constitutional question raised from time to time concerning the validity of a truly expansive privative clause in this State. The foreshadowed arguments focus upon the role of the State Supreme Court under the Federal Constitution, particularly its function as a channel of legal communication to the High Court of Australia in the integrated judicial system identified in *Kable's case*. In *Fish*, the majority of the High Court contented themselves with referring to what they described[9] as a presumption:

> … that a State Parliament does not intend to cut down the jurisdiction of the Supreme Court of that State over matters of a kind ordinarily dealt with by the State Supreme Courts and which, if dealt with by those Courts, are amenable to the appellate jurisdiction of this Court under s 73 of the Constitution.

Those wanting fuel for a constitutional argument would be advised to consult Professor Denise Meyerson's recent article *State and federal privative clauses: Not so different after all***.**[10] I imply no view as to the correctness of her learned opinion.

Last year the annual conference of parliamentary counsel had a competition to select the most draconian privative clause. My nomination, if asked, would have been s 27 of the *General Government Debt Elimination Act 1995*, although I might have had to make a personal disclosure. It provides:

> (1) Nothing in this Act places on any person any obligation enforceable in a court of law or administrative review body.
> (2) Without limiting subsection (1), a failure to comply with a provision of this Act:
> …..
> (b) does not affect the validity of any legislation, and
> (c) does not affect the validity of any action taken by any public official or agency, and
> (d) does not expose any person to civil or criminal liability.
> (3) Accordingly, no court or administrative review body has jurisdiction or power to consider any question involving compliance or non-compliance with this Act.

At this point, the drafters decided not to emulate the *Habeas Corpus Act 1679*[11] which imposed a penalty of £500 recoverable by the aggrieved prisoner on judges who failed to observe its commands.

Administrative law at State level continues to be a fascinating topic.

Endnotes

1 See generally *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476.
2 (2005) 63 NSWLR 557. See also the discussion in *Corbett v New South Wales* [2006] NSWCA 138 in relation to s 80 of the *Interpretation Act 1987* and *Italiano v Carbone* [2005] NSWCA 177.
3 *Brodyn Pty Ltd v Davenport* (2004) 61 NSWLR 421.
4 *Woolworths Ltd v Pallas Newco Pty Ltd* (2004) 61 NSWLR 707.
5 *Brown v Lewis* [2006] NSWCA 87.
6 (2004) 61 NSWLR 707 at 721[69]-[70].
7 (2003) 57 NSWLR 212.
8 [2006] HCA 22.
9 At [33].
10 (2005) 16 PLR 39.
11 31 Car 11 c 2, s 10.