

THE COURTS vs THE PEOPLE: HAVE THE JUDGES GONE TOO FAR?

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INTRODUCTION

It is as well to start by explaining that the title to this paper was the title suggested by the organisers of the colloquium for which the paper was prepared. It is, quite obviously, a title that links in to the debate – a debate that occurs seemingly in every age – about the role of the judiciary in public law cases. Whether the debate is cast as one occurring between courts and parliament, between courts and the executive or – as in the title to this paper – between courts and the people, the central theme remains the same. It is that no arm of government should encroach improperly on the province of another arm of government.

Lying behind that supposition is the separation of powers. More commonly the separation of powers is portrayed as a doctrine of checks and balances: power, it is explained, is distributed among three arms of government to avoid an undue concentration of power and to institute each arm as a counterbalance to the others. There are, however, other noteworthy reasons why a distribution of powers is a wise constitutional design. The task of governing a country is complex and multifaceted: the dissimilar functions that have to be discharged are mostly performed better in one arena of government rather than another. The formulation of communal policy is best undertaken in a legislative forum, by elected representatives who participate in public debate, who face periodic re-endorsement by the people, and who embody the widely differing values and aspirations that are intrinsically part of each society. The ongoing application of the general legislative rules is best undertaken by the executive arm of government, which is in a position over time to accumulate experience, wisdom, intuition, sagacity and other diverse skills that are essential to good judgment in administering the law. The essence of the judicial function in public law cases is threefold: judges can impartially and skilfully interpret legislative rules; by doing so independently of the other arms of government they can bolster community confidence in the administration of the law; and they can check the misuse of authority by the other arms of government.

The issue in debate is whether the judiciary has overstepped that role. Have judges, under the guise of adjudication, encroached on the legislative or executive functions of formulating and articulating public policy? Or, much the same, are judges discharging their role in a way that inappropriately frustrates the autonomy of the other arms of government? Those questions have a special sensitivity in our system of government, because of the exceptional constitutional principle that a judicial pronouncement is conclusive and binding on the other arms of government. This special quality of judicial decisions is most evident in the constitutional arena, wherein the judicial construction of the Constitution can be reversed only by the judiciary itself or by a referendum. The judicial impact on public administration is less entrenched, but no less commanding. The reality, in a practical sense, is that the judicial stance on what constitutes jurisdictional error, natural justice, good faith or an adequate administrative inquiry is indomitable.

Those are all large questions and they touch many areas of government and society. This paper is not so ambitious as to attempt a discussion generally of whether public policy determination is too judicialised and social regulation too lawyerised. My lesser objective is to reflect on whether recent trends in judicial review of administrative action have either moved the boundaries of legality too far or have confused where the boundary lies. I have been asked to undertake that

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analysis from a particular standpoint, namely, whether it is appropriate for judges to give increasing emphasis to human rights principles in their elaboration of administrative law doctrine. That emphasis has crept in from a number of sources, notably from international human rights instruments, and through a self-declared judicial emphasis on the protection of individual rights. Lying behind the task that I have been set (but not taken up in this paper) is the further question of whether we should institutionalise the judicial role in this area by a constitutional bill of rights that would facilitate judicial appraisal of whether legislation and executive practices impermissibly contravene protected human rights standards.

It will be clear that I am critical of recent trends and opposed to taking them a step further. I will outline my concerns in three ways. **First**, I discuss the recent history of migration litigation in Australia, and argue that judicial review has had an untoward impact on the administration of the law and the adjudication of disputes in this area. An analysis of immigration litigation is apposite, because a key justification offered in support of an assertive judicial role in this arena is that judicial review provides a safeguard for the human rights of people who seek sanctuary under Australia's immigration laws. The **second** topic I discuss is a substantive principle of administrative law – the ground of review for failure to consider relevant matters. The development and expansion of this legal standard, which has led increasingly to vagary and uncertainty in the standard, is a microcosm of judicial review changes in Australia over the past two decades. The trend, once again, has been driven as much as anything by a rights-based emphasis on the duty of government to consider the impact of its decisions on members of the public. **Thirdly**, I will take the issue of uncertainty a step further by discussing how judicial review is nowadays undertaken in a climate of doctrinal ambiguity. In that setting, the concept of legality, and with it the principles of public policy and the standards for public administration, will be influenced in greater measure by the discretionary preferences of the trial judge. The latitude for choice is likely to grow apace if international human rights norms more overtly become part of the legal equation.

There are common threads that loosely join the three topics that I have selected. The topics provide three different angles from which to look at how judicial review is operating – by looking at its impact on a particular area of government, at the suitability of the standards applied by courts, and at the essence of the function discharged by judges. Another common thread is that each of those topics also encompasses in one way or another the debate about the intersection between public law principles and human rights norms. That debate, in another guise, is a debate about whether judicial review is encroaching inappropriately on the legislative and executive functions of government.

A final prefatory remark I should make is that my comments, though critical, should not be misunderstood as a lack of confidence in judicial review. Criticism of activity occurring at the periphery of a function is not the same as dissatisfaction with the core of the function. At the risk of banality, I would use the analogy of gardening to illustrate this point. Judges and lawyers toil in the legal garden, moving from one problem to the next, focusing individually on each plant and detail. It is necessary occasionally to stand back, take an overall look at how different objects have flourished, and perhaps acknowledge – “the garden is out of balance; it hasn't quite turned out the way we expected”. My argument – to extend the analogy – is that the legal garden is not presently in need of a liberal fertilisation of human rights dogma: there is luxuriant growth already.

IMMIGRATION LITIGATION – A CONTEMPORARY BATTLEGROUND

Judicial review of decisions made under the *Migration Act 1958* (Cth) has been one of the more controversial aspects of Australian administrative law for nearly two decades. The controversy has surfaced in many ways. There has been a steady and striking rise in the immigration caseload of the Federal Court – rising from 84 cases filed in 1987/88 (28% of the Court's administrative law caseload), to 320 in 1993/94 (55%), 673 in 1996/97 (68%), 914 in 1999/2000; and 503 in a

little over three months in 2001/2.¹ There has been a succession of controversial Court decisions that have either tested or moved the demarcation boundary between judicial, executive and legislative power. There have been repeated and at times controversial attempts by Governments to legislate to restrict judicial review in this area – including legislation in 1992 to establish a new scheme for judicial review in place of the *Administrative Decisions (Judicial Review) Act 1977* (Cth),² and legislation in 2001 to replace that scheme with an even more restricted scheme built around a privative clause.³ There have been numerous independent and parliamentary inquiries into the intersection between immigration decision-making and administrative law review.⁴ There have been barbs traded from both sides of the fence – the Minister for Immigration condemning judges for embarking “on a frolic of their own”⁵, and judges of the High Court rebuking the Parliament for imposing an immigration trial load on the Court of “great inconvenience” that “[n]o other constitutional or appellate court of any nation ... is called on to perform”.⁶ The debate has frequently extended into the public domain as well – as displayed in the opinion of one of Australia’s most respected political columnists, Paul Kelly, at the height of the Tampa controversy, writing of a “defiant court provoking political wrath” and warning of “the sound of a huge voter backlash against the arrogance of the judiciary”.⁷

Judicial review of immigration decision-making is not new in Australia.⁸ Legal action to test the validity of adverse immigration decisions occurred even before federation (*Toy v Musgrove*⁹ being the leading example), and was a prominent theme in early decisions of the High Court.¹⁰ A few of those decisions (such as *Potter v Minihan*¹¹ and *R v Wilson; Ex parte Kisch*¹²) showed the readiness of the High Court to strike down executive decisions that trampled on the legal rights of those seeking to enter Australia. For the most part, however, the statutory powers of government

¹ The figures are taken mostly from Australian Law Reform Commission, *Review of the Federal Civil Justice System*, Discussion Paper 62 (1999) at 271.

² *Migration Reform Act 1992* (Cth), inserting a new Part 8 into the *Migration Act 1958* (Cth).

³ See s 474 of the *Migration Act*, inserted by *Migration Legislation Amendment Act (No 2) 2001* (Cth). Over the past decade there has also been a steady stream of legislative amendments designed to counteract court decisions:

⁴ Eg, *Review of Migration Decisions* (ARC Report No 25, 1985, AGPS); *Report of the Committee to Advise on Australia’s Immigration Policies* (CAAIP: 1998, AGPS); *Non-Adversarial Review of Immigration Decisions: the Way Forward* (CROSROMD: 1992, AGPS); Human Rights Committee, *Human Rights and the Migration Act 1958* (HRC Report No 13, 1985, AGPS); Senate Legal and Constitutional Legislation Committee, *Consideration of Legislation Referred to the Committee: Migration Legislation Amendment (Judicial Review) Bill 1998* (1999); Joint Standing Committee on Migration, *Review of Migration Legislation Amendment Bill (No 2) 2000*; Senate Legal and Constitutional References Committee, *A Sanctuary under Review: An Examination of Australia’s Refugee and Humanitarian Determination Processes* (2000).

⁵ Speech by Mr P Ruddock, Minister for Immigration, to National Press Club, “Immigration Reform: The Unfinished Agenda”, reported in “Ruddock Slams Courts for Ignoring Will of Parliament”, *Australian Current Law News*, 19 March 1998.

⁶ Respectively, *Re Refugee Review Tribunal; Ex parte Aala* (2001) at [133] per Kirby J; *Re Minister for Immigration and Multicultural Affairs; Ex parte Durairajasingham* (2000) 168 ALR 407 at [13] per McHugh J. See also *Abebe v Commonwealth* (1999) 197 CLR 510 at [50] per Gleeson CJ & McHugh J.

⁷ P Kelly, “Defiant court provokes political wrath”, *The Australian*, 5 September 2001, p 13.

⁸ Generally, see M Crock, *Immigration and Refugee Law in Australia* (The Federation Press, 1998) Ch 2.

⁹ (1988) 14 VLR 349 (Vic Sup Ct); *Musgrove v Toy* [1891] AC 272 (PC).

¹⁰ Eg, *Chia Gee v Martin* (1905) 3 CLR 649; *Robtelmes v Brenan* (1906) 4 CLR 395; *Attorney-General (Cth) v Ah Sheung* (1906) 4 CLR 949; *Ah Yin v Christie* (1907) 4 CLR 1428; *Donohoe v Wong Sau* (1925) 36 CLR 404.

¹¹ (1908) 7 CLR 277 (holding that a person born in Australia was not an “immigrant” required to pass the dictation test).

¹² (1934) 52 CLR 234 (holding that Scottish Gaelic was not a “European language” in which an immigration applicant could be required to demonstrate proficiency).

to exclude, detain and deport aliens were construed broadly in favour of government discretion, leaving little opportunity for those without Australian citizenship to contest an adverse decision.¹³ Dr Crock's summation of the early history was that "the judiciary appear to have been philosophically and juridically in tune with the policy initiatives of the government".¹⁴ The apotheosis of the judicial stance was the 1977 decision of the High Court in *R v Mackellar; Ex parte Ratu*,¹⁵ in which the Court ruled 5:1 that the Minister in ordering the deportation of a person who had overstayed a visitor's visa was not required to observe the principles of natural justice.

The High Court, immigration litigation and the doctrine of natural justice

A fresh approach was heralded soon after in the 1985 decision of the High Court in *Kioa v West*, effectively reversing *Ratu* by establishing a new rule that in the ordinary case the validity of a deportation decision would hinge on whether there had been a proper observance of natural justice. The principle established in *Kioa* is easily defensible: a decision by government as to whether a person is allowed to enter or remain in Australia can be, for them and their family, the most momentous decision made during their lifetime by a government agency. A fair procedure should be followed in making that decision.

The difficulties with *Kioa* lay in a different direction, in extracting from the case a rule that would identify other situations to which the obligation of natural justice would apply, and in gauging what was required to discharge that obligation. Four quite different approaches were taken to the first issue. Gibbs CJ (in dissent) adhered to the principle established in *Ratu*, that a person facing deportation had no legal right or interest that would attract the obligation of natural justice; further, such an obligation would be inconsistent with the Minister's unconfined statutory discretion to deport. Deane J¹⁶ took a contrary view, that a person resident in Australia had the right to the protection of the Australian legal system, and that the common law right to natural justice would respect that right. Brennan J regarded the right to natural justice as a statutory implication, that could more easily be drawn (in a case such as the present) where a decision affected a person in their individual capacity. Mason J, presaging the course of future development, thought it better in most cases to assume that procedural fairness was required, and to examine what those requirements were in the circumstances of a particular case.

Nor did a clear standard emerge from *Kioa* as to what was required to discharge the obligation of procedural fairness. If the only reason for deportation was that a person was a prohibited immigrant, Mason J thought that a hearing would not ordinarily be required, yet Deane and Brennan JJ held that it would. As to what should be disclosed, Mason J held there was no general obligation to allow a person to respond to material on file described as "policy, comment and undisputed statements of fact",¹⁷ whereas Deane J thought that a person should have an opportunity "to challenge the wisdom or justice of the administrative policy"¹⁸ on which the deportation rested. The criterion articulated by Brennan J, which has been repeatedly cited, was that a person should be given an opportunity to respond to "adverse information that is credible, relevant and significant".¹⁹

It would be easy to dismiss those differences as peripheral, as matters of style or detail that do not impinge on the core obligation to provide a hearing to a person before a decision is made

¹³ Eg, *Ah Yin v Christie* (1907) 4 CLR 1428; *Donohoe v Wong Sau* (1925) 36 CLR 404; *Znaty v Minister for Immigration* (1970) 126 CLR 1; *R v Mackellar; Ex parte Ratu* (1977) 137 CLR 461.

¹⁴ Crock, above n 8 at 15.

¹⁵ (1977) 137 CLR 461; see also *Salemi v Mackellar (No 2)* (1977) 137 CLR 396.

¹⁶ Wilson J's analysis was broadly similar to that of Deane J.

¹⁷ (1985) 159 CLR 550 at 588.

¹⁸ (1985) 159 CLR 550 at 633.

¹⁹ (1985) 159 CLR 550 at 629.

adversely affecting their rights or interests. However, non-compliance by a decision-maker with such a detail can lead to the invalidation of a decision. The practical consequences of such a finding can be great, as to the cost, effort and administrative dislocation that can stem from a finding of invalidity. Indeed, *Kioa* itself provided a good example of why it is important to be rigorous in defining and applying basic principles. The administrative error on which the Court's finding of invalidity rested was that Mr Kioa had not been given an opportunity to respond to a particular sentence in a briefing paper prepared internally for the Departmental decision-maker – "Mr Kioa's alleged concern for other Tongan illegal immigrants in Australia and his active involvement with other persons who are seeking to circumvent Australia's immigration laws must be a source of concern." However, a close reading of the facts of the case (for example, in the Full Federal Court judgment²⁰) indicates that the fateful sentence was merely a response to a submission to the Department from Mr Kioa's solicitor arguing that he was in a different position to other prohibited immigrants because of the pastoral care he was providing to them. In summary, the briefing paper, far from raising a fresh and unanswered allegation about Mr Kioa, was discharging the Department's obligation to consider relevant matters at the culmination of a relatively extended administrative hearing earlier provided to Mr Kioa!

The legacy of *Kioa* – a legal obligation of inexact and uncertain dimension – was soon reflected in other immigration cases. The danger was ever-present that, after a hearing had already been given, an observation or evaluative comment in a departmental briefing paper would be characterised as a credible, relevant and adverse statement that should give rise to another hearing. In *Taveli v Minister for Immigration, Local Government and Ethnic Affairs*²¹ that conclusion was reached as regards a comment that a prohibited immigrant had "obtained benefits under Medicare". The same was finding was reached in *Conyngham v Minister for Immigration and Ethnic Affairs*²² about a prejudicial remark in an agency file that was not excluded from the briefing paper sent to the Minister: the "mere possibility" that "unconscious prejudice" could permeate the preparation of the briefing paper and flow through to the decision was a serious enough breach to warrant invalidation of the decision.

The difficulty in the immigration arena of elucidating what natural justice required was soon reflected in another decision of the High Court, *Haoucher v Minister for Immigration and Ethnic Affairs*.²³ The High Court ruled 3:2 that the Minister was obliged by natural justice to provide a hearing to Haoucher before rejecting a recommendation of the Administrative Appeals Tribunal (AAT) that he not be deported. This would, in effect, be the third hearing provided to Haoucher, following the earlier hearings by the Department (as required by *Kioa*) and the AAT. Moreover, there were no new facts before the Minister. The Minister's task, as outlined in a Ministerial policy, was to decide if there were "exceptional circumstances" and "strong evidence" to justify rejection of the AAT recommendation: in short, did the Minister, as a matter of public policy, take a different view to the AAT of the seriousness of Haoucher's convictions and the chances of recidivism? (*Haoucher* also contrasts interestingly with the decision three years earlier in *South Australia v O'Shea*,²⁴ in which the Court ruled 4:1 that the Governor was not required to provide a hearing to O'Shea before rejecting a parole recommendation for his prison release.)

Parliament responded in 1992 to those and similar developments by enacting a new scheme for review of immigration decision-making.²⁵ Three features of that scheme were relevant so far as natural justice is concerned. Firstly, departmental decisions were reviewable on the merits by either the Migration Review Tribunal (MRT), the Refugee Review Tribunal (RRT) or the AAT.²⁶

²⁰ (1984) 55 ALR 669 at

²¹ (1989) 86 ALR 435 at 447; on appeal, (1990) 94 ALR 177.

²² (1986) 68 ALR 423; reversed on appeal ((1986) 68 ALR 441), but not on this point.

²³ (1990) 169 CLR 648.

²⁴ (1987) 163 CLR 378.

²⁵ *Migration Reform Act 1992* (Cth): the new scheme commenced operation in 1994.

²⁶ The tribunals had been established earlier – the MRT in 1989 and the RRT in 1993.

Secondly, the Act spelt out a detailed procedural code to be followed both by the Department and the tribunals.²⁷ The core features of natural justice doctrine were addressed in the code – how information was to be collected, which information was to be given to an applicant, and the applicant’s opportunity to present a case. Thirdly, both explicitly and implicitly, the Act provided that the code would replace the common law requirements of natural justice. As to the tribunals, the Act achieved that objective explicitly by providing in s 476(2) that a breach of natural justice was not a ground upon which an application could be made for review of a tribunal decision. As to the Department, the Act implicitly achieved the objective by declaring that a decision-maker “is not required to take any other action” apart from complying with the code (s 69(2)).²⁸ That objective, of defining legal rights in a precise statutory code in place of an indeterminate common law doctrine, was spelt out in both the Minister’s Second Reading Speech and the Explanatory Memorandum to the Bill, with the latter stating that the Bill “provides a code for decision-making, to replace the current common law rules of natural justice”.²⁹

Shortly stated, the scheme did not achieve its purpose. In two decisions the High Court declared both an RRT then a Departmental decision to be invalid on the basis of a denial of natural justice.

The circumstances giving rise to the invalidation of an RRT decision in *Re Refugee Review Tribunal; Ex parte Aala*³⁰ were as follows. Mr Aala’s application for a protective visa was lodged five years after arriving in Australia, and after earlier rejection of his application for a spouse visa. The Department’s rejection of his refugee application was heard twice by the RRT, on the second time as a result of a Full Federal Court ruling in his favour. At the second hearing the Tribunal indicated in general terms to Mr Aala that it had before it the earlier Tribunal and Court papers. By unwitting oversight, the Tribunal did not in fact have four handwritten documents provided by Mr Aala to the Federal Court – documents, which the High Court acknowledged, were unsworn, irrelevant in part, and of uncertain evidentiary status.³¹ Five months after the Full Federal Court had affirmed the trial judge’s decision to dismiss Mr Aala’s application for judicial review, he applied for and was granted an extension of time to maintain proceedings in the High Court under Constitution s 75(v), arguing that he had been denied natural justice by the Tribunal. That argument was upheld by all seven Justices, pointing out that the Tribunal may not have drawn a finding that Mr Aala had concocted evidence had he not been mistaken about what documents were before the Tribunal and thus presented his case differently. McHugh J dissented as to the result, reasoning that the Tribunal would still have reached the same conclusion, by reason of inconsistent and irreconcilable accounts given by Mr Aala at the Tribunal hearings, and the weight of other independent evidence indicating that he would not be persecuted in Iran. The majority took the different view that a breach of natural justice should lead to a decision being overturned, unless it is insignificant and the result would inevitably have been the same.³²

Justice McHugh’s dissent squarely raised the issue of whether in *Aala* as in other cases, the Court has gone too far in applying a doctrine of natural justice that is unrealistically exacting in its focus on individual procedural flaws in the process of decision-making. Less heard nowadays is the question of whether “the decision-making process, viewed in its entirety, entails procedural

²⁷ *Migration Act 1958* (Cth) ss 52-64 (the Department), Parts 5 & 7 (tribunals).

²⁸ S 69(1) further provided that a breach of the code would not cause the decision to be invalid, but liable only to be set aside on review by a tribunal.

²⁹ Explanatory Memorandum to the Migration Reform Bill 1992, para 25; see also para 51, stating that the Bill aims to “replace the uncodified principles of natural justice with clear and fixed procedures which are drawn from those principles”.

³⁰ (2000) 204 CLR 82.

³¹ (2000) 204 CLR 82 at [91], [186].

³² See (2000) 204 CLR 82 at [4] (Gleeson CJ); [79] (Gaudron & Gummow JJ), [210] (Callinan J).

fairness”.³³ Applying that standard, the procedural fairness received by Mr Aala over the course of many hearings was considerable, albeit not perfect. And, though it is not strictly relevant, it is interesting to note that his application upon remittal to the Tribunal was rejected for a third time.

The other observation to make about *Aala* is that no attention was given by the Court to whether there had been a breach by the Tribunal of the statutory hearing code which, for example, provided in s 425 that a person shall be given an opportunity “to give evidence and present arguments relating to the issues arising in relation to the decision under review”.³⁴ The failure of the Court to attach significance to the hearing code gave rise to an anomaly (discussed further below) that the criteria for reviewing the legality of a tribunal decision would thereafter be different in both the Federal Court and the High Court. The related issue, also not squarely addressed, was whether in the light of the statutory code and its enforceability by the Federal Court, it was appropriate so late in the piece for the original jurisdiction of the High Court to be invoked.³⁵

The contentious role played by natural justice doctrine in immigration litigation was further highlighted in *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah*.³⁶ Mr Miah’s right to seek review by the RRT of the Departmental decision to refuse a protection visa was lost after his solicitor failed to lodge the appeal within the statutory time limit. Thirty months later, and after two unsuccessful applications to the Minister, Mr Miah commenced proceedings in the High Court under Constitution s 75(v) claiming that the Departmental decision was invalid by reason of breach of natural justice. He had not been given an opportunity to comment on information, relied upon by the decision-maker in rejecting the visa application, concerning political changes occurring in Bangladesh since the visa application was lodged a year previously. That argument was upheld by a 3:2³⁷ majority in the High Court.

Three matters had to be confronted by the Court in reaching its conclusion that an actionable breach of natural justice had occurred. The first was that the information that had not been passed on to Mr Miah was non-personal information, of a public nature, concerning the supervening political climate in another country, and that was being evaluated in an executive context in resolving an application by a person for refugee protection. The conclusion of the majority that an onus rests on a decision-maker to initiate disclosure of information of that kind to an applicant before reaching a decision foreseeably gives rise to an obligation that is far-reaching and indeterminate. Arguably, it would henceforth be problematic for a decision-maker to reject an application of any kind without first disclosing a draft of the statement of rejection to the applicant.³⁸ What, after all, might be regarded as credible, relevant and significant in the reasoning process of the decision-maker? It would be curious, indeed, if the hearing rule as applied to executive decision-making had become more unpredictable or demanding than the same rule applied to judicial decision-making.

³³ *South Australia v O’Shea* (1987) 163 CLR 378 at 389 per Mason CJ; see also *Calvin v Carr* (1979) 22 ALR 417.

³⁴ See also *Migration Act 1958* (Cth) ss 424 (“Tribunal may seek additional information”), 424A (“Applicant must be given certain information”), and 424B (“Invitation to give additional information or comments”). S 425 was noted by Gaudron & Gummow JJ (2000) 204 CLR 82 at [60], and Callinan J at [216].

³⁵ The issue of delay as such was addressed: (2000) 204 CLR 82 at [81] (Gaudron & Gummow JJ); [216] (Callinan J).

³⁶ (2001) 179 ALR 238.

³⁷ Gaudron, McHugh & Kirby JJ; Gleeson CJ & Hayne JJ dissenting.

³⁸ Eg, see the description of the material to be disclosed – by Gaudron J at (2001) 179 ALR 238 at [99] “to meet the case that is put against him or her”; McHugh J at [140] “relevant matters adverse to his or her interests that the repository of the power proposes to take into account”; and Kirby J at [191] “adverse information that is credible, relevant and significant to the decision to be made”.

The second key point was that Mr Miah had a statutory right to a full merit review of the Departmental decision by an administrative tribunal.³⁹ Every pertinent issue of law, fact, policy and discretion involved in the decision could be raised before the tribunal.⁴⁰ In the process, any natural justice breach by the Department would be wholly cured. Mr Miah's opportunity to enjoy that right was foregone through no fault on his part, but that factual complexity bears no relevance to the scope of the Department's legal obligations. When there is a right to a full merit review of a primary decision by an independent administrative tribunal, it is hard to fathom why the primary decision should be subject to a hearing obligation of similar scope. Indeed, if it is, there will be a disincentive for legislatures to add unnecessary complexity to executive processes by establishing mechanisms for tribunal review.

The third consideration, noted earlier, was the legislative objective, declared both on the Parliamentary record and in the *Migration Act*, of replacing the uncertain standards of natural justice with a clear-cut hearing code that could be understood and followed by all concerned. This consideration was dismissed by the majority,⁴¹ invoking the long-standing maxim that parliament is not presumed to displace the obligation to observe natural justice except by clear words of plain intendment. That maxim, of course, is invoked as often to defeat as to uphold parliamentary intent. This, with respect, was such a case.

Procedural fairness is a legal obligation applied to government, but it is also an ideal. There will, understandably, be differing views as to what should be required to discharge that legal obligation. Ultimately it is for two bodies to decide that issue – parliament, by enacting a legislative code of procedure; and the High Court, by construing that code in the context of common law assumptions and other legal traditions. The High Court therefore exercises a degree of choice in deciding the content of the legal obligation of procedural fairness. If, in the immigration context, the answer given by the Court is such as to magnify a difference between the judicial review jurisdiction of the Federal Court and the High Court, thereby increasing the trial burden of the High Court, the Court is not in a persuasive position to lay sole blame for the result at the feet of the parliament.

The Federal Court and immigration litigation

Whatever the disquiet concerning the High Court's role in immigration matters, it has been overshadowed for many years by the controversy regarding the role played by the Federal Court in review of immigration decision-making. I referred earlier to some of the strands of that controversy – the steady increase in the trial load of the Federal Court, the resulting impact on the work of the Court, the impact of the Court's judgments on immigration policy, the at-times tense relationship between the Court and the tribunals, government criticism of judges of the Court, numerous legislative responses to restrict review rights, and the interlock between those developments and an intense public debate on immigration and refugee determination.⁴²

The great bulk of the Court's judgments are never reported but portray the Court in case after case confining its attention to the legal issues, and not being distracted by the factual, policy and humanitarian background to the litigation. Those matters, as the cases either acknowledge or assume, are for parliament, the government and the tribunals to resolve. The result is that most

³⁹ Discussed at (2001) 179 ALR 238 at [96] (Gaudron J, who regarded this point as “irrelevant”), [146] (McHugh J), [178]-[188] (Kirby J).

⁴⁰ *Drake v Minister for Immigration and Ethnic Affairs* (1979) 46 FCR 409 at 419.

⁴¹ (2001) 179 ALR 238 at [103]-[104] (Gaudron J), [144] (McHugh J) and [[203]-[209] (Kirby J).

⁴² Eg, see M Crock, *Immigration and Refugee Law in Australia* (Federation Press, 1998); and the articles in a special issue, “The Refugee Issue”, of (2000) 23(3) *University of NSW Law Journal*.

applications for judicial review – a proportion usually less than 20%⁴³ – are unsuccessful. In many cases (presently a majority) the plaintiff is unrepresented, and the Court faces added difficulty in maintaining judicial detachment while upholding the right of a litigant to scrutinise the legality of a government decision. The Court, aware of the strategic and personal reasons that often prompt asylum seekers to initiate court proceedings with little chance of success, has instituted arrangements for representation and case management to expedite the litigation without sacrificing justice.⁴⁴ Legal issues, when they do squarely arise in immigration cases, often present a special complexity that has troubled courts and tribunals around the world, on matters such as the interpretation of "particular social group" and "well founded fear of being persecuted" in the Refugees Convention.

Immigration litigation is thus an area of special challenge which, on any objective view, has been handled by the Federal Court in a customary judicial fashion by the assiduous application of legal method. That said, the role of the Court has not been free of difficulty. In an earlier article⁴⁵ I wrote that a problem of "judicial merits review" and "judicial overreach" has patterned the work of the Court for more than a decade. The problem, indisputably, has not been pervasive, and can be traced to a small minority of judgments. Unquestionably, too, the Court is alert to the emergence of such a trend, particularly in a court of nearly 50 members in an area as vexed as review of refugee determination: in a very public way members of the Court have confronted and discussed the dangers of judicial merits review in judgments and extra-curial writings.⁴⁶

Yet, the problem is real, and it persists. It illustrates a major theme of this paper, that exceptional or one-off decisions of a court often have greater impact in defining the dynamics of a legal system than the large body of consistent and less-talked about jurisprudence. I will briefly address that issue by tracing some of the trends of the last two decades that are dealt with more fully in my earlier article.

Tension between government and the judiciary over immigration litigation arose in the early days of "the new administrative law" in the 1970s, well before the expansion of legal principle was sanctioned by the High Court in *Kioa v West*. (Indeed, on one view the High Court in that decision was undertaking a post-*Ratu* realignment to conform to the trend that had by then developed in other courts and tribunals). Particularly in the area of criminal deportation, judges of the Federal Court, both as members of and on appeal from the Administrative Appeals Tribunal, downplayed and at times disparaged the weight that should be attached to executive policy and to factual assumptions that fell short of being "hard evidence". A number of deportation decisions, of people viewed by the government as having an entrepreneurial role in the Australian drug trade, were overturned by the Court and the AAT.⁴⁷ The heat in the early debate was partially defused by adjustments made within both the executive branch and the

⁴³ This includes cases in which the Minister withdraws as well as those (consistently less than 10%) in which the Court has declared the decision under review to be invalid. The figures (from the annual reports of the Court and the tribunals) are presented in Justice K Lindgren, "Commentary" (2001) 29 *Federal Law Review* 391.

⁴⁴ Lindgren, *ibid* at 399-401; and Justice R D Nicholson, "Administrative Issues in Refugee Law" (2001) 28 *ALAL Forum* 40.

⁴⁵ J McMillan, "Federal Court v Minister for Immigration" (1999) 22 *ALAL Forum* 1.

⁴⁶ Eg, Justice R Sackville, "Judicial Review of Migration Decisions: An Institution in Peril?" (2000) 23 *Uni of NSW Law Journal* 190; Justice Lehane, "Aspects of Judicial Review" (1999?) 11 *Law and Policy Papers*; Justice R S French, "Judicial Review Rights" (2001) 28 *ALAL Forum* 30.

⁴⁷ *Re Pochi and Minister for Immigration and Ethnic Affairs* (1979) 2 ALD 33, *aff'd* on appeal (1980) 4 ALD 139; *Vincenzo Barbaro v Minister for Immigration and Ethnic Affairs* (1982) 6 ALD 24; and see R Campbell, "Crime as a Family Business", *The Canberra Times*, 16 Dec 1995.

tribunal,⁴⁸ and also through the work of Sir Gerard Brennan and other senior tribunal members, although by their nature the issues of policy and evidence will be a continuing source of tension between law and administration.

Judicial review cases in the immigration arena soon reflected an abnormally rigid approach as to how executive decisions could be made. In *Minister for Immigration and Ethnic Affairs v Tagle*⁴⁹ a deportation decision was declared invalid because the written record of the decision, though canvassing the case put forward by Ms Tagle, stated that “her continued stay in Australia could not be countenanced”. In *Luu v Renevier*⁵⁰ the Court held that it was *Wednesbury* unreasonable for an administrator to rely on general medical reports to form an opinion about the prospects of recidivism of a convicted sex offender without first obtaining cogent evidence from a suitably qualified medical practitioner. In *Fuduche v Minister for Immigration, Local Government and Ethnic Affairs*,⁵¹ in a decision that now sits oddly with contemporary views about the potential unreliability of expert evidence assembled by a party, the Court held that it was irrational for a decision-maker simply to brush aside expert evidence given by a psychiatrist of the special relationship between two relatives, in favour of a theory held individually by the decision-maker. As noted later in this paper, failure to consider relevant matters also grew considerably in scope.

The government response to these developments was to establish gradually a more elaborate structure for administrative review of immigration decision-making.⁵² This trend was in response to varied pressures for legal reform and administrative justice, but a major purpose of the initiative was to downplay the role and expansion of judicial review. The Immigration Review Panel was established in 1982, giving way in 1989 to the Migration Internal Review Office and the Immigration Review Tribunal, and then in 1994 to the Migration Review Tribunal. Review of refugee decisions commenced with the Determination of Refugee Status Committee in 1978, the Refugee Status Review Committee in 1990, and the Refugee Review Tribunal in 1993. The powers and jurisdiction of the Administrative Appeals Tribunal in criminal deportation and other matters was also expanded in 1992.

These initiatives did not achieve the purpose of curbing judicial review. Indeed, the decisions of the administrative review bodies increasingly became the focus of judicial review, with the bodies themselves and their decisions being disparaged at times by Federal Court judges as being inferior and unprofessional.⁵³ A further legislative response was along two lines.

First, many of the broad discretions and discretionary phrases in the *Migration Act* that had become a focus of litigation were removed and replaced with a framework that was particularised and, in some respects, rigidified. For example, the discretion to grant a resident visa where there were “strong compassionate or humanitarian grounds” was repealed when the expected 100 or so applications per year quickly rose to 8,000 applications on hand in 1989, largely as a result of judicial expansion of both the scope of the phrase and the correlative duty of the Department in

⁴⁸ See J M Sharpe, *The Administrative Appeals Tribunal and Policy Review* (Law Book, 1986); and J McMillan, “Review of Government Policy by Administrative Tribunals” (1998) 9 *Law and Policy Paper* 30-41.

⁴⁹ (1983) 67 FCR 164.

⁵⁰ (1989) 91 ALR 39

⁵¹ (1993) 117 ALR 418.

⁵² See Administrative Review Council, *Better Decisions: Review of Commonwealth Merits Review Tribunals*, ARC Report No 39 (1995) Appendix B, “Review Tribunals – Background”; and P Ruddock, “Refugee Claims and Australian Migration Law: A Ministerial Perspective” (2000) 23 *Uni of NSW LJ* 1; Crook, above n 8 at Chs 3, 7.

⁵³ See the cases discussed in McMillan, above n at notes 84-96; J McMillan, “Commentary: Recent Developments in Refugee Law” (2000) 26 *AIAL Forum* 26.

administering it.⁵⁴ Related to this, perhaps, is that the focus of immigration litigation then switched in part to the remaining discretionary phrases in the *Migration Act*. Examples include whether a person has been persecuted as a member of a “particular social group” under the Refugees Convention, or whether someone qualifies for a “special need relative” visa.⁵⁵

The second legislative response was to remove judicial review of immigration decision-making from the *Administrative Decisions (Judicial Review) Act 1977* (Cth), and to replace it with a restricted scheme of review in Part 8 of the *Migration Act*. The scheme was awkward and destined to be problematic. Nevertheless, the underlying theme was sound and defensible. It was to focus judicial review on whether the decision-making code and visa criteria spelt out in the Act and Regulations had been correctly followed and construed by the migration and refugee review tribunals. Grounds of review that were characterised by common law evolution of legal standards, or that had become associated with review of the soundness of administrative fact-finding, were removed.⁵⁶

The restricted scheme, though often condemned by commentators on rule of law grounds, in fact became the engine room of the 1990s for the growth and extension of administrative law principles. The litigation, more often than not, focused on how decisions were being made and explained by the tribunals, rather than on whether the visa criteria had been correctly construed.⁵⁷ On key issues of administrative law principle there was often a sharp division of opinion within the Court, and frequent appeals by the Minister to the High Court. Those appeals, when dealing with the style of judicial review rather than substantive refugee and immigration law, were regularly successful. The message from the High Court was sometimes delivered frankly.

In *Minister for Immigration and Ethnic Affairs v Wu Shan Liang*⁵⁸ the High Court warned against “over-zealous judicial review” and counselled that the reasons of a decision-maker should be taken at face value. In *Minister for Ethnic Affairs v Guo*⁵⁹ the Court criticised both an unorthodox approach to statutory construction and judicial review adopted by the Federal Court and a Court order that usurped the role of the executive branch. In *Minister for Immigration and Ethnic Affairs v Eshetu*⁶⁰ the Court overturned a controversial chain of Federal Court decisions which had held that the direction in s 420 of the Act to the RRT to “act according to substantial justice” had effectively reintroduced grounds of judicial review that were excluded by Part 8. In *Minister for Immigration and Multicultural Affairs v Jia*⁶¹ the Court reversed a Federal Court ruling that a strongly-worded statement by the Minister constituted actual bias that disqualified him from exercising his decision-making functions under the Act. And, in *Minister for Immigration and*

⁵⁴ Eg, *Surinakova v Minister for Immigration, Local Government and Ethnic Affairs* (1991) 26 ALD 203; E Arthur, “The Impact of Administrative Law on Humanitarian Decision-Making” (1991) 66 *Canb Bull of Pub Admin* 90; and Crock, above n 8 at 132-134.

⁵⁵ This point is developed in McMillan, “Commentary”, above n 53.

⁵⁶ Thus, for example, a decision could be challenged for breach of statutory procedures, unauthorised decision, error of law, and unauthorised purpose. The excluded grounds were breach of natural justice (except actual bias) and *Wednesbury* unreasonableness. Other grounds (relevant and irrelevant considerations, improper exercise of power, and abuse of power) were removed as free-standing grounds but could, for example, be raised as an aspect of unauthorised decision or error of law.

⁵⁷ For example, an informal survey I undertook of all decisions reported in December 2000 revealed that the central claim in just on 50% of cases was that the RRT had not properly complied with the obligation under s 430 of the Act to prepare a statement of reasons. Admittedly, an error of that kind can reveal misapprehension of the statutory test to be applied – eg, *Paramanathan v Minister for Immigration and Multicultural Affairs* (1998) 160 ALR 24.

⁵⁸ (1996) 185 CLR 259.

⁵⁹ (1997) 191 CLR 559.

⁶⁰ (1999) 197 CLR 611.

⁶¹ (2001) 178 ALR 421.

*Multicultural Affairs v Yusuf*⁶² the Court took a narrower view than the Federal Court concerning the scope of a tribunal's obligation to prepare a statement of reasons. The issue currently before the High Court, which has earlier given rise to differing views in the Federal Court, is the scope of the "no evidence" ground of review in s 476(1)(e) of the *Migration Act*.⁶³ In addition to those High Court decisions, there has also been a steady stream of Full Federal Court decisions that have disapproved of inappropriate merit review in single judge decisions.⁶⁴

The lesson of that decade of litigation is that there is no equilibrium concerning the rules for administrative decision-making and the principles of judicial review. As one issue is resolved, another emerges – or, put another way, at any time during the decade there will be a principle or theme that predominates as a basis for invalidation of tribunal decisions. The principles are not invented by the Court in the exercise of a free-standing mandate to define public law: they are, of course, the principles that emerge in response to arguments posed by counsel and litigants. Nevertheless, courts have a unique power to define conclusively the rules for the exercise of their own jurisdiction, and cannot therefore escape criticism if that power is exercised inappropriately.

The current phase in immigration litigation will be dominated by a privative clause (s 474), that is noted further below. The clause, first introduced into Parliament in 1998 but rejected consistently in the Senate, was enacted in September 2001 as part of a legislative reform package in the aftermath of the Tampa dispute and the September 11 terrorist attacks and in the lead-up to the federal election. It is inevitable that it will take some time and numerous cases to elucidate the meaning of a privative clause of the kind that has been enacted, concerning its application to an area as legally complex as immigration decision-making. Understandably, some differences of opinion about the scope of the privative clause have already been aired.⁶⁵

The courts and immigration litigation – broad reflections

There are lessons from the short history of immigration litigation that are relevant to public law generally. Three issues will be taken up at this stage.

In the **first** place, judicial review of any area of government activity will give rise to questions of two kinds – to do with the meaning of the substantive rules being applied by administrators, and with the procedural style adopted in administering those rules. Questions of the former kind have regularly been addressed by courts in undertaking review of immigration decisions. The decisions can be controversial, with major implications (and also inconvenience) for the administration of the law. A notable example is the decision of the High Court in *Chan v Minister for Immigration and Ethnic Affairs*,⁶⁶ holding that a "well-founded fear" of persecution

⁶² (2001) 180 ALR 1; see S Rebikoff, "Minister for Immigration and Multicultural Affairs v Yusuf: One Door Closed, Another Opened" (2001) 29 *Federal Law Review* 453.

⁶³ See *Minister for Immigration and Multicultural Affairs v Rajamanikkam* (2000) 179 ALR 495 (on appeal): for a discussion of the cases, see J Basten, "Judicial Review: Recent Trends" (2001) 29 *Federal Law Review* 365 at 384-389.

⁶⁴ Eg, *Minister for Immigration and Multicultural Affairs v Rajalingam* [1999] FCA 719, *Minister for Immigration and Multicultural Affairs v Bethkoshabeh* [1999] FCA 980, *Minister for Immigration and Multicultural Affairs v SRT* [1999] FCA 1197, *Minister for Immigration and Multicultural Affairs v Cho* (1999) 164 ALR 339, *Minister for Immigration and Multicultural Affairs v Epeabaka* (1999) 160 ALR 543; see also the cases cited in n ? below.

⁶⁵ Eg, cf as to whether a breach of natural justice by a tribunal is reviewable, cf *Walton v Ruddock* [2001] FCA 1839, *NAAX v Minister for Immigration* [2002] FCA 263, and *Ratumaivai v Minister for Immigration* [2002] FCA 311. See also *Wang v Minister for Immigration* [2002] FCA 167.

⁶⁶ (1989) 169 CLR 379; discussed in Crock, above n 8 at 134-138.

equates with the rather opaque standard of a “real chance” of persecution.⁶⁷ Nonetheless, even controversial decisions on substantive issues are usually accepted phlegmatically by the executive, as an exercise of judicial power to declare the law. If needs be, legislation can be enacted to vary a substantive rule as enunciated by a court.⁶⁸

The greater controversy in Australian administrative law has been sparked by judicial decisions of the second kind, dealing with the way in which administrative decisions should be made. Some degree of judicial scrutiny of administrative style and procedure is both inevitable and proper, as a standard such as natural justice (or procedural fairness) indicates. At the end of the day, however, it largely falls within the province of the executive arm of government to decide how best to fulfil its functions. The processes that are chosen will strike a balance between the varied constraints and objectives that impinge on the executive branch. Wisely, too, the processes will be designed to allow room for administrative judgment and policy to play a part in decision-making.

There is forever a danger that procedural choices of that kind will harbour or nurture defective administration. On the other hand, procedural perfection is a castle in the air and can, in any case, only go so far in ensuring the quality of decision-making, however that is to be measured. To secure the promise of higher standards in decision-making we must rely principally on other devices and mechanisms, such as staff training, internal auditing of decision-making, internal review, external oversight by Ombudsman and public service commissions, and open government.

The consequences of focusing unduly on the way decisions are made was the subject of a telling observation of Gyles J in *NAAX v Minister for Immigration and Multicultural Affairs*.⁶⁹

In this case, the Tribunal member, instead of giving a decision on credibility promptly, with the real reasons expressed economically, adjourned for a very considerable time, to ultimately produce a relatively elaborate piece of reasoning which included a detailed refutation of individual facts claimed by the applicant ... This is typical. The reason is not hard to find. For some years decisions of this Court imposed considerable obligations upon the Tribunal by reference to the so-called “real chance” test ... to s 420 ... and to s 430 ..., accompanied, on occasion, by criticism of the Tribunal member in question. On one view, standards higher than those of judges were imposed ... This had a natural tendency to encourage elaborate reasons, designed to protect members from such criticism, although there is usually no need for elaborate reasons when evidence is not accepted ...

Finally, on this point, it is worth observing that if the scope of Australian public law is extended by the incorporation of human rights standards, the major focus of that development is likely to be the procedural rules for decision-making. New standards for decision-making, such as “fairness”, “proportionality” and “equality”, will quickly emerge as legally enforceable conditions on the exercise of executive power. That, it seems, has been the early experience in the United Kingdom under European human rights law.⁷⁰

⁶⁷ Other recent examples of landmark decisions on controversial aspects of immigration law are *Chen Shi v Minister for Immigration and Multicultural Affairs* (2000) 201 CLR 293, and *Minister for Immigration and Multicultural Affairs v Khawar* [2002] HCA 14.

⁶⁸ Eg, see the *Migration Legislation Amendment Act (No 6) 2001* (Cth), amending the criteria for a protection visa in s 36 of the Act.

⁶⁹ [2002] FCA 263 at [56].

⁷⁰ This is illustrated, for example, by recent experience in the United Kingdom under European human rights law – eg, *R (Mahmood) v Secretary of State for Home Environment* [2001] 1 WLR 840; and *R v North and East Devon Housing Authority; Ex parte Coughlan* [2001] QB 213.

The **second** general lesson from immigration litigation has to do with the ramifications of an escalating problem to do with judicial review. The administrative law package that was established in Australia beginning in the 1970s was an advanced system, based around complementary forms of administrative review.⁷¹ It is important to recall that that system was introduced at the initiative of Parliament and the Executive Government, and signalled a preparedness on their part to accept administrative law review. It was to be expected that that review would exacerbate the inherent tension and occasional acrimony that exists between government agencies and review authorities, but there is every reason for thinking that the executive commitment to administrative law was genuine and continuing. That is certainly the picture that emerges firmly from a recent empirical survey of bureaucratic attitudes that I have undertaken with a colleague.⁷²

The immigration experience shows (and it is not the only area to have done so) that a point can be reached at which governments of both political colour lose tolerance with the adverse impact of judicial review on public policy formulation and administration.⁷³ That observation is not meant to sanction the Government response, but to point to the reality and the consequences. An individual example given earlier was the removal from the *Migration Act* of some of the broad discretionary safety net powers, such as the “humanitarian and compassionate” visa category. More systemically, the upshot has been that the far better scheme for judicial review established by the ADJR Act was annulled and replaced with an awkwardly-designed scheme in Part 8 of the *Migration Act*. In time, when that scheme broke down, the least satisfactory alternative – a privative clause – was introduced. The reason, it should be recalled, why that approach was adopted was because the Government accepted the advice of six leading QCs that a privative clause was the only mechanism that would effectively contain judicial review of immigration decision-making.⁷⁴

Like all eco-systems, the legal eco-system is a fragile balance of many parts fighting for recognition and survival. A prolonged disruption in one part of the system will likely result in an imbalance in another part. It is easy to be self-satisfied in condemning the parliamentary and executive backlash to litigation, but if the result is a less effective system of administrative law, purity of belief counts for very little.

The **third** aspect of immigration litigation that is of broader interest is the claim often made that the humanitarian dimension of immigration and refugee determination is especially important.⁷⁵ Without dismissing the relevance of this facet, it is hard to know how it translates into legal doctrine. And, as commonly, there is little attempt by proponents of this argument to spell out the rational meaning of the claim.

⁷¹ See R Creyke & J McMillan (eds), *The Kerr Vision of Australian Administrative Law – At the Twenty-Five Year Mark* (CPL, 1998).

⁷² R Creyke & J McMillan, “Executive Perceptions of Administrative Law – An Empirical Study” (2002 – forthcoming).

⁷³ The *Migration Reform Act 1992* (Cth) was enacted under a Labor Government, and the *Migration Legislation Amendment (Judicial Review) Act 2001* (Cth) under a Coalition Government. The similar criticisms of judicial review by Labor and Coalition Ministers for Immigration are reported in Senate Legal and Constitutional Legislation Committee, *Report on the Migration Legislation Amendment (Judicial Review) Bill 1998* (1999) Ch 1.

⁷⁴ Senate Committee report, *ibid* at The wider consequences where there is executive antipathy to administrative law developments is discussed in R Creyke, “Sunset for the Administrative Law Industry?” in J McMillan (ed), *Administrative Law under a Coalition Government* (AIAL, 1998) 20, and M Sassella, “Commentary” at 65.

⁷⁵ Eg, *Re Minister for Immigration and Ethnic Affairs; Ex parte Miah* (2001) 179 CLR 238 at [146], [186]; *W375/01A v Minister for Immigration and Multicultural Affairs* [2002] FCA 379 at [16]; M Crock, “A Sanctuary under Review: Where to from here for Australia’s Refugee and Humanitarian Program” (2000) 23 *Uni of NSW L J* 246 at 286.

If it means that courts have a free-standing role of protecting human rights, constitutionally that is wrong. If it means that substantive principles of law have to be construed or applied differently than otherwise they might be, generally that would be inappropriate. If it means that a more vigilant stance has to be taken by review bodies, it presupposes that there are differing standards of review to be applied according to the choice of the review body. If it means that there should be extra procedural safeguards to ensure that applications for review are properly heard, it deals with matters of detail (albeit important) that should be handled at that level rather than in substantive jurisprudence. Or if it means – as I suspect it often does – that it should be that much harder for an administrator to reject an asylum or immigration claim or to make an adverse decision, then it is a contention that is both result-oriented and political in character and to be evaluated in that light.

There is nothing novel about the humanitarian dimension of administrative decision-making. Decisions made in any area – social security, taxation, university entrance, occupational licensing, law enforcement – can have a profound impact on the lives of those they touch. Refugee determination has the added sensitivity that the risk of persecution has to be assessed, but even then there is a larger context that cannot be ignored. When decisions on refugee determination are made in the context of an immigration control policy that restricts Australia's annual intake to 12,000 people, drawn from an estimated 30 million or more putative refugees and displaced persons, the decisions to be made are not entirely one-dimensional in character. In short, evaluation of individual claims and humanitarian themes has long been a core part of executive decision-making, even though the importance ascribed to those matters may have increased over time.

Designing a system for balancing those interests is pre-eminently the responsibility of parliament and the government. In the process, choices have to be made about how decisions shall be made and about review rights.⁷⁶ Restrictions on review rights are an accustomed feature of decision-making systems. Decisions, for example, of the Administrative Appeals Tribunal on social security and other matters are appealable to the Federal Court only on a "question of law"⁷⁷ (which is not substantially different to the former restriction applying to Federal Court review of immigration decisions). The individual and humanitarian impact of decisions is a feature to be kept in mind, but it affords a problematic basis for super-adding unspecified principles or presumptions into the decision-making equation.

FAILURE TO CONSIDER RELEVANT MATTERS

Whatever else we expect of government agencies, we expect them at least to listen and give consideration to any view we put before an adverse decision is made. That expectation seems simple enough in itself. Compliance would not unduly burden agencies nor hinder their discretion to reach the correct or preferable decision. A legal standard imposed on government to give effect to an individual's expectation of being listened to would also complement rather than contradict existing legal doctrine. The doctrine of natural justice requires government agencies to provide members of the public with the opportunity to present a submission before a decision is made, and it seems only natural that an agency should bear a corresponding obligation to consider the case put by an individual.

An obligation to that effect has steadily been developed by the judiciary in recent years. The principal basis on which this development has occurred has been the ground of judicial review for

⁷⁶ The chief way by which Australia implements the humanitarian dimension is by creating an independent review system that can be accessed by non-citizens and asylum seekers. As to Australia's compliance in this regard with its international obligations, see Ruddock, above n 52 at 2.

⁷⁷ *Administrative Appeals Tribunal Act 1975* (Cth) s 44.

“failing to take a relevant consideration into account in the exercise of a power”.⁷⁸ The ground, largely dormant or undeveloped for much of its life,⁷⁹ has fast become one of the key grounds for setting aside administrative decisions in Australia. This is borne out in an empirical study of administrative law that I have been undertaking with two colleagues at the ANU, which identifies this ground (after breach of natural justice and error of law) as the third most common ground for setting decisions aside. Yet, as I shall presently argue, as the ground has developed it has become a legal standard that contains very little law. It therefore serves as a good case study – a microcosm as it were – of trends and themes in Australian administrative law.

I shall outline the implications of that claim before analysing the cases that in my view support it. The separation of powers rests on a number of principles that are designed to define the different province of each arm of government. A cardinal principle in public law is the legality/merits distinction, to the effect that the role of a court is to define the boundaries of a statutory discretion, but not to examine whether an executive decision made within those boundaries was the preferable decision to make.⁸⁰ The distinction is largely maintained by further principles, chiefly that judicial review is not concerned directly with review of administrative fact finding,⁸¹ and that in judicial review a court will not substitute its opinion for that of a decision-maker on the discretionary element of a decision.⁸² Those principles enjoy a great measure of respect, but what has always been more problematic is that if a common law standard that defines how a discretion must be exercised is in truth, no standard at all, then the scope for judicial intrusion on the merits of a decision will be to that extent heightened.⁸³

That, it will be argued, is what has transpired in relation to the legal obligation of a decision-maker to consider relevant matters. An idea, simple enough in itself, that a decision-maker should consider the case being put by a person, has been taken beyond the realm of law to the point that judicial scrutiny intrudes impermissibly and unproductively on the merits and style of administrative decision-making. Therein lies a partial response to the contention that the principles of Australian public law should increasingly be based on or incorporate international human rights standards. Those standards are not unlike the inexact principles that have been devised to encapsulate the legal obligation of a decision-maker to consider relevant matters – the obligation, for example, to give “proper, genuine and realistic consideration to the merits of the case”. A similarity exists between that expression and many of those used in international conventions. Examples include: the *1951 Convention Relating to the Status of Refugees*: “A refugee shall have free access to the courts of law” (art 16); the *International Covenant on Civil and Political Rights*: “All persons shall be equal before the courts and tribunals” (art 14), and “Everyone shall have the right to recognition everywhere as a person before the law” (art 16); and the *Convention on the Rights of the Child*: “In all actions concerning children ... the best interests of the child shall be the primary consideration” (art 3).

The inescapable consequence of defining the legal obligations of government by standards of that kind will be, in my view, that the legality/merits distinction will continue to erode. The rules for administrative decision-making will become inherently vague, governed to an unhealthy extent by the sense of restraint or forbearance of the individual judge. And so to the cases.

⁷⁸ The expression used in s 5(2)(b) of the *Administrative Decisions (Judicial Review) Act 1977* (Cth).

⁷⁹ Eg, it was common in academic texts not to give separate consideration to this ground but to have a combined discussion of relevant/irrelevant considerations: eg, S D Hotop, *Principles of Australian Administrative Law* (1985, 6th ed) 225, and M Aronson and N Franklin, *Review of Administrative Action* (1987) 31.

⁸⁰ *Attorney-General (NSW) v Quin* (1990) 170 CLR 1 at 36 per Brennan J.

⁸¹ *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 355 per Mason CJ.

⁸² Eg, *Randall v Northcote Corporation* (1910) 11 CLR 100; *Green v Daniels* (1977) 13 ALR 1; *Johnson v Federal Commissioner of Taxation* (1986) 72 ALR 625 at 628 per Toohey J.

⁸³ See J McMillan, “Recent Themes in Judicial Review of Federal Executive Action” (1996) 24 *F L Rev* 347 at 377-385.

Foundation cases, and the emphasis on statutory construction

The early cases which gave birth to the failure to consider relevant matters as an independent ground of review keenly reflected the legality/merits distinction by tying the ground to the interpretation of the legislation being administered. The role of a court was narrowly defined, and was to ensure that the exercise of judgment by a decision-maker occurred within the bounds of the statutory framework. The preservation of that right to exercise judgment was not at risk. In *Associated Provincial Picture Houses Ltd v Wednesbury Corporation*⁸⁴ (probably the foundation case for the development of this ground) Lord Greene MR observed that: “If, in the statute conferring the discretion, there is to be found expressly or by implication matters which the authority exercising the discretion ought to have regard to, then in exercising the discretion it must have regard to those matters.” The same emphasis on statutory construction was given as firmly many years later by Mason J in a foundational Australian case, *Minister for Aboriginal Affairs v Peko-Wallsend Ltd*: “What factors a decision-maker is bound to consider in making the decision is determined by construction of the statute conferring the discretion”.⁸⁵

In other ways too the early Australian cases emphasised the narrow compass of this ground. In *Sean Investments Pty Ltd v Mackellar*⁸⁶ Deane J observed that “it is largely for the decision-maker ... to determine which matters he regards as relevant and the comparative importance to be accorded to matters which he so regards”. The same point was emphasised by in *Peko-Wallsend* by Mason J, who noted too that in applying the ground to a Minister due allowance should ordinarily be made for the decision to be based on broader policy considerations.

Briefing papers – emerging difficulties

In other respects, however, *Sean Investments* and *Peko-Wallsend* contained seeds of invalidity that would grow luxuriantly in the coming years. First, it was accepted in both cases that a decision-maker such as a Minister could discharge the obligation to consider relevant matters by adoption of a departmental briefing paper that summarised the issues to be decided. However, if there was a shortcoming in the paper (specifically, if there was no mention of a particular relevant matter) a breach of the ground would thereby be established – unless, of course, the decision-maker chose to give evidence in court to supplement the written record.

The length and quality of the briefing paper thereafter became a crucial determinant of the validity of an administrative decision. It was acknowledged that the briefing paper could be *brief*: “Part of a Department’s function”, Brennan J noted, “is to undertake an analysis, evaluation and precis of material to which the Minister is bound to have regard”.⁸⁷ But just what could be left out was not clearly defined. Brennan J noted that “the salient facts” had to be in the briefing paper;⁸⁸ Gibbs CJ said that the paper had to bring to attention each “material fact”, but could leave out matters that were “insignificant or insubstantial”;⁸⁹ and Mason J similarly used “insignificant” as the discriminen.⁹⁰ A further point, made explicit by Mason J,⁹¹ was that any such shortcoming in a briefing paper could not be excused by proof that the relevant matter had nevertheless been considered but set aside by officers in the Department.

⁸⁴ [1948] 1 KB 223 at 228.

⁸⁵ (1986) 162 CLR 24 at 39. See also *Shrimpton v Cth* (1945) 69 CLR 613 at 620.

⁸⁶ (1981) 38 ALR 363 at 375.

⁸⁷ (1986) 162 CLR 24 at 65.

⁸⁸ (1986) 162 CLR 24 at 66 (Deane J agreeing).

⁸⁹ (1986) 162 CLR 24 at 31.

⁹⁰ (1986) 162 CLR 24 at 46 (Dawson J agreeing).

⁹¹ (1986) 162 CLR 24 at 37-38.

There was no attention given to the disparity that now existed between the obligation of a decision-maker under this ground and the obligation of a decision-maker under the doctrine of natural justice. There it had been long-established that the obligation to provide a hearing did not have to be discharged personally by the decision-maker:⁹² it was enough that the decision-making process overall was fair. The emphasis now given to relevant matters being considered personally by the decision-maker also excluded other models of administrative decision-making. For example, an alternative view might have regarded the Minister's responsibility as formal, political and managerial; the focus would then switch to whether as a matter of substance the obligation to consider relevant matters had been discharged properly within an agency in a manner that was then linked to the formal approval of that decision by the Minister.

The focus on the decision-maker rather than the decision-making process is illustrated by *Tickner v Chapman*,⁹³ in which the Full Federal Court declared invalid a decision by the Minister for Aboriginal and Torres Strait Islander Affairs to make a declaration that would have prevented the construction of the Hindmarsh Island Bridge. The Minister's decision was preceded by a public inquiry, from which a report was prepared and presented to the Minister recommending that a heritage declaration order be made. The decision was followed by a debate in both houses discussing (and rejecting) a motion that the order be disallowed. The decision was nevertheless held to be invalid as there was no evidence that the Minister had personally looked at either the 400 submissions attached to the report nor a secret envelope attached to the report describing the potential damage that construction of the bridge would cause to the traditions of the Ngarrindjeri women. Burchett J suggested that the problem could be avoided by the Prime Minister appointing a female Minister to exercise for the time being the functions of the Minister for Aboriginal Affairs: but that, with respect, is a matter to be decided within government and on which it is inappropriate for the judiciary to offer guidance.

The stance adopted in *Tickner v Chapman* has been repeated in many other cases. A similar finding was made in *Minister for Aboriginal and Torres Strait Islander Affairs v Western Australia*⁹⁴ to the effect that a heritage declaration order applying to a proposed crocodile farm in Broome was invalid in the absence of inadequate evidence of Ministerial consideration of the inquiry report. In *Tobacco Institute of Australia Ltd v National Health and Medical Research Council*⁹⁵ a report on passive smoking by the Council was declared invalid because of the Council's reliance on the work of two university researchers who had prepared a precis of submissions and reports received by the Council in the inquiry leading up to the report. In each of those cases the Court placed considerable reliance on the requirements of the statutory scheme – one requiring the Minister to “consider” the report, the other requiring the Council to “have regard” to the submissions. A competing and equally plausible construction of the statute would be that those were neutral statutory terms describing the steps in the decision-making process, rather than terms that enlarged the scope of the obligation of each participant in that process.

Factual and other errors – the shifting focus

A second aspect of *Sean Investments* and *Peko-Wallsend* that, when magnified, was apt to disturb the balance between judicial review and government decision-making was the idea that an error or shortcoming in a briefing paper would ordinarily flow through to and invalidate a decision that was based on that paper. That risk is heightened by an observation in *Peko-Wallsend* that the information on which a decision is based must be “the most recent and accurate information that [is] at hand ... the most current material available to the decision-maker”.⁹⁶ An error can thus

⁹² Eg, *FAI Insurances Ltd v Winneke* (1982) 151 CLR 342.

⁹³ (1995) 57 FCR 451.

⁹⁴ (1996) 67 FCR 40.

⁹⁵ (1996) 71 FCR 265.

⁹⁶ (1986) 162 CLR 24 at 44-45.

arise in situations of actual or constructive knowledge, that is, where a decision-maker has failed to give consideration to matters that he or she either knew or should have known of.

The decision of the High Court in *Re Patterson; Ex parte Taylor* provides an interesting illustration of this point and of the open-ended risk now posed by this ground of review. The comprehensive briefing paper to the Minister (the second time the case had gone to a Minister) dealt with the question of whether it was in “the national interest” to cancel Mr Taylor’s visa under s 501(3) of the *Migration Act 1958* (Cth). Two errors in the briefing led to the Minister’s decision being declared invalid.⁹⁷ First, Gaudron and Kirby JJ felt that the briefing paper did not spell out as precisely or as fully as it might have the statutory meaning of “national interest”.⁹⁸ The opposing view is that a Minister is an officer *par excellence* able to define the national interest, and that Parliament chose “national interest” as the decisional criterion for exactly that reason. Secondly, most members of the Court drew attention to an erroneous statement in the briefing paper to the effect that under the *Migration Act* Mr Taylor would have a right to put in a subsequent submission requesting the Minister to review the visa cancellation decision.⁹⁹ There is no denying that that error was material to whether the decision was valid and could provide a basis for concluding that the Minister had misconstrued the statutory framework. What is lacking in the judgments, however, is any discussion of the significance of the error in evaluating overall the validity of the decision.¹⁰⁰ It was, after all, an error concerning the post-decisional opportunity available to Mr Taylor to seek Ministerial reconsideration of the decision. Statutory procedure or not, there would be nothing stopping Mr Taylor from seeking such a review.

This approach, of closely tying the validity of a decision to the quality of the briefing paper, has given rise to surprising results in other cases.¹⁰¹ The error in *Nikac v Minister for Immigration, Local Government and Ethnic Affairs*¹⁰² stemmed from the failure of the briefing paper to draw to the Minister’s attention a transition policy published three and a half years previously by the Minister’s predecessor. While the new Minister, as befits a system of responsible government, was free to make and remake policy from one decision to the next, earlier policies including those of predecessors in the office would, it was held, remain relevant until formally revoked. In *Andary v Minister for Immigration and Multicultural Affairs*¹⁰³ a decision by the Minister was held to be invalid by reason that it was based on a lengthy briefing paper that did not spell out that the Minister had a discretion to depart from the approach taken in the paper concerning the weight to be attached to relevant considerations. That conclusion (reflected as well in other

⁹⁷ The decision was also set aside by a majority of the Court on a constitutional ground, namely that Mr Taylor as a British citizen who had been in Australia for over thirty years was not an “alien” under Constitution s 51(19) liable to deportation.

⁹⁸ [2001] HCA 51 at [81]-[86] (per Gaudron J); and [333]-[341] (per Kirby J). Kirby J in fact went further and held that the definition of “national interest” proffered to the Minister was erroneous.

⁹⁹ [2001] HCA 51 at [1] (per Gleeson CJ); [87] (per Gaudron J); [91] (per McHugh J); [197]-[200] (per Gummow & Hayne JJ). See also *Johnson v Williams* [2000] FCA 3. 58 ALD 1, holding that a decision by the Attorney-General to request the extradition of an offender from Britain was invalid by reason that one paragraph in the briefing paper misstated the possible legal action that could ensue in Australia.

¹⁰⁰ The key issue in the legislation was whether a hearing should be given to Mr Taylor either before or after the decision. Under the statutory path chosen by the Minister, no such hearing had to be given after the decision. He was in fact given such a hearing ([2001] HCA 51 at [195]), though with hindsight it was futile so far as compliance with statutory procedures was concerned. Seemingly, too, because of the course of the litigation, he was given an opportunity before the decision to make his views known (eg, [2001] HCA 51 at [336]).

¹⁰¹ The “error in the briefing paper” cases are not always classified as a failure to consider relevant matters, but can interchangeably be considered as an irrelevant consideration, a failure to apply the correct test, or jurisdictional error. Either way, the issue is essentially the same.

¹⁰² (1988) 20 FCR 65.

¹⁰³ [2001] FCA 1544.

cases¹⁰⁴) sits oddly with an alternative view that a Minister hardly needs to be told that he or she is not bound by departmental advice. Finally, in *Minister for Health and Family Services v Jadwan Pty Ltd*,¹⁰⁵ a decision by the Minister to revoke a nursing home approval was held to be invalid as the Panel on whose advice the Minister acted was invalidly constituted; the advice purported to be that of a legally constituted body, but was not.

Pausing at that point, it is clear that the focus of judicial review under this ground had broadened. The narrow concern of the law in earlier days with whether the legislation had been carried into effect had been supplemented and at times overshadowed by a focus on other issues to do with the style and the content of the decision-making process. The shift in focus is apparent from an observation made in 1963 by Dixon CJ in *Klein v Domus Pty Ltd*¹⁰⁶ on the role of a court in judicial review. His Honour observed that “[i]f it appears that the dominating, actuating reason for the decision is outside the scope of the purpose of the enactment, that vitiates the supposed exercise of the discretion”. The Chief Justice went on to observe, in a comment that neatly captures the separation of powers, that “the real object of the legislature in such cases is to leave scope for the ... officer who is investigating the facts and considering the general purpose of the enactment to give effect to his view of the justice of the case”.

Proper, genuine and realistic consideration

The departure from the approach outlined by Dixon CJ has been demonstrated more sharply by another line of reasoning that has flourished over the last two decades. Courts had often observed that a discretion to make a decision could involve a duty of sorts – a duty, for example, to consider any application that would enliven that discretion,¹⁰⁷ and a duty “to address the real question required by the legislation to be addressed”.¹⁰⁸ It seemed but a short step from that requirement to add that the decision-maker must “give proper, genuine and realistic consideration to the merits of the case”.¹⁰⁹ That short step has, in time, become a giant leap. The subsequent case law bears out well a recent observation by the Full Federal Court that the standard “creates a kind of general warrant, invoking language of indefinite and subjective application, in which the procedural and substantive merits of any ... decision can be scrutinised”.¹¹⁰

Hindi v Minister for Immigration and Ethnic Affairs is a foremost illustration of the elasticity of that standard. An application by the Hindi family for permanent resident status, at the expiration of their visitor entry permits, was rejected twice by the Department and again on review by the Immigration Review Panel. The Hindis would most probably have to return to Lebanon, a war torn country from which they had been absent for many years. The Departmental letter of

¹⁰⁴ Eg, see *Aksu v Minister for Immigration and Multicultural Affairs* [2001] FCA 514; *Ruhl v Minister for Immigration and Multicultural Affairs* [2001] FCA 648; *Jahnke v Minister for Immigration and Multicultural Affairs* [2001] FCA 897. Contra, see *Turini v Minister for Immigration and Multicultural Affairs* [2001] FCA 822; *Javillonar v Minister for Immigration and Multicultural Affairs* [2001] FCA 854. See also the suggestion by Kirby J in *Re Patterson; Ex parte Taylor* [2001] HCA 51 at [347] that it was close to a “borderline” error for a Departmental briefing paper to inform the Parliamentary Secretary to the Minister for Immigration and Multicultural Affairs of the Minister’s preferred outcome.

¹⁰⁵ (1998) 89 FCR 478.

¹⁰⁶ (1963) 109 CLR 467 at 473 (McTiernan and Windeyer JJ concurring).

¹⁰⁷ *Water Conservation & Irrigation Commission (NSW) v Browning* (1947) 74 CLR 492 at 505 per Dixon J; and *Murphyores Inc Pty Ltd v Commonwealth* (1976) 136 CLR 1 at per Mason J.

¹⁰⁸ *Minister for Immigration and Ethnic Affairs v Maitain* (1988) 78 ALR 419 at 429 per Beaumont & Gummow JJ.

¹⁰⁹ *Khan v Minister for Immigration and Ethnic Affairs* (1987) 14 ALD 291 at 292 per Gummow J; see also *Brelin v Minister for Immigration and Ethnic Affairs* “proper and adequate consideration”.

¹¹⁰ *Minister for Immigration and Ethnic Affairs v Anthonypillai* (2001) 106 FCR 426 at 442; see also *Bruce v Cole* (1998) 45 NSWLR 163 at 185 (Full Court, NSW Sup Ct).

rejection made special note of all the points raised and submissions made by the Hindi family. In overturning the decision, Sheppard J noted that “the use by the writer of the letter of such phrases as ‘has been read’, ‘has been made aware of’, and ‘have been noted’ do not necessarily reflect that genuine and proper consideration of the matter which Mr Hindi was entitled to have brought to bear on the matter”.¹¹¹

A similar approach was adopted in a large number of other cases – along the lines, for example, that the decision-maker’s statement of reasons “simply rejects the substance of an applicant’s case without giving reasons which can rationally support that rejection”¹¹²; or, that relevant matters “were referred to in the delegate’s decision. It is another matter whether they were adequately addressed”¹¹³. This line of reasoning was submerged in immigration cases for a period, after the amendment of the *Migration Act* in 1992 established a new scheme for judicial review that did not include failure to consider relevant matters as a free-standing ground of review. In time, however, the same line of reasoning re-emerged on a different footing. The obligation of the decision-maker (now a tribunal) to prepare a statement of reasons setting out “the findings on any material questions of fact” and referring “to the evidence or any other material on which the findings were based”¹¹⁴ was treated in many cases as an obligation to explain why the tribunal had not accepted claims and assertions of fact made by an applicant.¹¹⁵ That approach to judicial review was subsequently disapproved by the High Court in *Minister for Immigration and Multicultural Affairs v Yusuf*,¹¹⁶ holding that the obligation to prepare a statement of reasons is discharged by a tribunal setting out the findings it has actually made rather than by addressing those which in the objective view of a court were material questions of fact. The Federal Court has also reiterated many times that apparent flaws in the reasoning process of a tribunal do not necessarily constitute reviewable errors.¹¹⁷ The “proper, genuine and realistic” standard nevertheless had a temporary resurgence, on the basis that it was intrinsically an aspect of the function of a tribunal considering the merits of a case.¹¹⁸ That view was disapproved by the Full Federal Court,¹¹⁹ but it is doubtful whether the immigration jurisdiction has seen the last of the standard: decisions of the Refugee Review Tribunal have recently been declared invalid on a basis that seems little different from that prevailing in the earlier jurisprudence of the Court.¹²⁰

¹¹¹ (1988) 20 FCR 1 at 15.

¹¹² *Minister for Immigration, Local Government and Ethnic Affairs v Pashmforoosh* (1989) 18 ALD 77 at 80 (per Davies, Burchett & Lee JJ). See also *Waniewska v Minister for Immigration, Local Government and Ethnic Affairs* (1986) 70 ALR 284; *Chumbairux v Minister for Immigration and Ethnic Affairs* (1987) 74 ALR 480; *Singh v Minister for Immigration and Ethnic Affairs* (1987) 15 FCR 4; *Surinakova v Minister for Immigration, Local Government and Ethnic Affairs* (1991) 33 FCR 87; *Sacharowitz v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 33 FCR 480; *Pattanasri v Minister for Immigration, Local Government and Ethnic Affairs* (1993) 34 ALD 169.

¹¹³ *Lek v Minister for Immigration, Local Government and Ethnic Affairs* (1993) 117 ALR 455 at 472 (per Wilcox J).

¹¹⁴ *Migration Act 1958* (Cth) s 430 (Refugee Review Tribunal), s (Migration Review Tribunal).

¹¹⁵ (2001) 180 ALR 1. See also the decision of the Full Federal Court in *Minister for Immigration and Multicultural Affairs v Singh* (2000) 98 FCR 469.

¹¹⁷ Eg, a reviewable error is not established merely by showing the reasons contained – illogical reasoning or reached findings unsupported by probative evidence (*Minister for Immigration and Multicultural Affairs v Epeabaka* (1998) 84 FCR 411; a *non-sequitur* or a lack of rational process (*Minister for Immigration and Multicultural Affairs v Perera* [2001] FCA 1212); an illogical finding of fact or reasoning (*Minister for Immigration and Multicultural Affairs v Anthonypillai* (2001) 106 FCR 426); a conclusion of fact that is demonstrably unsound or reached by a faulty process (*Minister for Immigration v Al-Miahi* [2001] FCA 744); or an unreasonable finding of fact (*Brakni v Minister for Immigration* [2001] FCA 48).

¹¹⁸ *Anthonypillai v Minister for Immigration and Multicultural Affairs* [2000] FCA 1368.

¹¹⁹ *Minister for Immigration and Ethnic Affairs v Anthonypillai* (2001) 106 FCR 426.

¹²⁰ Eg, *W321/01A v Minister for Immigration and Multicultural Affairs* [2002] FCA 210; *W68/01A v Minister for Immigration and Multicultural Affairs* [2002] FCA 148.

Immigration decision-making has been a fertile ground for litigation over the nature and extent of the obligation to consider relevant matters, but it has not been the only area. In *ARM Constructions Pty v Deputy Commissioner of Taxation*¹²¹ a refusal to grant an extension of time to pay tax was held to be invalid by reason that the decision-maker's statement of reasons did not refer to one of the arguments put by the taxpayer in support of the request. The obligation has also figured frequently in litigation concerning the obligation of a local council to give consideration to various matters in deciding whether to grant development approval to a project. The decision of the NSW Court of Appeal in *Weal v Bathurst City Council*¹²² illustrates the contrasting approaches to this issue. In deciding to grant approval to a rail freight terminal, the Council relied on the report of an expert acoustic consultant which concluded that the noise danger was minimal overall, but was inconclusive as to measures that should be taken to mitigate unacceptable risks. The majority of the Court declared the Council's decision to be invalid, with Giles JA observing that "[t]here had to be an understanding of the matters and the significance of the decision to be made about them, and a process of evaluation, sufficient to warrant the description of the matters being taken into consideration".¹²³ Mason P dissented, observing that "a problem can be recognised and addressed without precise determination of its scope, at least so long as the decision is made in the light of an understanding of the outer limits of the problem and ... a fair assessment of their potential impact".¹²⁴

The uncertain nature of the legal obligation to consider relevant matters was also revisited in an interesting fashion in the Hindmarsh Bridge litigation. Mr and Mrs Chapman, the proponents of the Bridge construction, in a subsequent action against the Minister for Aboriginal Affairs claiming damages for breach of statutory duty and misfeasance in public office, alleged that the Minister should have been aware at the time of issuing a heritage declaration of the scope of his legal obligation to consider the 400 or more submissions attached to the report prepared for him. In dismissing the claim, the Court clarified the nature of the Minister's obligation, saying that his obligation to "consider" the submissions was an obligation at least to have "direct physical access" to but not to read all submissions.¹²⁵ It would be sufficient for the Minister to read a summary of the major themes in the submissions (a course of action that, by contrast, was not approved in the *Tobacco Institute* case).

Lessons

What lessons can be drawn from this phase of legal history? It has not been the purpose of this analysis to argue that the cases referred to were all wrongly decided or that each is an example of judicial intrusion into the merits of administrative decision-making. A more in-depth analysis of each case would be required to make such a claim. Rather, the purpose of the analysis has been to illustrate how a public law standard with a relatively narrow focus can quickly expand to become a formidable basis for invalidating the exercise of executive power.

That, in turn, raises a series of other questions. Why have the criteria for invalidity developed along that path? What problem in executive decision-making was being corrected, or objective in public law being achieved? Are public law and public administration better as a result? Or, do

¹²¹ (1986) 65 ALR 343. For other examples, see *Baker v Australian Telecommunications Commission* (1987) 75 ALR 504; *Alexandra Private Geriatric Hospital Pty Ltd v Blewett* (1985) 68 ALR 222; *C v T* (1995) 136 ALR 703; *Tasmanian Conservation Trust Inc v Minister for Resources* (1995) 55 FCR 516.

¹²² (2000) 111 LGERA 181. See also *Parramatta City Council v Hale* (1982) 47 LGRA 319; *King v Great Lakes Shire Council* (1986) 58 LGRA 336; *Currey v Sutherland Shire Council* (1998) 100 LGERA 365.

¹²³ (2000) 111 LGERA 181 at 201.

¹²⁴ (2000) 111 LGERA 181 at 186.

¹²⁵ *Chapman v Luminis Pty Ltd (No 5)* [2001] FCA 1106.

those questions miss the point that we expect the law (and courts) to play a different role in society nowadays?

Those questions, though addressed in some cases, have not been fully answered or acknowledged. I query, moreover, whether a satisfactory answer can be given. It is not apparent why a more demanding standard for legal validity had to be imposed, so far as consideration of relevant matters was concerned. The cases themselves seem to indicate that in nearly every instance more care than hitherto was being taken in decision-making to consult with those affected, to assemble relevant information, and to explain and justify the eventual decisions. Moreover, in the period under discussion, a far more extensive framework had been developed around government to safeguard administrative justice and to ensure executive accountability. Those developments included Ombudsmen, administrative tribunals, human rights commissioners, open government laws, internal review procedures, and external inquiries into decision-making standards. It is not easy, in that context, to explain why there should be judicial leadership in defining the standards for public administration.

Another problem is that the focus of the law has apparently shifted. The conclusion is hard to resist that in some of the cases at least the court was imposing more rigorous standards because it was not satisfied either that the right or a fair administrative decision had been made. It is understandably hard for a judge to ignore that dimension of any case, particularly when the adverse impact that a decision will have on a person is known. And, after all, the law is not dictating what the decision should be, merely requiring those responsible for that decision to reach it properly and defensibly. Nevertheless, that approach quickly encounters issues of great practical and theoretical difficulty, since it is not the purpose of judicial review to ensure that the right decision was made. Nor are courts in a position either to make that assessment or to define the standard for measuring whether the administration of law and policy has led to the right decision in the individual case.

In summary, when there is excessive judicial rigour as to how executive decisions are to be made, the choice of what decision can be made is also subtly influenced or, in the worst case, predetermined. In the process, the locus of responsibility for making the decision will be undermined or, again in the worst case, usurped. The separation of powers, which sustains judicial respect and authority, is dependent conversely on judicial adherence to the legality/merits distinction.

JUDICIAL REVIEW AND THE JUDGES

In a recent speech on “Courts and the Rule of Law”, Chief Justice Gleeson made the following point:

From the point of view of a litigant, the rule of law suggests the outcome of the litigation should depend as little as reasonably possible upon the identity of the judge who hears the case. It also suggests that Parliament, in enacting law, and appellate courts, in developing the common law, should pay attention to the importance of establishing principles of general application rather than widening the scope for ad hoc discretionary judgment. ... Public confidence demands that the rule of law be respected, above all, by the judiciary.¹²⁶

Individual interpretation and philosophy necessarily play a part in adjudication, as the right of appeal from single judge decisions to a full bench acknowledges. The key issue therefore is whether the personal factor is “as little as reasonably possible” a factor in adjudication. In this part of the paper I will argue that that expectation is not being properly realised at present.

¹²⁶ M Gleeson, “Courts and the Rule of Law”, paper presented to the Rule of Law Series, Melbourne University, 7 Nov 2001.

The analysis of the judicial system commonly focuses on the role of appellate courts. Trends in the law, and the degree of certainty in legal doctrine, are usually measured by reference to appeal court judgments. From the point of view of a litigant, however (whether plaintiff or defendant), the first and often the only point of contact with the judicial system is before the single judge. Consequently, an assessment of the prospects of success in litigation has to be made by reference to the range of possible responses of the trial judge and the likely choice within that range. If, within that range, there are competing legal principles of equal weight that can be applied by the trial judge, the task of defining the legal rights and obligations of the parties, and predicting the outcome of foreshadowed litigation, is made more difficult. Similarly, if some judges are thought to choose more from one side of the ledger than the other, the prediction of legal outcomes will take on a decidedly personal dimension.

A central theme of this paper is that this is presently a problem in Australian public law. There is considerable doctrinal uncertainty concerning the major principles for lawful decision-making. On many core issues there are competing principles from which to choose, one resulting in the validity of a decision, the other in invalidity. Thus, a decision may be invalid on natural justice grounds because an adverse inference that was credible, relevant and significant was not disclosed; or, on the other hand, the inference may be classified instead as an evaluative comment that did not have to be disclosed. Equally, the discussion of an issue on file might adequately discharge the obligation to give consideration to relevant matters; or, on the hand, it may fail to discharge the obligation to give proper, genuine and realistic consideration to an issue. The list of similar examples is far more extensive, touching most key administrative law principles, such as the no evidence rule, the delegate/agent distinction, and the application of government policy.

There has in recent cases been a move by appeal courts to downplay this uncertainty by re-defining the issue as one turning on the proper interpretation of the statute being administered. But, as often, this simply masks the problem without lending any greater certainty to the outcome. Thus, in the lead-up to the decision of the High Court in *Eshetu*, the members of the Federal Court were evenly divided on whether the direction to the tribunals to “act according to substantial justice” was facultative or prescriptive. In *Miah*, a majority of three held that the statutory hearing code in the *Migration Act* did not displace a common law obligation of disclosure, whereas a minority of two held otherwise. And in *Minister for Immigration and Multicultural Affairs v Bhardwaj*,¹²⁷ a majority of six relied on the provisions of the *Migration Act* to reach the conclusion that the MRT had a duty to remake an earlier erroneous decision, while a minority of one held that it was inconsistent with the scheme of the Act for the Tribunal to reconsider or revoke a decision once the duty to make that decision had been discharged.

Ironically, the increasing emphasis given by the Court to statutory interpretation in yielding a result can heighten the problem of uncertainty, as it means that no general doctrine emerges that will be binding in other cases. For instance, on the issues that arose in *Miah* and *Bhardwaj*, that arise frequently in other areas of decision-making, there is no general principle emerging that is more important than the factual and statutory result in those cases. Just, as in those cases, the members of the appeal court divided for and against, there is scope for a trial judge in subsequent litigation to uphold or strike down a decision under review.

A further illustration of this uncertainty is that most of the leading administrative law cases of the last decade or so that define the principles for lawful decision-making have involved a reversal by a superior court of the decision or principle of a lower court: the list includes *FAI*, *Kioa*, *Osmond*, *Conyngham*, *O'Shea*, *Peko-Wallsend*, *Park Oh Ho*, *Chan Yee Kin*, *Quin*, *Haoucher*, *Bond*, *Annetts*, and *Kurtovic*, *Ainsworth*, *Wu Shan Liang*, *Eshetu* and *Jia*.¹²⁸ In one sense that is an idle

¹²⁷ [2002] HCA 11.

¹²⁸ *FAI Insurances Ltd v Winneke* (1982) 151 CLR 342 (High Court), reversing a decision of the Full Bench of the Supreme Court of Victoria, unreported; *Kioa v West* (1985) 159 CLR 550

observation, as appeals and special leave are more likely to occur on points of difficulty or uncertainty. However, when courts themselves are sharply divided on the standards for lawful decision-making it does accentuate the difficulty faced by those in government in making a similar assessment. Moreover, as earlier examples in this paper illustrate, the large number of appellate decisions on administrative law issues over the past two decades have tended as much as anything to introduce new standards and options as to clarify existing problem areas. On many issues that confront those in government on a recurring basis, the concept of legality is as much a range of options as a set of standards.

Another sign of the difficulty in clarifying the standards for lawful decision-making was encountered in an empirical research project I have been undertaking with a colleague (Robin Creyke, at ANU). Our research assistants (senior law students) were asked to prepare a profile of close to 300 judicial review cases, including identifying the ground of legal error. In only 40% of cases were the students able easily from the judgment to categorise the decision under one of the 18 grounds of legal error specified in the ADJR Act. Further, some judges were consistently clear in identifying the legal error in each case they decided, while some were far less so. Generally speaking, the normative and declaratory value of judicial decisions for Australian public administration will be correlated with the clarity of the exposition of legal principle in those decisions.

Reducing uncertainty in administrative law standards

Total certainty and predictability in legal standards is both unrealistic and impracticable in a system in which evolution is a strength rather than a weakness. Nonetheless, certainty and predictability are core objectives of the law, particularly in relation to administrative law standards that play a key role in securing the rule of law and the separation of powers. Special regard should therefore be given to establishing a climate for factors that advance legal certainty. Three factors will be discussed in this paper.

Firstly, and consistently with a theme of this paper, it would be inappropriate to go further down the path of regarding human rights standards as a separate or stand-alone feature of administrative law jurisprudence. It is unnecessary to take that step. Individual rights protection is a theme that is anciently rooted in our legal system. The human rights issues that are posed by the international human rights standards are addressed already by a more sophisticated body of

(High Court), reversing a decision of the Full Court of the Federal Court (1984) 55 ALR 669; *Public Service Board of NSW v Osmond* (1986) 159 CLR 656 (High Court), reversing a decision of the NSW Court of Appeal [1984] 3 NSWLR 442; *Conyngham v Minister for Immigration and Ethnic Affairs* (1986) 68 ALR 441 (Full Court of the Federal Court), reversing a decision of the Federal Court (Wilcox J) (1986) 68 ALR 423; *South Australia v O'Shea* (1987) 163 CLR 378 (High Court), reversing a decision of a Full Bench of the Supreme Court of South Australia (1986) 44 SASR 507; *Minister for Arts, Heritage and Environment v Peko-Wallsend Ltd* (1987) 75 ALR 218 (Full Court of the Federal Court), reversing a decision of the Federal Court (Beaumont J) (1986) 70 ALR 523; *Park Oh Ho v Minister for Immigration and Ethnic Affairs* (1989) 167 CLR 637 (High Court), reversing a decision of the Full Court of the Federal Court (1988) 81 ALR 288; *Chan Yee Kin v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379 (High Court), reversing a decision of the Full Court of the Federal Court (1988) 15 ALD 751; *Attorney-General (NSW) v Quin* (1989) 170 CLR 1 (High Court), reversing a decision of the NSW Court of Appeal, unreported; *Haoucher v Minister for Immigration and Ethnic Affairs* (1990) 169 CLR 648 (High Court), reversing a decision of the Full Court of Federal Court (1988) 83 ALR 530; *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 (High Court), reversing a decision of the Full Court of the Federal Court (1988) 81 ALR 508; *Annetts v McCann* (1990) 170 CLR 596, reversing a decision of the Full Bench of the Supreme Court of Western Australia [1990] WAR 161; *Minister for Immigration and Ethnic Affairs v Kurtovic* (1990) 92 ALR 93 (Full Court of the Federal Court), reversing a decision of the Federal Court (Einfeld J) (1989) 86 ALR 99.

domestic legal doctrine. If the answers provided by that doctrine are not always palatable to those who don the mantle of human rights advocate, that simply presents a challenge for them to work through the plethora of existing mechanisms for human rights protection, such as parliament, the media, ombudsmen, human rights and anti-discrimination agencies, and government consultative procedures. It is not a reason for further clouding the role of courts in public law by requiring them to judge the legality of government action by reference to standards that are inherently elastic and value-driven.

Secondly, courts should themselves eschew standards that do not have any self-apparent meaning. I refer here to the developing trend in the High Court in particular of invoking legal standards such as “jurisdictional error”, “jurisdictional fact” and “asking the wrong question”.¹²⁹ Those concepts are as likely to obscure as to illuminate what an administrator is required to do in order to act lawfully. For example, a general principle enunciated by a majority of Justices in *Bhardwaj* was that a tribunal has a duty to perform its function afresh if there was a jurisdictional error in the earlier exercise of power.

Whether an administrator can lawfully correct or remake an earlier decision is one of the more vexing issues that persistently troubles government officials. It does not help, with respect, if the answer turns on whether a jurisdictional error has occurred. Given the consequences for government of a finding of invalidity, and the criticism that is occasionally directed at government officials for flouting legal standards, a core objective of judicial review should be to clarify rather than muddy those standards.

Thirdly, there is a pressing need for judicial restraint in the development of new standards of legal invalidity, particularly at the trial level. As noted elsewhere in this paper, judicial review now functions as part of a system that overall pays more attention to defining the standards of public administration, and contains numerous bodies devoted to this task (tribunals, ombudsman, public service commissions, auditors-general, and internal review units, to name a few). It is unnecessary and inappropriate that legal standards are developed for a growing list of procedural defects in the fashion that has occurred over the past two decades.

I will give a recent example in explanation of this point. In *White v Overland*¹³⁰ the judge was faced with a novel problem: is a decision invalid by reason that the decision-maker took into account a “without prejudice” discussion held with a person? The judge held that the decision was invalid, treating the discussion as an irrelevant consideration that could not be taken into account. What the administrator should have done, it was held, was to invite the applicant at the conclusion of the without prejudice discussion to make an “open communication” which, at the applicant’s discretion, could reiterate the earlier discussion. If not, and no open submission was forthcoming, the decision-maker should excise from his or her mind the earlier discussion. The basis of this new principle of legal validity was the importance as a matter of public policy of protecting the privilege attaching to without prejudice discussions against unilateral disclosure by either party.

My first criticism of the judgment is that it is inappropriate for a single justice to create a new legal standard in that way and declare an executive decision to be invalid. Standards of invalidity should not lightly be created at the trial level. As a general rule, this should occur if appropriate at the appellate level. That comes closer to approximating the other processes adopted in

¹²⁹ Eg, *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 180 ALR 1; *Corporation of Enfield v Development Assessment Commission* (2000) 169 ALR 400; and *Minister for Immigration and Multicultural Affairs (MIMA) v Eshetu* (1999) 162 ALR 577 (per Gummow J). Admittedly this trend, of reviving traditional standards, has been exacerbated by the legislative enactment of a privative clause to regulate litigation under the *Migration Act*.

¹³⁰ [2001] FCA 1835.

government for the creation of new legal standards for public administration. The legislative process, for example, comprises a large number of people and stages for formulating and evaluating the soundness of new rules. Similarly, the executive branch of government largely operates on a pattern of institutional rather than individual generation of rules and policies. By contrast, if a new legal standard for invalidity is developed by a single judge, government agencies throughout Australia must assume (in accordance with the separation of powers) that the ruling is conclusive and binding, whatever doubts they may hold.

As it happens, my view is that *White v Overland* was wrongly decided. There is a doctrinal clash with some other established principles of administrative decision-making. One is that the administrative process is regarded usually as a continuum,¹³¹ in which decision-making powers can be exercised from time to time as circumstances require, and decisions can be made, reviewed and – unless a decision has the quality of finality – be remade. Consequently, a decision-maker cannot generally be estopped from acting inconsistently with an earlier finding of fact, representation or undertaking.¹³² Furthermore, administrators are not bound by the rules of evidence, and are generally free to consider any information or evidence of probative force. Further, as an aspect of natural justice doctrine, courts have consistently ruled that any information which is known to a decision-maker is assumed to be capable of affecting the decision, even if only subconsciously, and there is a duty to disclose such information whether it is regarded as relevant or not.¹³³ It is doubtful, too, how workable the ruling in the case would be in other situations of administrative review, for example, by a tribunal or Ombudsman, or where there is a multi-party dispute. In summary, the source of the problem in the case was the assumption that without prejudice discussions could qualify the duty of a decision-maker to discharge their functions as circumstances require.

CONCLUSION

The executive and judicial roles are strikingly different, but teasingly similar. The obligation of one is to look at the merits of the individual case, the pledge of the other to uphold justice in the individual case. Yet behind those similar labels lie many profound differences in executive and judicial roles. It is intrinsic to the separation of powers that those differences be maintained.

The theme of this paper is that judicial review of administrative action has become more assertive and demanding over the last two decades. Administrative action that would have been accepted as lawful in an earlier age is now more likely to be declared unlawful. The criteria for lawful decision-making have an expanded reach and are applied more rigorously. Those criteria have, at the same time, become more elastic and indefinite, making it difficult quite often to gauge in advance whether an administrative action would survive challenge. The implementation of public policy, in some areas of government at least, can be frustrated by the difficulty of manoeuvring through a legal minefield.

Those points are, of course, a generalisation. They do not characterise every case, nor the demeanour of every judge. The changes have occurred also in an age when more attention generally has been paid to executive accountability, to raising the standards of administrative decision-making, and to protecting individual rights. To that extent, judicial innovation has been compatible with rather than inconsistent with other trends in law and government.

Yet that is only part of the picture and alone cannot justify the transformation that has occurred. Nowadays, judicial review does not operate primarily to correct executive interpretation of legislation that is clearly wrong. Nor is it easy to point to any recent case where an obvious abuse of executive power was corrected by judicial intervention. For the most part, administrative

¹³¹ Eg, *Jebb v Repatriation Commission* (1988) 80 ALR 329 at 333.

¹³² *Attorney-General (NSW) v Quin* (1990) 170 CLR 1.

¹³³ Eg, *NIB Health Funds Ltd v Private Health Insurance Administration Council* [2002] FCA 40.

action is now declared invalid because of a perceived procedural shortcoming in the way a decision was reached.

The transformation in judicial review has occurred also in an age when, arguably, judicial review should have been less rather than more important. The non-judicial system for controlling executive power and for protecting individual rights is stronger than it has ever been. Beginning in the 1970s Australian legislatures, federal and State, created an entirely new framework for the control and accountability of state power that placed comparatively less weight on judicial review of administrative decision-making.¹³⁴ The new accountability matrix includes a great many general and special jurisdiction administrative tribunals that (federally) receive as many as 40,000 applications each year; the creation of many general and special jurisdiction Ombudsman that investigate as many complaints; the establishment of human rights and anti-discrimination agencies around Australia; the enactment of new public sector control legislation such as (to give federal examples) the *Freedom of Information Act 1982* (Cth), *Financial Management and Accountability Act 1997* (Cth) and the *Commonwealth Authorities and Companies Act 1997* (Cth); the development of a far more active parliamentary scrutiny system; and the greater elaboration of decision-making principles and procedures in legislation and in official publications.

This dimension of Australian public law is rarely adverted to in the legal and academic commentaries that advocate an expanded judicial role. An alternative argument is more often presented, along the lines that judicial activism is an expression of the rule of law in safeguarding individual rights and civil liberties against executive abuse. A related argument is that human rights standards should play a stronger and more overt role in judicial review in Australia, to keep pace with legal developments in other western democracies and with the globalising influence of human rights norms. It is also claimed, though not often explained, that judicial activism forms part of a new democratic settlement between the government and the community.¹³⁵

Those arguments are too easily made and too rarely justified. It is not enough to assume that general humanitarian concern, legal obligation and judicial activism go hand-in-hand, one justifying the other. A great many issues need to be addressed before that connection can safely and properly be made. If there are present deficiencies in the Australian system of administrative law and public administration, they need to be explained by example. If judicial method is as capable or better than legislative or executive method for distilling enduring community values, that needs to be demonstrated. The differences (and they exist) between Australian legal and political culture, and the culture of other countries that have chosen to go down the path of bill of rights protection, need to be understood and explained away. Acknowledgment must also be made of the impact that legal activism can have on the style and complexity of administrative decision-making, and of who benefits from that trend.

An underlying premise of this paper is that those issues are not being confronted. The onus rests upon those who argue that judges should go further in human rights protection to do so. Until that happens, judicial activism that forms part of that trend can rightly be criticised.

¹³⁴ This issue is developed at greater length in J McMillan, "Parliament and Administrative Law" in G Lindell and R Bennett, *Parliament: The Vision in Hindsight* (The Federation Press, 2001) 340-350.

¹³⁵ Eg, D Dyzenhaus, "Reuniting the Brain: The Democratic Basis of Judicial Review" (1998) 9 *Public Law Review* 98; M Kirby, "The Role of International Standards in Australian Courts" in P Alston & M Chiam, *Treaty-Making in Australia: Globalisation versus Sovereignty* (Federation Press, 1995) 89. See also Sir Anthony Mason, "Future Directions in Australian Law", (1987) 13 *Monash University Law Review* 149; Sir Gerard Brennan, "Courts, Democracy and the Law" (1991) 65 *Australian Law Journal* 40; J J Spigelman, "Rule of Law – Human Rights Protection" (1999) 18 *Aust Bar Review* 29. Cf J J Doyle, "Common Law Rights and Democratic Rights" in P D Finn (ed), *Essays on Law and Government*, vol 1 (Law Book, 1995) 144.

