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The Impact of Judicial Review on Tribunals

Robin Creyke

Law and Policy Paper 27

PRESS

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Preface

The Law and Policy Papers series was established in 1994 by the Centre for International and Public Law in the Faculty of Law, The Australian National University. The series publishes papers contributing to understanding and discussion on matters relating to law and public policy, especially those that are the subject of contemporary debate.

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The Impact of Judicial Review on Tribunals

Robin Creyke*

Over the centuries[1] the courts have maintained their role of supervising the decisions made by executive agencies including tribunals. The source of their authority to do so is controversial. Is it simply a matter of the checks and balances functions of each arm of government under separation of powers? Is it a concomitant of the principle of legality? Is it an essential element of democracy that since parliament expresses the will of the people, the executive arm must comply with the wishes of the majority?[2] Each of these theories has its adherents and provides at least part of the answer. An added justification in a federal system like ours is the principle stated by Marshall CJ in *Marbury v Madison*[3] that there is:

> a role of the courts in controlling the limits on the exercise of power which [is] constitutionally mandated. This constitutional checking role of the courts makes it easier to accept that they have a general obligation to control exercises of power by the executive which is not authorised.

Whatever its source, the courts' supervisory function is not likely to disappear. It was inherited on their foundation by the superior courts in each of the States and Territories, has been supplemented by statute in some jurisdictions,[4]

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* Thanks for assistance in the preparation of this paper are due to Simon Thornton, Alexander Flecknoe-Brown, Elizabeth Southwood and Joanna Virtue.

1 SA De Smith, Harry Woolf and Jeffrey Jowell, *Judicial Review of Administrative Action* (5th ed, 1995) ch 14.

2 Mark Aronson, Bruce Dyer and Matthew Groves, *Judicial Review of Administrative Action* (3rd ed, 2004) at 3.

3 1 Cranch 137 (1803), 2 L Ed 60; 5 US 137.

4 *New South Wales Act 1823* (4 Geo IV, c 96) and the *Charter of Justice 1823; Australian Courts Act 1828* (9 Geo IV, c 83); and see James Crawford and Brian Opeskin, *Australian Courts of Law* (4th ed, 2004) at 131–4. See also Aronson, Dyer and Groves, above n 2, at 15–24.

granted by the Constitution to the High Court[5] and by statute to other federal courts.[6] The jurisdiction has expanded with the growth in the reach of government. In the States and Territories, not shackled by constitutional separation of powers, judicial review may in time be granted even to bodies other than courts.[7] Hence, there are pragmatic and constitutional reasons why it can be asserted that the supervisory powers of the courts, although they may be limited in certain areas,[8] and severely curtailed in others,[9] will continue to play a significant role. Indeed, paraphrasing words reflecting the High Court's constitutional jurisdiction and applying them to the judicial review jurisdiction: 'the necessity of such a controlling power existing somewhere is so apparent that I should think that the ambiguity should be resolved in favour of the power'.[10]

This paper examines how the courts are exercising that function in relation to the many tribunals which operate in Australia. The cases are categorised under headings commonly found in the jurisprudence. What they reveal is an ambivalence by the courts about their supervisory role. On the one hand the judges are suspicious of the competence of tribunal members. In turn that leads to the courts intervening readily to quash tribunal decisions and remit them for reconsideration. On the other, the limitations of the judicial review role and, to a lesser extent, a judicial willingness to acknowledge that the specialist skills and knowledge of tribunal members should be respected and only interfered with in cases of egregious error, have led judges to take a more cautious stand. The cases illustrate the circumstances in which courts are more likely to adopt one attitude rather than the other.

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5 Constitution s 75(iii), (v).

6 *Judiciary Act 1903* (Cth) s 39B(1), (1A); *Administrative Decisions (Judicial Review Act) 1977* (Cth) (ADJR Act); *Federal Magistrates Court Act 1999* (Cth) Part 3.

7 For example, in introducing the Bill for the *Administrative Decisions Tribunal Act 1997* (NSW) the Minister noted that in time a judicial review jurisdiction could be granted to the Administrative Decisions Tribunal: NSW, *Hansard*, Legislative Assembly, 29 May 1997, at 9602.

8 Note eg ADJR Act s 3(1), Schs 1 and 2; *Income Tax Assessment Act 1936* (Cth) ss 124ZADAB, 155UV, Part VA Div 6, s 202F; and see Administrative Review Council report *The Scope of Judicial Review* (forthcoming early 2006).

9 *Migration Act 1958* (Cth) Part 8.

10 R *v Commonwealth Court of Conciliation and Arbitration and the President thereof; Ex parte Whybrow & Co* (1910) 11 CLR 1 at 22 (Griffith CJ).

General approaches by the courts

The High Court from which, ultimately, all inferior courts must take their lead, has exemplified these alternative views. For example, in *Minister for Immigration and Ethnic Affairs v Wu Shan Liang*,[11] in the context of an examination of a reasons statement by a tribunal, the Court warned that courts should not be 'concerned with looseness in the language … nor with unhappy phrasing of the reasons of an administrative decision-maker'. Rather, as the Court concluded: 'The reasons for the decision under review are not to be construed minutely and finely with an eye keenly attuned to the perception of error'.[12]

Behind that concern lay the need to respect the inherent limitation on judicial review, namely, that the courts' role is restricted to issues of legality. As the Court noted: 'the … court must beware of turning a review of the reasons of the decision-maker upon proper principles into a reconsideration of the merits of the decision'.[13]

The High Court's view in *Wu* was echoed by Spigelman CJ of the New South Wales Supreme Court in *Bruce v Cole* concerning a review of a decision as to the fitness for office of Justice Vince Bruce:[14]

> In cases which engage the sense of compassion of a judge such as this, it is necessary to avoid the temptation to express a conclusion in terms of one of the recognised grounds for judicial review, whilst in truth making a decision based on the merits. In a democratic society such conduct transgresses the proper limits of judicial intervention. It will, if often repeated, undermine the basis for judicial independence and the fundamental role which judicial impartiality plays in the social stability of the nation and the maintenance of personal freedom of its citizens.[15]

The cases followed a period in which judges increasingly criticised decisions of tribunals for often minor infringements of grounds of review or relatively unimportant factual or legal errors.[16] The views of the High Court and of

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11 (1996) 185 CLR 259. See also *Minister for Immigration and Ethnic Affairs v Guo* (1997) 191 CLR 559.

12 *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 272. The words quoted are taken from the decision of the Full Court of the Federal Court in *Collector of Customs v Pozzolanic* (1993) 43 FCR 280 at 287.

13 *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 272.

14 (1998) 45 NSWLR 163.

15 *Ibid* at 184–5.

16 John McMillan, 'Federal Court v Minister for Immigration' (1999) 22 *AIAL Forum* 1; John McMillan, 'Judicial Restraint and Activism in Administrative Law' (2002) 30 *Federal Law Review* 335.

Spigelman CJ were expressed with unusual firmness, and appeared to herald a new respect for tribunals. They indicated that courts should henceforth be restrained when approaching their judicial review task.[17] That expectation has not been realised.

An indication that the High Court was unlikely to heed its own counsel of restraint was provided in *Craig v South Australia*,[18] heard not long before the decision in *Wu*. In *Craig's* case the High Court drew a distinction between the errors which would be categorised as jurisdictional if committed by a tribunal as compared with an inferior court. By permitting greater laxity for courts than tribunals the High Court clearly indicated that it regarded tribunals as having an inferior status. The reason for the distinction was said to be that 'tribunals … are commonly constituted, wholly or partly, by persons without formal legal qualifications or legal training',[19] the implication being that tribunal members needed more careful supervision. Similar sentiments were expressed by Kirby J in *NAIS v Minister for Immigration and Multicultural and Indigenous Affairs*:[20]

> Typically, judges are required to decide more complex controversies. These often necessitate more detailed reasoning. They commonly oblige a lengthier time for reflection, analysis and exposition of the reasons. Moreover, judges are members of a trained profession to whom are conventionally ascribed capacities of analysis and discipline in decision-making superior to those possessed by, or expected of, most members constituting statutory tribunals.[21]

Although in some quarters these justifications have been seized upon to exclude tribunals which are headed by lawyers,[22] for the most part, the distinction has served to entrench the lower stature of all tribunals in this country.

The significance of their subordinate status has been heightened by the expanded reach of the concept of jurisdictional error, at least when pleaded under the Constitution s 75(v). The High Court has repeatedly affirmed that the concept of jurisdictional error when a tribunal is involved is a broad one. Jurisdictional error encompasses whether the tribunal has identified a wrong issue, asked itself a wrong question, ignored relevant material, relied on irrelevant

17 That attitude reaffirmed a view expressed early in the life of, for example, the Commonwealth Administrative Appeals Tribunal. See eg *Deniz v Minister for Immigration and Ethnic Affairs* (1983) 51 ALR 645 at 650.

18 (1995) 184 CLR 163.

19 *Ibid* at 176.

20 [2005] HCA 77.

21 *Ibid* at [91].

22 *Matson v Racing Appeals Tribunal* [2001] VSC 264.

material, breached procedural fairness or, at least in some circumstances, made an erroneous finding or reached a mistaken conclusion.[23] Errors of this kind – and the category is so broad as to encompass virtually all the grounds of review – are jurisdictional and will invalidate a decision of the tribunal.[24] Further, as the High Court has also signalled, the list is not exhaustive.[25] The indeterminacy of these tests permits an enhanced level of intervention by the Court exercising review.[26] In other words, the Court is again signalling its distrust of tribunals and its desire to retain the widest possible avenue for reviewing tribunal decisions.

This renewed emphasis on the courts' judicial review role has been in part a response to the attempts to exclude the supervisory jurisdiction under the *Migration Act 1958* (Cth).[27] As Heerey J noted in *Thirukkumar v Minister for Immigration and Multicultural and Indigenous Affairs*,[28] in the context of a statutory review scheme for migration decisions deliberately designed to restrict the courts' role, the interpretation of jurisdictional error has reopened the door for review under that Act by allowing greater scope for arguing potentially open-ended grounds, such as failure to take account of relevant considerations or error of law.[29] At the same time, the impact of these developments is not restricted to the migration tribunals, raising the possibility that judicial review challenges to findings by tribunals will become more widespread.

Equally worrying for at least some Commonwealth tribunals is that the High Court's distrust of tribunals is echoed within public administration. In research conducted in 1999-2000, officers within some 40 Commonwealth agencies indicated significantly different approval rates for aspects of review by courts and tribunals, tribunals being perceived less favourably than courts.[30] Overall there

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23 *Craig v South Australia* (1995) 184 CLR 163 at 179.

24 *Minister for Immigration and Multicultural Affairs v Yusuf; Re Minister for Immigration* (2001) 206 CLR 323 at 351 (McHugh, Gummow and Hayne JJ).

25 *Ibid.*

26 *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82; *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57; *Re Minister for Immigration and Multicultural Affairs; Ex parte Jia* (2001) 205 CLR 507; *Re Paterson; Ex parte Taylor* (2001) 207 CLR 391; *Minister for Immigration and Multicultural Affairs v Yusuf; Re Minister for Immigration* (2001) 206 CLR 323.

27 Administrative Review Council report *The Scope of Judicial Review* (forthcoming early 2006).

28 [2001] FCA 864.

29 *Ibid* at [24]–[27].

30 Robin Creyke and John McMillan, 'Executive Perceptions of Administrative Law – An Empirical Study' (2002) 9 *Australian Journal of Administrative Law* 163.

was satisfaction with the quality, length and comprehensibility of the reasons for decisions of external review bodies, that is, both courts and tribunals.[31] The global figure was 76.6 per cent satisfaction level for the quality of reasons, 55.1 per cent as to length, and 67.6 per cent as to comprehensibility. However, there was a significantly lower figure for specialist tribunals[32] which scored only a 57 per cent satisfaction level for the quality of reasons, only 18.6 per cent satisfaction for the length of their reasons, and only 55.3 per cent satisfaction for their comprehensibility. The satisfaction level for all three measures was closer to the norm for the Commonwealth Administrative Appeals Tribunal, although it remained below the overall level.

Again one can speculate about officers' lower ratings for tribunals. Given that tribunals' functions replicate those within public administration, any assessment of tribunals by those within government will always be a sensitive task. Courts claim to know the law better than administrators and assessment of the effectiveness of courts will reflect this perception. No quarter will be granted to members of tribunals on these grounds. Officials are also closer to tribunals and their personnel, leading – in some cases – to a diminution of respect. Tribunal members, for the most part, also have lesser protection in terms of their independence from government than is accorded to those with judicial status. With limited exceptions for Presidents and presidential members in the multi-purpose tribunals like the Administrative Decisions Tribunal (ADT) in New South Wales, the Victorian Civil and Administrative Tribunal (VCAT), and the Commonwealth Administrative Appeals Tribunal (AAT (Cth)), membership does not include those holding judicial office. Whatever the reasons, the lower approval rating for tribunals is a matter for concern.

For most Australians, tribunals *are* the face of administrative justice. Australian residents are entitled to assume that this form of adjudication will provide an accessible, fair and just answer to their concerns about executive decision-making. Regular overturning of tribunal decisions does nothing to engender that confidence in their output which tribunals were intended to enjoy. These are issues which need to be addressed, not least by the Council on Australasian Tribunals (COAT), the body set up to coordinate research and training for

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31 The questions were asked to assess whether external review is performing its normative role, that is, informing officers of principles which should be applied generally by decision-makers within public administration.

32 For the purposes of the survey the specialist tribunals were the principal Commonwealth merits review tribunals, the Social Security Appeals Tribunal, the Veterans' Review Board, and the two migration tribunals, the Refugee Review Tribunal and the Migration Review Tribunal.

Australian tribunals, if the stature of tribunals, is not to be undermined. These findings at the general level are illustrated by the following judicial review decisions in a number of areas of practical significance for the operation of tribunals.

Reasons

The inconsistent messages of the courts have particular relevance to the writing of reasons. Despite *Wu*, courts continued to criticise the reasons of tribunals, and the nature of that obligation has become increasingly onerous. The demands of the courts reached their zenith when four members[33] of a specially convened five-member bench of the Federal Court found, in *Minister for Immigration and Multicultural Affairs v Singh*,[34] that a material fact is a fact which objectively is material, not one which the tribunal considers to be material. That conclusion inevitably meant that the courts would be the final arbiter of materiality and sanctioned curial fact-finding. Indeed, the standard imposed on tribunals was in danger of exceeding that required of courts.[35]

The spectre of enhanced intervention in the supervisory jurisdiction of the courts led the High Court to rein in this interpretation. As Gleeson CJ said in *Minister for Immigration and Multicultural Affairs v Yusuf; Re Minister for Immigration*,[36] a view endorsed by the five other members of the majority:[37]

> There is nothing in that language [of section 430 requiring the tribunal to set out its findings on material facts] which imposes a requirement to make a finding on every question of fact which is regarded by the Federal Court, on judicial review of the Tribunal's decision, as being material.[38]

Indeed, quoting from *Australian Broadcasting Tribunal v Bond*,[39] the majority in *Yusuf* observed that:

> To expose all findings of fact, or the generality of them, to judicial review would expose the steps in administrative decision-making to comprehensive review by the courts and thus bring about a radical change in the relationship between the executive and judicial branches of government.[40]

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33 Black CJ, Sundberg, Katz and Hely JJ.

34 (2000) 98 FCR 469.

35 *Brackenreg v Comcare Australia* (1995) 56 FCR 335 at 343–52 (Sheppard J).

36 (2001) 206 CLR 323.

37 Gaudron, McHugh, Gummow, Hayne and Callinan JJ. See eg at 346 [68].

38 *Ibid* at 331 (Gleeson CJ).

39 (1990) 170 CLR 321 at 341 (Mason CJ).

40 (2001) 206 CLR 323 at 344.

The majority, therefore, affirmed that the obligation on the tribunal is to do no more than set out the findings of fact for the decision which the tribunal has made. There is no requirement to make findings on facts on matters against an objective standard to be established only by a superior court. This ruling also acknowledges that the correctness of a fact is often dependent on an assessment of the credibility of the applicant, a matter with which, by tradition, appellate or supervisory courts do not interfere.[41]

Both concessions should be welcomed. The explicit moderation of the fact-finding standard means, for example, that it is 'not necessary for the tribunal to give a line-by-line refutation of the evidence for the claimant, either generally or in those respects where there is evidence that is contrary to findings of material fact made by the tribunal'.[42] More recent statements have emphasised that it is only those facts which are material to the decision to which reference must be made.[43] These statements foreshadow that absences from a tribunal's reasons should be read in context and that in future courts exercising their supervisory role should adopt the 'light touch' approach first advocated in *Wu* and now reinforced in *Yusuf*.[44]

That view was echoed in *Applicant WAEE v Minister for Immigration and Multicultural Affairs*[45] where the Full Federal Court said:

> It is plainly not necessary for the tribunal to refer to every piece of evidence and every contention made by an applicant in its written reasons … The tribunal is not a court. It is an administrative body operating in an environment which requires the expeditious determination of a high volume of applications. Each of the applications it decides is, of course, of great importance. Some of its decisions

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41 *SS Hontestroom v SS Sagaporack* [1927] AC 37 at 47; *Watt or Thomas v Thomas* [1947] AC 484 at 488; *Jones v Hyde* (1989) 63 ALJR 439 at 351; *Abalos v Australian Postal Commission* (1990) 171 CLR 167; *Devries v Australian National Railways Commission* (1993) 177 CLR 472.

42 *Re Minister for Immigration and Multicultural Affairs; Ex parte Durairajasingham* (2000) 168 ALR 407 at 433, cited with approval by Heerey J in *Thirukkumar v Minister for Immigration and Multicultural Affairs* [2001] FCA 864 at [20].

43 *Kioa v West* (1985) 185 CLR 550 at [38] (Brennan J); *Minister for Immigration and Multicultural Affairs v Yusuf; Re Minister for Immigration* (2001) 206 CLR 323; *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57; *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82; *Muin v Refugee Review Tribunal* (2002) 68 ALD 257; *Minister for Immigration and Multicultural Affairs v Rajamanikkam* (2002) 210 CLR 222; *SAAP v Minister for Immigration and Multicultural Affairs* (2005) 215 ALR 162.

44 For example, *Visvanathan v Minister for Immigration and Multicultural Affairs* (1999) 59 ALD 660 (Lindgren J).

45 (2003) 75 ALD 630.

> may literally be life and death decisions for the applicant. Nevertheless, it is an administrative body and not a court and its reasons are not to be scrutinised 'with an eye keenly attuned to error'. Nor is it necessarily required to provide reasons of the kind that might be expected of a court of law.
>
> It may be that it is unnecessary to make a finding on a particular matter because it is subsumed in findings of greater generality or because there is a factual premise upon which a contention rests which has been rejected. Where, however, there is an issue raised by the evidence advanced on behalf of an applicant and contentions made by the applicant and that issue, if resolved one way, would be dispositive of the tribunal's review of the delegate's decision, a failure to deal with it in the published reasons may raise a strong inference that it has been overlooked.[46]

Relief may need, however, to be tempered. The majority in *Yusuf* left open the possibility that a failure to refer to a matter may signal a jurisdictional error, an error of law, or breach of another ground of review, a concession which will undoubtedly be exploited.[47] An example of the courts' continuing close analysis of the reasons of tribunals is the postscript by Drummond J in *Huang v Minister for Immigration and Multicultural Affairs*:[48]

> The principle of restraint is one that cautions against too zealous a search for error. It is not a principle that immunises the Tribunal's reasoning from that critical examination which is part and parcel of the function of a court charged with review of the Tribunal's decision to see if it is flawed with reviewable error of the kinds listed in … the Act.[49]

His observations were made in the context of a comment that the rigour which courts will impose on tribunals will vary with the role and function of the particular tribunal, an observation with which it is hard to cavil. Referring to the Migration Review Tribunal but in words which should be heeded by all review tribunals, he said:

> Members of the Migration Review Tribunal perform a significantly different function from public servants in the mainstream of federal executive activity who, from time to time, are called upon to make administrative decisions as part of a range of duties conferred on them. The Tribunal is a specialist decision-maker charged with reviewing lower-level administrative decisions. The obligation imposed … to provide in written form both reasons and findings, in the context

46 *Ibid* at [46]–[47] (French, Sackville and Hely JJ). See also *Comcare Australia v Mathieson* (2004) 79 ALD 518.

47 For example, see *Thirukkumar v Minister for Immigration and Multicultural Affairs* [2001] FCA 864 (Heerey J); *Grundman v Repatriation Commission* (2001) 66 ALD 125 at [31] (Gray J).

48 [2001] FCA 901.

49 *Ibid* at [20].

> of its decisions being subject to judicial review, shows that the Parliament expects the Tribunal to be capable of giving a coherent and informative explanation for how it reaches its ultimate conclusion for or against an applicant.[50]

In the light of these differences in emphasis, perhaps the best summary which can be offered is that provided by Brennan J in his dissenting judgment in *Repatriation Commission v O'Brien*[51] when he stated what should remain a guiding principle, namely that:

> a failure by a tribunal adequately to fulfil its statutory obligation to state the reasons for making an administrative decision does not, without more, invalidate the decision or warrant its being set aside by a court of competent jurisdiction. If a failure to give adequate reasons for making an administrative decision warrants an inference that the tribunal has failed in some respect to exercise its powers according to law (as, for example, by taking account of irrelevant considerations or by failing to consider material issues or facts), the court may act upon the inference and set the decision aside. In such a case, the exercise of the statutory power to make a decision is held invalid not because of a failure to state the reasons for making the decision, but because of a failure to make the decision according to law.[52]

Again in *Roncevich v Repatriation Commission*[53] the majority of the High Court stated:

> One of the appellant's arguments advanced in the Federal Court was repeated in this court, that the paucity of reasoning on the part of the tribunal was so deficient as to constitute error of law. It should be rejected. Sufficient appears from the judgment of the tribunal to enable the courts below, and this court to understand, and to deal with the reasoning and decision of the tribunal.[54]

This latest attempt by the High Court to limit the courts' judicial review role in relation to reasons is welcome. However, there is no clearly discernible line which marks out for a decision-maker when an omission of a reference to a fact in a reasons statement will amount to jurisdictional error, error of law, or breach of another ground of review. The most that can be expected, given the injunction from the High Court in *Yusuf*, and repeated in *Roncevich*, is that other courts will adopt a less stringent attitude to tribunal reasons when undertaking

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50 *Ibid.*

51 (1985) 155 CLR 422.

52 *Ibid* at 445–6.

53 (2005) 218 ALR 733.

54 *Ibid* at 740 (McHugh, Gummow, Callinan, Heydon JJ; Kirby J agreeing).

review. There is evidence that the courts are prepared to adopt this approach.[55] Nonetheless, in the absence of any formal doctrine of deference in Australia, the shoals of fact-finding retain perils for an unwary tribunal reasons-writer.

Credibility

The determination of the credibility of a witness in legal or administrative proceedings is an important role for the trier of fact. The High Court's recognition in earlier cases[56] that courts should be slow to overturn findings based on a witness' credibility has been reinforced by the Full Federal Court in *Kopalapillai v Minister for Immigration and Multicultural Affairs*.[57] Significantly, O'Connor, Branson and Marshall JJ also acknowledged that the credibility issue must be considered in the statutory and factual context. For example, there is legislative recognition in veterans' cases that 'the effects of the passage of time' on veterans' recollections, a problem which is compounded by 'the absence of, or a deficiency in, relevant official records'[58] are factors which must be taken into account in fact-finding. So too, in the context of refugees, the Full Federal Court noted that there should be a 'reasonable margin of appreciation'[59] for evidentiary inconsistencies or vagueness in recollections when people have been the objects of persecution. The members of the Court also pointed out that it was the decision-maker – not a judge or a court – who was given the statutory task of being 'satisfied' that the applicant was a person to whom Australia had protection obligations under the Refugee Convention.[60]

While accepting these suggestions 'as sound and sensible advice to, and guidelines for, decision-makers' in the context of decision-making by the Refugee Review Tribunal, the Full Court in *Kopalapillai* observed that this did not amount to:

> a rule that a decision maker may not reject an applicant's testimony on credibility grounds unless there are no possible explanations for the delay or inconsistency

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55 There is evidence to this effect. See *Applicant WAEE v Minister for Immigration & Multicultural Affairs* (2003) 75 ALD 630 at [22], [24]; *Mohammed v Minister for Immigration & Multicultural & Indigenous Affairs* [2005] FCAFC 47 at [22], [24]; *TelePacific Pty Ltd v Commissioner of Taxation* (2005) 218 ALR 85 at 96.

56 See note 41.

57 (1998) 86 FCR 547.

58 *Veterans' Entitlements Act 1986* (Cth) s 119(1)(h).

59 James Hathaway, *The Law of Refugee Status* (1991) at 84–5.

60 See also *Fox v Percy* (2003) 214 CLR 118 at 127–8; *NAIS v Minister for Immigration & Multicultural & Indigenous Affairs* [2005] HCA 77at [68].

> … . Nor is there a rule that a decision maker must hold a 'positive state of disbelief' before making an adverse credibility assessment in a refugee case.[61]

An example to illustrate this exception is seen in *NAIS v Minister for Immigration and Multicultural Affairs*[62] where the majority[63] of the High Court (in the words of Kirby J) found that: '[w]here the decision-maker reaches a decision in reliance upon a consideration of the credibility of parties or witnesses significant delay undermines the acceptability of such assessments'.[64]

In other words, while credibility must always be a matter to be handled sensitively, and a reviewing court should be slow to overturn the judgment of tribunals which have had the benefit of observing the applicant, there is no inflexible rule to that effect. The courts' reluctance to close the gate is apparent in these observations, reminding us that judicial members are cautious about permitting too ready an acceptance of fact-finding by tribunals.

Duty of inquiry

Closely allied to the fact-finding task and to issues of credibility is the question of whether the tribunal is under an obligation to make inquiries to elucidate further evidence. There had, until recently, been no majority High Court acceptance that a duty of this kind should be imposed[65] and even in other courts which had, on occasion, accepted the notion, the statements favouring the obligation were heavily qualified. The standard principles were expressed in *Prasad v Minister for Immigration and Ethnic Affairs*[66] where Wilcox J held:

> The circumstances under which a decision will be invalid for failure to inquire are, I think, strictly limited. It is no part of the duty of a decision-maker to make the applicant's case for him. It is not enough that the court find that the sounder course would have been to make inquiries. But, in a case where it is obvious that material is readily available which is centrally relevant to the decision to be made, it seems to me that to proceed to a decision without making any attempt to obtain that information may properly be described as an exercise of the decision-

61 (1998) 86 FCR 547 at 558–9.

62 [2005] HCA 77.

63 Gleeson CJ, Kirby, Callinan and Heydon JJ.

64 [2005] HCA 77 at [88] (Kirby J).

65 There was some discussion of the issue by Toohey J in *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 302–3 who favoured such an obligation in that case. Gummow and Hayne JJ also referred to the issue, with inconclusive results, in *Abebe v Commonwealth* (1999) 197 CLR 510 at [194].

66 (1985) 6 FCR 155 at 169–70. See also *Luu v Renevier* (1989) 19 ALD 521.

> making power in a manner so unreasonable that no reasonable person would have so exercised it.

The law was particularly unlikely to require such investigations when the applicant was represented by solicitors.[67] Nonetheless, the duty has been imposed, for example, in the following circumstances, namely, when a matter was known by the decision-maker and it raised an issue which could not be resolved without seeking further material,[68] when the information held by the decision-maker was out of date,[69] and when a gap in the evidence was due to the decision-maker misleading the applicant.[70]

Subsequent decisions had confirmed some of these principles but also illustrated the caution with which courts treated this ground for challenging the validity of a tribunal decision. *Grant v Repatriation Commission*[71] endorsed the statement that the duty arises when the material raises questions which need to be resolved before a sound decision can be made. The Full Federal Court observed:

> [The AAT] is obliged not to limit its determination to the 'case' articulated by an applicant if the evidence and material which it accepts, or does not reject, raises a case on a basis not articulated by the applicant.[72]

That comment was qualified by Madgwick J in *Hendy v Repatriation Commission* when he said:

> the Tribunal's duty to expand the scope of its consideration beyond that which was actually articulated by the parties, is not enlivened unless there *is some* evidence and material on the relevant issue before the Tribunal.[73]

This qualification appeared to be essential before such an obligation was triggered.

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67 *Videto v Minister for Immigration and Ethnic Affairs* (1985) 8 FCR 167 at 178–9 (Toohey J).

68 *Lek v Minister for Immigration, Local Government and Ethnic Affairs* (1993) 117 ALR 455; *Akers v Minister for Immigration, Local Government and Ethnic Affairs* (1988) 20 FCR 363

69 *Videto v Minister for Immigration and Ethnic Affairs* (1985) 8 FCR 167.

70 *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273at [50] (McHugh J). See also *Videto v Minister for Immigration and Ethnic Affairs* (1985) 8 FCR 167; *Tickner v Bropho* (1993) 114 ALR 409.

71 (1999) 57 ALD 1.

72 *Ibid* at [18]. See also *Sellamuthu v Minister for Immigration and Multicultural Affairs* (1999) 90 FCR 287 at [23]; *Satheeskumar v Minister for Immigration and Multicultural Affairs* [1999] FCA 1285 at [15].

73 (2002) 72 ALD 112 (emphasis added).

Such a circumstance arose in *Budworth v Repatriation Commission*[74] where the veteran claimed to have suffered a war-caused disability which he described variously as 'PTSD', and later 'severe nerves'. One of the medical experts had also suggested that Mr Budworth may have been suffering from another form of mental condition – a passive-aggressive-personality disorder – albeit the medical witness suggested this was not related to service. Given the generic description by the applicant of his condition, and the medical evidence supporting the possibility that Mr Budworth suffered some psychiatric condition other than PTSD, Madgwick J[75] found that the Commonwealth Administrative Appeals Tribunal had a duty to consider whether Mr Budworth had a form of mental disorder other than PTSD, if necessary calling for evidence to explore that possibility. In other words, the Tribunal should not have limited itself to PTSD even though that condition was the primary one presented in the claim.

The outcome was the more surprising given the statutory context. The terms of the *Veterans' Entitlements Act 1986* (Cth) impose a statutory obligation on the applicant to claim incapacity from 'a particular injury or disease'[76] and that eligibility must be assessed in relation to the disease 'as claimed'.[77] As Finn J observed in *Owens v Repatriation Commission*[78] not only does this place an obligation in practice on a veteran to nominate the disability claimed, '[i]n consequence … [the tribunal] lacked jurisdiction to make a decision in relation to any alleged war-caused disabilities other than those raised for the determination of the Commission'.[79]

Despite these provisions Madgwick J in *Budworth* found that there was no obligation on the applicant to 'attempt to put a medical label on the malady said to constitute a "disease".'[80] His Honour said the most that was required was that the injury or disease be described in some manner that was identifiable. At that point the obligation shifted to the decision-maker to identify the symptoms so

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74 (2001) 63 ALD 422. The circumstance identified by Madgwick J which triggered the duty of inquiry was not disapproved of on appeal (*Repatriation Commission v Budworth* (2001) 116 FCR 200).

75 In a view not disagreed with by the Full Court and conceded by the Commission at first instance in the Federal Court (*Repatriation Commission v Budworth* (2001) 116 FCR 200 at [9]).

76 *Veterans' Entitlements Act 1986* (Cth) s 14(5).

77 *Veterans' Entitlements Act 1986* (Cth) s 19(7)(a).

78 (1995) 59 FCR 93. Special leave to the High Court was refused: *Repatriation Commission v Owens* (1996) 70 ALJR 904.

79 (1995) 59 FCR 93 at 99.

80 (2001) 63 ALD 422 AT [45].

that the medical condition could be matched with the appropriate legislative instrument defining the causal link between a condition of that nature and service. In other words, the investigation and labelling of the medical condition became a task for the decision-maker.

Given earlier decisions which had come to a contrary view,[81] the findings were surprising. In most cases, the onus would be heavier on the applicant (see *Burden of proof*, below) than these findings indicate. The outcome illustrates the difficulty of assigning an appropriate balance of responsibilities between agencies and applicants, and that each case will, to an extent, turn on its own facts. The findings also highlight the fact that in the veterans' jurisdiction there are undoubtedly special circumstances. These include the advanced age of many veteran applicants, a particularly beneficial standard of proof, and a culture of assistance which has led to a heightened duty of investigation on officials. Normally it is considerably harder to establish any such obligation.

Hence, in *Luu v Minister for Immigration and Multicultural Affairs*[82] Mr Luu argued that the Minister had a duty to inquire whether Mr Luu, who was in immigration detention, would reoffend or disappear if released into the community. The case was characterised as one of hardship, since Mr Luu, a Vietnamese citizen, had been held in immigration detention in a high security prison for four years, a longer period than his sentence. The lengthy period in immigration detention was due to the failure of the Vietnamese Government to issue him with travel documents, a problem compounded by the delay in completion of a Memorandum of Understanding between the Australian and Vietnamese governments concerning the orderly repatriation of deportees to Vietnam. Despite the hardship for Mr Luu, Marshall J relied on the traditional reluctance to impose a duty of inquiry to deny that the Minister had any such obligation. Marshall J held that:

> Any duty on the decision-maker to inquire is generally restricted to material that is readily available. Behavioural evidence, which the minister is required to create through interviews and assessment, does not fall into the definition of readily available material.[83]

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81 For example, *Harris v Repatriation Commission* (2000) 62 ALD 174 (Finn J); approved on appeal to the Full Court in *Harris v Repatriation Commission* (2000) 62 ALD 161.

82 (2001) 65 ALD 161.

83 In a comment at the end of his judgment Marshall J, having noted that Mr Luu had already been in detention for four years longer than the sentence deemed appropriate by the sentencing judge, went on: '[I]t is hard to see how detention of such a length pending deportation is appropriate. Had this matter been reviewable on the merits, this court may have reached quite a different conclusion to the one reached by the minister. Unfortunately this matter is not so reviewable': at [114].

The approach in *Luu* illustrated that the duty of inquiry has generally been confined to special and exceptional circumstances, even in the context of the *Veterans' Entitlements Act 1986* (Cth).[84] In addition to the circumstances outlined earlier, these could include an applicant who has real communication difficulties and cannot turn to anyone to provide linguistic support,[85] who suffers some medical condition which prevents adequate collection or presentation of evidence,[86] who is unable to access information, for example, because confined or in a remote area, or where government has a special advantage in relation to obtaining information.[87] Even then the information which should be supplied is limited to that which is readily accessible and which is critical to the outcome or on which the outcome turned.

An example illustrating the imposition of the duty in relation to evidence which was central to the decision arose in *Li v Minister for Immigration and Multicultural Affairs (No 2)*.[88] Drummond J found that the failure to check on the authenticity of an army identity card, evidence which was critical to the applicant's credibility and reflected on the remainder of his evidence, amounted to a breach of the duty to inquire. According to Drummond J the obligation was an element of the requirement to adopt inquisitorial procedures, an obligation imposed on many tribunals.

Generally speaking, however, the courts have been slow to impose an obligation on a tribunal to undertake independent inquiries, even given some tribunals' ostensibly inquisitorial functions.[89] This reluctance reflects the need to balance efficient administration with administrative justice, and to date the courts have been reluctant to expand this duty.

Recently, however, the High Court has given the 'green light' to the duty of inquiry. In *Applicant VEAL of 2002 v Minister for Immigration and Multicultural*

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84 *Foroghi v Minister for Immigration and Multicultural Affairs* [2001] FCA 1875 (Marshall J). See also *Hill v Repatriation Commission* (2005) 218 ALR 251 at [102]–[104].

85 *Minister for Immigration, Local Government and Ethnic Affairs v Buksh* (1992) 26 ALD 399 at 404.

86 *Lawson v Minister for Immigration and Multicultural Affairs* (2001) 65 ALD 472 (Marshall J), where although it was pleaded that the applicant was said to be suffering from post-traumatic stress disorder and, it was alleged, had memory lapses, since the issue of memory lapse was not put to the tribunal, there was no need to inquire.

87 *Minister for Immigration and Ethnic Affairs v Singh* (1997) 44 ALD 487; *Re Bond v Repatriation Commission* (2001) 64 ALD 501; *Hourn v Farm Plan Pty Ltd* [2003] FCA 1122 at [44]–[53] (RD Nicholson J).

88 [2000] FCA 172.

89 *Minister for Immigration and Multicultural Affairs v Anthonypillai* (2001) 106 FCR 426.

Affairs[90] the High Court unanimously[91] conceded that it is a breach of procedural fairness not to make an inquiry in certain circumstances. As the Court noted:

> The Tribunal was not an independent arbiter charged with deciding an issue joined between adversaries. The Tribunal was required to review a decision of the Executive made under the Act and for that purpose the Tribunal was bound to make its own inquiries and form its own views upon the claim which the appellant made. And the Tribunal had to decide whether the appellant was entitled to the visa he claimed.[92]

Although the comment was made in the context of a statute requiring that the decision-maker consider whether the person was entitled to a protection visa, and that the decision was to be made by the executive, not the judiciary, these two preconditions – that the applicant be seeking to establish eligibility to a benefit, and the assessment is to be made by the executive – would apply generally to applications made to tribunals.

The concession is welcome. However, it will be interesting to see to what extent the qualifications to the duty articulated earlier by the courts and illustrated in the earlier material in this section reappear in the case law. The way has been left open for that to occur, given the comment by the High Court in *Applicant VEAL* that:

> the particular content of the obligation to accord procedural fairness was to be identified having regard not only to the particular provisions of the Act that regulated the Tribunal's work but also to the scope and objects of the Act as a whole.[93]

Duty to 'give proper, genuine and realistic consideration'

Closely allied to the duty to inquire is the obligation to 'give proper, genuine and realistic consideration' to a matter during the decision-making process. Since the 1980s, if the decision-maker failed to give such 'genuine consideration' to an applicant's case this could lead to invalidity. Various grounds have played host to the concept including dictation, breach of the non-fettering rule,[94] relevant/irrelevant considerations, error of law and unreasonableness.

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90 [2005] HCA 72.

91 Gleeson CJ, Gummow, Kirby, Hayne and Heydon JJ.

92 [2005] HCA 72 at [26].

93 *Ibid* at [23].

94 *Khan v Minister for Immigration and Ethnic Affairs* (1987) 14 ALD 291; *Hindi v Minister for Immigration and Ethnic Affairs* (1988) 20 FCR 1 at 13; *Surinakova v Minister for Immigration, Local Government and Ethnic Affairs* (1991) 33 FCR 87 at 96; *Pattanasri v Minister for Immigration, Local Government and Ethnic Affairs* (1993) 34 ALD 169 at 178–9.

A significant contraction to this ground of challenge occurred in *Minister for Immigration and Multicultural Affairs v Anthonypillai*.[95] Heerey, Goldberg and Weinberg JJ denied that any such obligation arises under the *Migration Act 1958* (Cth) for reasons that are capable of applying generally. Their Honours concluded that the formula did not in fact equate to breach of a ground of review and warned that, in particular, the relevant/irrelevant considerations ground could expand to permit review on the merits if based on a failure to give 'proper, genuine and realistic consideration' to a matter. In so finding their Honours commented:

> The 'proper, genuine and realistic consideration' formula runs counter to this [migration] scheme. It creates a kind of general warrant, invoking language of indefinite and subjective application, in which the procedural and substantive merits of any Tribunal decision can be scrutinised.
>
> In our view, to say that the Tribunal failed to give 'proper, genuine and realistic consideration' to an application does not make out any available ground for review under Pt 8.[96]

The Court's observations were made in the context of Part 8 of the *Migration Act 1958* (Cth) which did not contain relevant/irrelevant considerations as grounds of review and the findings were designed to banish the 'proper, genuine and realistic' expression from the judicial review lexicon for migration matters. Whether the ban will be permanent is another question, since the errors covered by the expression have shown a remarkable ability to reappear in covert guise.[97]

That prediction is reinforced by observations in *Anthonypillai* itself. The Court noted that a challenge on similar grounds could be made by arguing a constructive failure to review, a doctrine developed in the context of the common law principles governing the grant of mandamus.[98] This argument could be mounted, according to the Court, for breach of the obligation to 'consider' a valid application for a visa. As the Court noted:

> [There] is some scope, albeit limited, for the argument that the Tribunal may, in a particular case, have failed to 'review' the decision of the Minister. In other words, although we consider the use of the formula 'proper genuine and realistic

95 (2001) 106 FCR 426.

96 *Ibid* at 442.

97 See eg *Turner v Minister for Immigration* (1981) 55 FLR 180 at 184 (Toohey J); *Howells v Nagrad Nominees Pty Ltd* (1982) 66 FLR 169 at 195; *Kioa v West* (1985) 159 CLR 550 at 604 (Wilson J); *Parramatta City Council v Hale* (1982) 47 LGRA 319 at 331 (Street CJ); and also at 335–6.

98 (2001) 106 FCR 426 at 443. See also R *v War Pensions Entitlement Appeal Tribunal; Ex parte Bott* (1933) 50 CLR 228 at 242–3 (Rich, Dixon and McTiernan JJ).

> consideration' to be an unsuitable method of expressing the circumstances in which that contention can be maintained, we accept that there may be some cases where it can properly be said that the Tribunal has not in truth 'considered' the application for a visa at all.[99]

The Court also said that if the Tribunal restricted its review function to something akin to an appeal rather than a hearing *de novo*, or addressed the wrong question, or failed to read the material before it, it could constructively have failed to exercise its jurisdiction to consider an application.[100] These comments have the potential to undermine the banishment edict the Court had just pronounced.

The decision in *Anthonypillai* was specifically limited to review under the *Migration Act 1958* (Cth).[101] Arguably when review is sought under the *Judiciary Act 1903* (Cth), the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (ADJR Act), or the inherent judicial review jurisdiction of the State and Territory Supreme Courts, or there is an appeal on a question of law under the *Administrative Appeals Tribunal Act 1975* (Cth) s 44, the findings in *Anthonypillai* are irrelevant. That view has been upheld. Hence in *NACZ v Minister for Immigration and Multicultural Affairs*[102] the Full Federal Court applied the formula, noting that in *Anthonypillai* the comments had been confined to the context of the *Migration Act 1958* (Cth) and that even in that Act the relevant provisions had since been amended.[103]

There are good reasons not to so limit the decision. Reliance on the formula by a court exercising judicial review opens the way for the court to second-guess tribunals on issues of fact under the guise of a breach of a ground of review.[104] The removal of this opportunity generally by a prohibition on use of the expression would go some way to inhibiting transgression of the boundary between legality and merits review.

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99 (2001) 106 FCR 426 at 442.

100 *Minister for Immigration and Multicultural Affairs v Anthonypillai* (2001) 106 FCR 426 at 444.

101 *Ibid* at 442. See also *Hendy v Repatriation Commission* (2002) 72 ALD 112 at [61] (Madgwick J).

102 [2003] FCA 457.

103 *Ibid* at [29], [31]–[33] (Madgwick J). See also *B41 of 2003 v Refugee Review Tribunal* [2005] FCAFC 4 at [44], [47]; *Applicant S370/2002 v Minister for Immigration and Multicultural Affairs* [2004] FCA 1514 at [31]–[33]; *Cummeragunga Pty Ltd (in liq) v Aboriginal & Torres Strait Islander Commission* (2004) 139 FCR 73 at [173]; *Djalic v Minister for Immigration and Multicultural Affairs* (2004) 139 FCR 292.

104 For example, *Repatriation Commission v Flentjar* (1997) 47 ALD 67 at 71–2 (Spender J).

Unfortunately, there are no signs that this is likely to occur. The formula was referred to by Gummow J in *NAIS v Minister for Immigration and Multicultural Affairs* in the context of a provision of the *Migration Act 1958* (Cth) which obliged the Refugee Review Tribunal to 'give the applicant an opportunity to appear before it to give evidence'.[105] It is frequently raised by counsel[106] and has been said to give rise to an 'error of law'.[107] There is an issue, as yet unresolved, of whether a failure to give 'proper, genuine and realistic' consideration to a matter is a jurisdictional error.[108]

At the same time, some comfort may be provided by *Commissioner of Taxation v Asiamet (No 1) Resources Pty Ltd*[109] in which Allsop J (with whom Ryan and Finkelstein JJ agreed) approved the following in relation to an argument that the decision-maker did not 'give real and genuine consideration to the merits of the applications':

> taking advice within the ATO would not, of itself, result in the decision-maker failing to give proper genuine or realistic consideration to the merits of the case. A decision-maker who takes into account the recommendations and advice of departmental officers, who are responsible for providing that advice, does not, on that account alone, fail to consider the merits of a particular case. Decision-makers who make a large number of decisions do not act unlawfully by acting on the basis of facts found by their advisors, rather than performing every step of the decision making process personally, provided they act on the basis of an accurate summary of the relevant evidence and submission that has been heard by their advisors. The fact that [the decision-maker] had regard to the ATO Advice does not, of itself, give rise to an inference that he did not exercise his own judgment in relation to the decision that was required of him.[110]

The reality, however, is that although *Anthonypillai* attempted to banish the expression from the judicial review lexicon, the expression has proved to be resilient. In particular, if the time is reached in which a failure to give 'proper, genuine and realistic consideration' to a matter is found to be a jurisdictional

105 *Migration Act 1958* (Cth) s 425.

106 *Braganza v Minister for Immigration and Multicultural Affairs* [2003] FCAFC 170; *WAEH v Minister for Immigration and Multicultural Affairs* [2002] FCAFC 364; *Djalic v Minister for Immigration and Multicultural Affairs* (2004) 139 FCR 292; *Kola v Minister for Immigration and Multicultural Affairs* (2002) 120 FCR 170.

107 *Repatriation Commission v Hendy* (2002) 72 ALD 112.

108 For example, *Braganza v Minister for Immigration and Multicultural Affairs* [2003] FCAFC 170 at [37].

109 (2004) 137 FCR 146.

110 *Ibid* at [218].

error, the expression will have found a permanent and powerful base from which criticisms can be launched of the reasons and reasoning of tribunals.

Burden or onus of proofs

Consideration of evidentiary issues leads inevitably to the question of the nature and locus of any burden or onus of proof. The starting point is that common law concepts of onus or burden of proof have no role in tribunal proceedings.[111] But as the court noted in *McDonald v Director-General of Social Security*:[112]

> a tribunal will still have to determine practical problems such as the sequence of receiving evidence and what to do if it is unable to reach a clear conclusion on an issue, but it is more likely to find the answer to such questions in the statutes under which it is operating, or in considerations of natural justice or common sense, than in the technical rules relating to onus of proof developed by the courts. However, these may be of assistance in some cases where the legislation is silent.[113]

The absence of any formal onus does not deny there is a practical burden of proof on an applicant. That is justified on the basis that an applicant is the best source of the information on which an application is to be based. That justification is encapsulated in the aphorism 'he who asserts, or seeks a result, must prove'.[114] Even so, it is clear that in administrative proceedings, statutory standards aside, it may be wrong to impose too onerous a burden of proof on an applicant. Hence, in *Re Ferreras*[115] the court found that imposing on an applicant a burden akin to a persuasive burden of proof was unnecessarily demanding.

Even if an applicant carries a practical but not a legal onus, that does not relieve others from bearing part of that burden. Many tribunals are explicitly or implicitly cast in an inquisitorial mould. Hence tribunal members may be under an obligation to elicit information from an applicant and, on occasion (see *Duty of inquiry* above) actively to seek other evidence. It is clear that the dividing line is a fine one between the competing practical obligation on an applicant to supply information, and the legal obligation, at times, on the tribunal, to elicit evidence. An example of when the onus will shift to the tribunal arises if, after receipt of

111 *McDonald v Director-General of Social Security* (1984) 1 FCR 354 at 356–7, 366 and 369; *Cam Mui Chi v Minister for Immigration and Multicultural Affairs* (1998) 84 FCR 14 at 15, 34–6; *Huang v Minister for Immigration and Multicultural Affairs* [2001] FCA 901 (Drummond J).

112 (1984) 1 FCR 354.

113 *Ibid* at 356.

114 Quoted in eg *Re Ferreras* [1991] IRTA 299 at [7].

115 [1991] IRTA 299.

evidence, the tribunal is unable to decide the matter to the requisite probative standard. In other words when the evidence is in a state of equipoise the onus may shift to the tribunal to seek further information which would enable the balance to tip.

The shifting nature of the onus is illustrated by the facts of *Huang v Minister for Immigration and Multicultural Affairs*,[116] a case concerning the revocation of a student visa for breach of a condition of the visa, namely, failure to meet the required level of attendance at an education institution. The Federal Court found that, given that the applicant had disputed the information about her attendance level, at that point the burden of proof shifted to the tribunal to resolve the dispute about what was her actual attendance. Since the matter was of central importance, it should have been resolved and the tribunal's failure to do so amounted to an error of law. In the circumstances, meeting that burden could have been accomplished by first suggesting to the applicant that she supply further information in support of her contention that the findings of the tribunal on this issue were incorrect. Only if that proved unsuccessful would there be a necessity for the tribunal itself to make inquiries. Approaching the issue in that manner would meet the tribunal's inquisitorial obligation, while not placing a persuasive burden on the applicant, nor too onerous an obligation on the tribunal.

The relationship between onus of proof and inquisitorial processes was stressed in *Li v Minister for Immigration and Multicultural Affairs (No 2)*.[117] On this issue Drummond J noted, in words which could apply to most tribunals:

> the Tribunal must follow inquisitorial procedures in deciding whether a claim to refugee status is made out. In aid of doing that, it had, at times presently relevant, specific powers ... that enabled it to procure for itself information that it considered relevant to the performance of its decision-making task. The unexplained failure by the Tribunal to seek out information that the Tribunal itself identified as of importance to its decision, in my opinion, amounts to a failure to follow the inquisitorial procedures it is required to follow. Such a failure amounts to reviewable error ... That is, ...I consider that this is one of those exceptional cases in which the Tribunal did commit reviewable error ... by failing to have the authenticity of a particular document checked.[118]

Both *Huang* and *Li* emphasise that a finding of reviewable error by a tribunal for failure to carry the onus of proof only applies when the unresolved matter is

116 [2001] FCA 901.

117 [2000] FCA 172.

118 *Ibid* at [8].

of critical importance to the outcome. In other words, there is an initial practical onus on an applicant to establish the facts on which their claim is based and generally no obligation on the decision-maker – including the review body – to seek out the information, unless it is centrally relevant and easily obtainable.[119]

The issue resonates strongly in the veterans' jurisdiction. On the one hand the *Veterans' Entitlements Act 1986* (Cth) specifically states that there is no onus of proof on either party[120] but on the other, it imposes on the Repatriation Commission the obligation 'to satisfy itself with respect to, or to determine, as the case requires, all matters relevant to the determination of the claim or application'.[121] In addition, the Commission must 'consider all matters that, in the Commission's opinion, are relevant to the claim or application'.[122] The contradictory messages sent by the legislation open the way for the practical approach advocated in *McDonald v Director-General of Social Security*,[123] namely, that although there is no evidential onus, the failure by an applicant to produce evidence of facts peculiarly within his or her knowledge may result in an unfavourable inference being drawn against the applicant. Further, if the tribunal, having considered all the available evidence, is unable to decide a question of fact to the requisite standard, and the tribunal has undertaken all reasonable inquiries to enable it to resolve the issue, no decision is capable of being reached.

For a tribunal to steer its way safely through the issues associated with burdens of proof requires attention to a number of matters. These include the obligation to give 'proper, genuine and realistic consideration' to an issue, meeting any duty of inquiry, and making findings which are adequate to avoid it falling into reviewable error. Navigating these various shoals requires considerable care on the part of the tribunal.

Policy and legislative limits

The courts' suspicion of tribunals often arises in the area of policy, perhaps because it is the area with which courts are least familiar. Policy, after all, is often closer to the ends of public administration than legislation or the courts' interpretation of it. For these reasons, courts generally adopt a strict construction

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119 See also *Department of Social Security v Riley* (1987) 17 FCR 99; *Stafford v Repatriation Commission* (1995) 56 FCR 121.

120 Section 120(6).

121 Section 18(1).

122 Section 19(1)(a).

123 (1984) 1 FCR 354.

of policies which flesh out a legislative scheme, especially when individual interests are at stake. As a consequence, there are numerous examples of courts striking down executive policy either because it is not sanctioned by the legislation or because it unduly narrows the statutory provision. It is also the case that the opportunities for this to occur are increasing. This is largely because modern legislation is increasingly fine-grained and, as the Full Federal Court noted in *Minister for Immigration and Multicultural Affairs v Anthonypillai*, 'the more a statute makes detailed express provisions in relation to a topic, the less easy it will be to read in something unexpressed'.[124]

The combination of strict judicial construction and very detailed legislative provisions gives limited latitude to agency interpretation which is at odds with the legislation. This position is supported by the absence of any express doctrine of deference in Australia.[125] Justification for the courts' reluctance to defer to an agency's policies is exemplified by this observation of Gaudron J in *Corporation of the City of Enfield v Development Assessment Commission*:[126]

> Once it is appreciated that it is the rule of law that requires the courts to grant whatever remedies are available and appropriate to ensure that those possessed of executive and administrative powers exercise them only in accordance with the laws which govern their exercise, it follows that there is very limited scope for the notion of 'judicial deference' with respect to findings by an administrative body of jurisdictional facts.[127]

Another argument against any formal doctrine of deference is that it contradicts the separation of powers enjoined by the Constitution. As Kirby J noted in *NAIS v Minister for Immigration and Multicultural Affairs*:

> In Australia, at least in respect of officers of the Commonwealth, we embarked in a constitutional direction different from that of deference to administrators. It is one that affords to the courts the jurisdiction and power to ensure compliance with the law by federal officer-holders, including, relevantly, members of the [Refugee Review] Tribunal. This is a distinctive feature of our constitutional arrangements. It is reflected in the provisions of the Judiciary Act. This Court should not in any way diminish it.[128]

Whether these arguments are persuasive, it is clear judges are reluctant to permit a degree of tolerance of an executive policy even when this may have

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124 (2001) 106 FCR 426 at 439.

125 *Corporation of the City of Enfield v Development Assessment Commission* (2000) 199 CLR 135.

126 *Ibid.*

127 *Ibid* at 158.

128 [2005] HCA 77 at [97].

been warranted. On occasions, this can lead to outcomes which fly in the face of common sense. The following cases, three from the migration jurisdiction and one from the workers' compensation field, illustrate the issues.

In *Schaap v Minister for Immigration and Multicultural Affairs*,[129] Ms Schaap had a visa to visit Australia. She was forbidden to seek a substantive visa while in Australia unless the Minister waived the condition. Waiver was possible under the legislation only if, in the period after the visa was granted, 'compelling and compassionate circumstances have developed over which the person had no control and that resulted in a major change to the person's circumstances'. Ms Schaap, a South African, arrived in Australia on 12 March 2000. On 11 May she asked the Minister to waive the condition, claiming that she was 79, her only two daughters were in Australia, she had no immediate family in South Africa, her husband had died close to a year ago and, although she thought she was coping well before she left South Africa, since being in Australia her depressive emotional state had deteriorated, a situation over which she had no control and which provided compelling and compassionate circumstances that she remain longer with her daughters. A delegate of the Minister refused the application stating that the 'the change in her mental well-being is not something that could not be foreseen with the approach of the first anniversary of her husband's death' and, in any event, the change to her mental well-being had not developed since the visa was granted. The requirement that the change be something the person could not have foreseen was contained in policy – the department's *Procedures Advice Manual* (PAM). Whitlam J found that the requirement that the change not be foreseeable 'represents, in my opinion, an entirely unwarranted gloss' on the legislation and set aside the decision despite the fact that Mrs Schaap also failed to meet the legislative requirement that the change in circumstances must arise after the visa was granted.

In *Cohen v Minister for Immigration and Multicultural Affairs*,[130] Ms Cohen, a United States citizen, applied for a medical treatment visa which permits a person to visit Australia or remain in Australia as a visitor for the purposes of 'medical treatment'. Ms Cohen had been obtaining treatment in Australia from a general medical practitioner for chronic fatigue syndrome. The Migration Review Tribunal rejected her application on the basis that she was not receiving treatment from a specialist. Mansfield J found this was an error of law since 'medical treatment' in the Migration Regulations did not refer to treatment from

129 (2000) 63 ALD 65.

130 (2000) 107 FCR 127.

a medical specialist and was therefore only a matter of policy. The concessional nature of the visa indicated, however, that it was not routine treatment which was envisaged. The finding leads to the absurd conclusion that anyone who seeks the visa for conditions such as a cough or a cold which could be treated by an ordinary medical practitioner would qualify. The outcome also ignored the other criteria for the visa, namely, that it was often granted to people who wanted to come to Australia solely to receive treatment; that the person had to establish to the Minister's satisfaction that there were arrangements in place for the treatment regime (a requirement also not met by Ms Cohen); that for visa applicants outside Australia the period of the treatment must involve a stay in excess of three months, and that the Minister had to fix the period for which the visa would be granted.

In *Huang v Minister for Immigration and Multicultural Affairs*,[131] the issue was whether Ms Huang met the legislative criterion for grant of a business long stay visa, namely, that 'the applicant proposes to develop in Australia a business activity that will be conducted by the applicant as a principal'. According to the managing director of the company Ms Huang was to be an executive director, she would be involved in negotiation and discussion on business matters, she would be the sole person making decisions when the managing director was away and she would own 25 per cent to 30 per cent of the shares in the company. The Migration Review Tribunal (MRT) had found that this level of share holding did not give her a degree of control over the company and hence she was not a 'principal'. Heerey J held that 'principal' conveyed no more than that an applicant not be an employee and hence the MRT had wrongly imported a notion of 'control over the business' thereby making an error in construction.

In *Re Medical Panel; Ex parte Symons*,[132] a similar issue arose under the *Workers' Compensation and Rehabilitation Act 1981* (WA). The Act required the degree of permanent impairment to be assessed in accordance with the Australian Medical Association (AMA) Guide – in effect, a policy. The Guide was defined in the Act to mean the edition of the *Assessment of Disability Guide* published by the Western Australian Branch of the AMA. The Regulations prescribed the first edition of the Guide published in 1994 which gave no guidance about methods of assessment. Despite that, a medical panel assessed a claimant as having a degree of disability at 10 per cent. The Full Court of the Supreme Court of WA found that the medical panel had acted in excess of their jurisdiction by making an

131 (2000) 105 FCR 34.

132 [2001] WASCA 280.

assessment not based on the Guide, notwithstanding there were no assessment tables in the Guide. The Court, relying on *Project Blue Sky Inc v Australian Broadcasting Authority*,[133] was persuaded that the statutory intention was that assessments should be undertaken only based on the Guide and, if the Guide was deficient, no assessments could properly be made. The Regulations have since been amended to provide for a method of assessment.[134]

The message from these examples is that, in the absence of an effective doctrine of deference, there is little room for decision-makers, including tribunals, to rely on assumptions about the intended effect of a legislative provision, even when the executive policy could be argued to comply with the legislative indicators. The result is that in order to meet present administrative law standards, agencies need either to define in the legislation what they intend a scheme to cover, or accept that the courts will construe strictly any policies they devise to implement the legislative provisions.

Self-correction of administrative decisions

An unresolved area of administrative law doctrine is what is the effect of an erroneous decision.[135] Courts are divided as to whether the result of making an invalid decision is that the decision is void, that is, it is as if it had never been made,[136] or should be regarded as remaining on foot, or voidable, until set aside by a court with appropriate jurisdiction. Indeed, the High Court has noted that these distinctions are so problematic that they should be abandoned.[137]

Nonetheless, there are practical advantages in both approaches and it is unlikely that they have been banished. If an invalid decision is regarded as void, the decision-maker is free to correct the error, thus avoiding effort on the part of the innocent recipient of the decision to seek a reversal of the decision. When review channels are foreclosed because time limits are not observed or there are

133 (1998) 194 CLR 355.

134 See also *Jackson v Minister for Immigration and Multicultural Affairs* (2003) 75 ALD 643.

135 See Margaret Allars, 'Perfected Judgments and Inherently Angelical Administrative Decisions: The Powers of Courts and Administrators to Reopen or Reconsider Their Decisions' (2001) 21 *Australian Bar Review* 50; Enid Campbell, 'Revocation and Variation of Administrative Decisions' (1996) 22 *Monash University Law Review* 30; Bradley Selway, 'The Rule of Law, Invalidity and the Executive' (1998) 9 *Public Law Review* 196; Robert Beech-Jones, 'Re-Opening Tribunal Decisions: Recent Developments' (2001) 21 *Australian Bar Review* 75.

136 *Ridge v Baldwin* [1964] AC 40; *Re Kretchmer and Repatriation Commission* (1988) 16 ALD 206.

137 *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597.

other limitations on the powers of the review body, that approach is particularly attractive. Remaking the decision by the decision-maker serves the ends of administrative justice while also providing an incentive for effective auditing of an agency's decision-making.

From a managerial perspective the alternative, voidable, approach also has advantages because it leads more quickly to closure of the matter. The agency is able to put away the file after the time limits for review have expired, and the person involved has an outcome which is final and certain, subject to the person exercising any right of review.[138] Errors, if discovered after the time for seeking review has expired, may be dealt with under government schemes for compensation for defective administration or by seeking the assistance of investigative bodies such as the Ombudsman. This alternative approach, often conveniently labelled the *functus officio* (having discharged the function) doctrine, means that, as a general rule,[139] an administrative decision-maker cannot revisit a decision once it has been made because the decision-making power is exhausted.[140] The consequence is that only a review body can overturn the decision and the onus is on the aggrieved individual, if unhappy with the outcome, to seek review of the decision.

The acceptance that an invalid decision is merely voidable is apparently undermined by a provision in Acts interpretation legislation which overturns the common law doctrine that a power is spent once it has been exercised.[141] For example, the *Acts Interpretation Act 1901* (Cth) s 33(1)[142] provides that, unless the contrary intention appears, statutory powers are ambulatory, that is, 'they may be exercised … from time to time as occasion requires'. There is some uncertainty about the effect of this provision. Even if it applies to authorise an official to reopen a decision which contains an error, there are doubts that it would apply to tribunal decision-making with its greater emphasis on achieving finality.

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138 *DJL v Central Authority* (2000) 201 CLR 226.

139 Exceptions to the rule apply in certain circumstances, for example, to correct a clerical mistake, or if there has been fraud or misrepresentation: *Leung v Minister for Immigration and Multicultural Affairs* (1997) 79 FCR 400 at 411–12 (Finkelstein J); *Ousley v R* (1997) 192 CLR 69 at 100–1 (McHugh J) and 130–1 (Gummow J).

140 *Sloane v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 37 FCR 429; *Minister for Immigration and Ethnic Affairs v Kurtovic* (1990) 21 FCR 193.

141 *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597 at 610 (Gaudron and Gummow JJ).

142 There are equivalent provisions in State and Territory interpretation legislation.

The issues raised by these conflicting doctrines were addressed in *Minister for Immigration and Multicultural Affairs v Bhardwaj*.[143] The student visa of Mr Bhardwaj was cancelled. Mr Bhardwaj sought review of the decision before the Immigration Review Tribunal and was offered a hearing. The day before the hearing, the Tribunal registry received a letter saying Mr Bhardwaj was ill and unable to attend. Through an oversight the Tribunal was not advised of the receipt of the letter and, in Mr Bhardwaj's absence on the day of the hearing, the Tribunal affirmed the decision under review. When the decision was communicated to Mr Bhardwaj, it was pointed out that he had advised he would not be able to attend the original hearing. The Tribunal thereupon arranged a new hearing and at that hearing, following Mr Bhardwaj's evidence, revoked the cancellation. The Minister for Immigration and Multicultural Affairs sought review of the decision on the basis that the Tribunal was *functus* after its first decision.

It was argued by counsel for the Minister that the *Migration Act 1958* (Cth) provided for merits review by the Tribunal, there were strict time limits for seeking review by the Federal Court and limited grounds on which such review could be sought, and that these indicators suggested that finality of decisions was paramount. Despite these arguments, the majority of the High Court (Kirby J dissenting) found that the Tribunal was not *functus* and in the circumstances could revisit its decision. Gleeson CJ, while acknowledging that the issue would invariably involve construction of the particular statutory provision, observed that 'circumstances can arise where a rigid approach to the principle of *functus officio* is inconsistent with good administration and fairness'.[144] Not only had the first decision of the Tribunal breached procedural fairness – a jurisdictional error – but the failure to offer Mr Bhardwaj the opportunity to appear before it to give evidence and present arguments, as the Act provided, also meant that the Tribunal had not properly performed its statutory review function. That view was supported by all the majority judges and has since been affirmed by the High Court in *Plaintiff S157/2002 v Commonwealth*.[145]

While the decision is attractive because it appears fair, there are problems which it does not address. Subject to statutory time limits for seeking review, *Bhardwaj* permits an applicant to make a further application to a tribunal on any occasion on which it can be claimed that the tribunal has committed a jurisdictional error, including a breach of fair process. Since establishing a

143 (2002) 209 CLR 597.

144 *Ibid* at 603.

145 (2003) 211 CLR 476.

jurisdictional error is often contentious this opens the way for prolonged litigation. Further, it enables the tribunal to ignore the statutory constraints on its jurisdiction and the time limits within which applications for review must be made. This sets at nought statutory indicators that certainty and finality are primary goals. In addition, the decision gives no guidance where third party rights may be affected. For example, in matters to do with promotion or the allocation of a finite amount of funding the consequences of a later finding of eligibility for others has not been considered. Finally, since the outcome was principally dependent on a finding of jurisdictional error, a doctrine which has no application to decision-making within agencies, the outcome has not clarified what should be the principles which operate within public administration, the area where the issue is of most concern.

One response for agencies is to rely on the Acts interpretation legislation route. The argument based on the terms of the *Acts Interpretation Act 1901* (Cth) s 33(1) were generally dismissed by the majority judges in *Bhardwaj*, Gleeson J noting that since the decision was a nullity, the section had nothing to which to attach. Nonetheless, within agencies it is arguable that since decision-making is a collective activity and no doctrine of jurisdictional error applies, the terms of s 33(1) should be given full effect. On that basis, if an agency discovers that an error has been made the agency should be responsible for correcting it. For tribunals, however, it appears that if an error is sufficiently serious that it could amount to a jurisdictional error, the present rule is that the tribunal is free to revisit the decision at any time.

However, there is an important qualification. The principle in relation to tribunals is subject to any legislative provision to the contrary. This qualification was emphasised in the subsequent case of *Jadwan Pty Ltd v Secretary, Department of Health and Aged Care*[146] which involved the funding scheme for subsidising nursing homes under the *National Health Act 1953* (Cth). Since the legislation gave no indication of an intention that the decision to revoke funding approval for a nursing home would have no effect in the circumstances which had arisen in that case, the Full Federal Court found that the decision was voidable only.

The upshot is that before a tribunal can confidently conclude it is free to remake a decision, it must be able to show not only that the invalidating error was jurisdictional but that the statute permits the tribunal to correct the error. Since both these preconditions are unlikely to be present in many cases, the initial concerns about the impact of *Bhardwaj* have diminished considerably.

146 (2003) 204 ALR 55 at [42]. See also *Hicks v Nixon* (2004) 138 FCR 32.

Nonetheless, there will be occasions, legislation permitting, when a tribunal, alerted to an error of a sufficiently serious nature, can assume that the error has led to the decision being void. In those circumstances it is as if the decision had not been made and it is for the tribunal itself to embark on that task. The benefit of such an approach is that it avoids the expense of a challenge before a court. Such occasions are, however, likely to be relatively rare.

Breach of natural justice

No attempt will be made to provide a comprehensive coverage of developments under this fertile ground of review. However, several unusual cases are discussed. As a preliminary, it should be noted that increased emphasis is being placed on this ground of review since the High Court acknowledged that a breach of natural justice is capable of being a jurisdictional error and attracts the entrenched jurisdiction of the Court under s 75(v) of the Constitution.[147]

Hearing rule

It has been commonplace that an initial applicant for a licence or other benefit from government is generally not entitled to a 'hearing' before a determination is made. There are exceptions to that principle. In *Cole v Cunningham*,[148] a breach of an explicit promise by a government agency not to record on a personnel file information of a prejudicial nature gave rise to a legitimate expectation that the person would be granted fair process when applying to rejoin the Australian Public Service. Cases of this kind are rare. However, there is much wider scope for an expansion of the exception in another line of cases. Commencing with *Commissioner for ACT Revenue v Alphaone Pty Ltd*,[149] the courts have reaffirmed the principle that even in the case of an initial application for a licence, if an applicant meets the specified statutory criteria, there is a legitimate expectation that a discretionary licence will not be denied without affording the applicant procedural fairness. An exception applies if criteria are not clearly defined or involve questions of policy.[150]

The principle was explored in the *Alphaone* case, in which the applicant was seeking a licence under the *Business Franchise ("X" Videos) Act 1990* (ACT) to supply X-rated videos. Before a licence was granted the Commissioner had to be

147 *Plaintiff S157/2002 v Commonwealth of Australia* (2003) 211 CLR 476.

148 (1983) 81 FLR 158.

149 (1994) 49 FCR 576.

150 *FAI Insurances Ltd v Winneke* (1982) 151 CLR 342.

satisfied that the applicant was a 'fit and proper person'. The Court found that the policy of the statute was in favour of the grant of a licence, this being a revenue-raising law, and that the fitness and propriety requirements, although broad, did not usually extend to allegations of past misconduct, in this case some old convictions of an intending director of the firm which had no bearing on the application. On that basis, a rejection of the application on fitness and propriety grounds attracted procedural fairness. Since being a 'fit and proper person' is a common prerequisite to becoming the holder of a variety of licences, the potential has been considerably expanded for the introduction of an obligation to provide procedural fairness, even though the process relates to an initial application.

A similar approach was followed in *R v Tasmanian Racing and Gaming Commission; Ex parte Heatley*[151] in which two applicants for gaming licences successfully challenged a decision of the Commission refusing their application on the ground that they were not suitable persons within s 38(1) of the *Gaming Control Act 1993* (Tas). Since the Commission did not put to the applicants that they had demonstrated a propensity for indifference to the law and government officials by failing to accept service of a notice sent by registered mail, nor that one of the applicants was willing to alter facts to facilitate a version most favourable to herself, nor that her daughter and son-in-law were the subjects of warrants of arrest on criminal charges, these matters were sufficiently damning to warrant procedural fairness.

Content and notice requirements

The courts have consistently invoked strict standards for the content of notices when the person is entitled to fair process. However, a statutory requirement to notify does not necessarily mean that procedural fairness obligations for the content of notices are activated. Rather the notice requirement may simply be fulfilled in terms of the statutory requirements:

In *Secretary, Department of Family and Community Services v Rogers*,[152] the Social Security Appeals Tribunal (SSAT) and, on review, the Administrative Appeals Tribunal, had found that Mrs Rogers had not been properly notified of a change in the rate of her supporting parent benefit. The notice was deficient because, among other things, she was given no reason why her supporting parent benefit had been changed other than that her entitlement had been wrongly calculated.

151 [1976] Tas SR (NC) N21.

152 (2000) 104 FCR 272 (Cooper J).

The deficient notice was said to have resulted in a breach of natural justice. Mrs Rogers sought review but since her application was outside the three-month time limit no retrospective payment of arrears could be made for more than three months. The tribunals found that she should be backpaid to the date of the department's miscalculation. They did so, on the basis that the notice to Mrs Rogers had not been intelligible because it had not specified with sufficient particularity whether the calculation assumed an amount she received as compensation following the death of her husband was the reason for the reduction in benefit. The amount in fact was payable solely to her two children and not to her. Nor was there a sufficient pattern in payments for her to understand why amounts varied. On that basis, the tribunals had found that the notice was insufficient to enable her to understand that she was being underpaid due to departmental error.

On appeal, Cooper J adopted a strict construction of the legislative scheme and concluded that the requirement to notify in s 299 of the *Social Security Act 1991* (Cth) did not encompass procedural fairness obligations. Fair process was provided for by giving Mrs Rogers a right of review, a right of which she had been fully apprised. Nor was the notice to Mrs Rogers invalid on any other ground. On that basis he overturned the decision. His Honour's reasons contain a useful summary of the sometimes conflicting findings as to the requirements for a valid notice. As he observed (references omitted):

> The word 'notice' is not to be construed in isolation. It takes its meaning from its subject matter, the context in which it appears in … the Act, and, its statutory purpose … A requirement that a person be given notice of something does not demand that the matter be brought home to the person's understanding or knowledge. However, notice requires that the matter of which a person is to have notice must be brought clearly to the person's attention. … In my view, the matter to be communicated by the 'notice' referred to … is the making of a decision …which is a reviewable decision under… the Act. That involves two elements; the fact that a decision has been made and the content of the decision. The subsections make no reference to any requirement that the notice contain reasons or sufficient information for the recipient of the notice to understand the main reason for the decision and so be in a position to know whether or not to exercise the person's right to seek a review. Nor, in my view, do any principles of procedural fairness require that such a requirement be read into the provisions of [the Act].[153]

153 *Ibid* at [21], [32], [33].

Cooper J in *Rogers* rejected the suggestion in *Wang v Minister for Immigration and Multicultural Affairs*[154] that to be valid a notice must be intelligible to the person adversely affected and that a valid notice must be one which was not calculated to frustrate or negate the entitlement of the person notified of a decision so as to prevent the person applying for review. As he said:

> The requirement that a notice be intelligible does not introduce a requirement that reasons for the decision communicated by it be given. Nor does it require that sufficient information be given as to the basis upon which the decision was made to enable the recipient to decide whether to seek review of the decision. … [Intelligibility means] no more than [that] the means employed to communicate the decision must be intelligible to the person to whom the notice is to be given so that that person is informed of the making of the decision and the content of it.[155]

His Honour's findings as to the contents of a statutory notice, strict though they appear, go further than those of Drummond J in *Austin v Secretary, Department of Family and Community Services*[156] who said that all a notice had to contain was 'clear advice that a decision had been made fixing the rate of payment at a particular sum'.[157] Cooper J had found in *Rogers* that notice must be given not only of a decision to fix payment at a particular rate, but also of any decision affecting payment which is reviewable. The upshot is that in the context of a statutory requirement to notify, there is no need for the purposes of meeting procedural fairness standards to import detailed requirements into the notice provision.[158]

Bias, including in domestic tribunals

Whether there is a different standard of bias for domestic tribunals is a contentious issue. In *Crowe v Mercy Health and Aged Care Central Queensland Ltd*,[159] a physician had his clinical privileges at a particular hospital revoked. The process required a recommendation of the Credentials Committee, followed by a decision of the hospital executive, and finally endorsement of the decision by the

154 (1997) 71 FCR 386 at 393–4 (Merkel J); quoting from *Long v Minister for Immigration, Local Government and Ethnic Affairs* (1996) 65 FCR 164 at 167 (Jenkinson J).

155 *Secretary, Department of Family and Community Services v Rogers* (2000) 104 FCR 272 at [35].

156 (1999) 92 FCR 138.

157 *Ibid* at 194.

158 See also *Solomon v Minister for Immigration and Multicultural Affairs* (2000) 62 ALD 121; *Western Australian Police Union of Workers v Anti-Corruption Commission* [1999] WASCA 227; *Wallace v Anti-Discrimination Board of New South Wales* [2000] EOC ¶93-065.

159 [2001] QSC 384.

General Administrative Committee. One of the members of the Credential Committee was the person who made the complaint and had a financial interest in the decision. Further three members of the Credentials Committee were also members of the other committees.

In interlocutory proceedings, the Supreme Court of Queensland declined to review the decision under the *Judicial Review Act 1991* (Qld) because the hospital involved was a private one, but found that procedural fairness was required. The Court concluded that whether there was bias would need to be considered. The Court also noted that in *Maloney v NSW National Coursing Association Ltd*[160] Glass JA had held that actual bias rather than an appearance of bias must be shown for disqualification of members of a domestic tribunal. The Court in *Crowe* made no findings on this matter although it was of the opinion that the facts could have met the tests for actual bias.

However, in *D'Souza v Royal Australian and New Zealand College of Psychiatrists*[161] the Court held that apprehended bias is not a ground of judicial review in the case of a domestic, consensual or private tribunal as compared to a decision of a court or tribunal set up by statute. The matter is unresolved. Given the High Court's direction in *Ebner v Official Trustee in Bankruptcy*[162] that the categories of bias should be restricted, it would be unlikely that that Court would sanction the introduction of multiple standards depending on the body involved.

Official notice and procedural fairness

An issue which arises frequently for tribunals is the extent to which members of tribunals can rely on their personal knowledge, experience and judgment – that is, the doctrine of official notice[163] – without requiring documentary or oral evidence of such matters. The doctrine is valuable since it can save time and expense for the parties before a tribunal. However, reliance on the principle needs to be sensitive to avoid disadvantaging any party. Of necessity there may be different standards applied to agencies who are regular players in the review system and one-off applicants.

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160 [1978] 1 NSWLR 161.

161 [2005] VSC 161.

162 (2000) 205 CLR 337.

163 JA Smillie, 'The Problem of "Official Notice": Reliance by Administrative Tribunals on the Personal Knowledge of Their Members' [1975] *Public Law* 64; TJH Jackson, 'Administrative Tribunals and the Doctrine of Official Notice: "Wrestling with the Angel"' in Michael Harris and Vicki Waye (eds), *Australian Studies in Law – Administrative Law* (1991) 120. See also *Minister for Health v Thomson* (1985) 8 FCR 213.

The issue arose in *Secretary of the Department of Veterans' Affairs v Studdert.*[164] The Secretary of the Department of Veterans' Affairs claimed he had been denied procedural fairness because of the manner in which the Administrative Appeals Tribunal had relied on Military Board Instructions (MBIs) in a hearing about compensation entitlements. The Tribunal had set aside a decision made by Comcare and remitted the claim. Counsel for Studdert had relied on an MBI tendered to the Tribunal in another Comcare case. Moore J found that the Tribunal was entitled to rely on facts found in the earlier case concerning the existence of the MBI. Tribunal members' knowledge of facts of general application in a class of matter may later be drawn on in deciding a particular application in the class as long as parties have an opportunity to comment on the facts as they may impact on the particular application. Counsel for the Secretary knew these facts were being relied on, could have raised factual issues concerning the existence of the MBI, or sought an adjournment. In the course of his judgment Moore J noted the typical circumstances in which the doctrine applies and the limitations, consistent with procedural fairness, in use of the principle:

> Members of the Tribunal will build up a body of knowledge about facts of general application in a class of matter that it can draw on in deciding a particular application in that class. Those facts may be known to a particular member of the Tribunal because that member has decided cases that are the same or similar and in which findings about those facts have been made. Equally those facts may be known to a particular member through decisions (containing findings of fact) of other members of the Tribunal. Plainly if a member of the Tribunal decides a matter by reference to facts known to the member in either of these ways, it should do so only if the parties have had an opportunity to comment on the facts as they might impact on the particular matter before the Tribunal. If there is a controversy about the facts in the sense that they are contentious, the Tribunal should also give the parties an opportunity to call or tender evidence about the contentious facts.[165]

Those principles were applied in *Tisdall v Health Insurance Commission.*[166] Members of a committee appointed on the basis of their professional or specialist expertise were not required by the doctrine of procedural fairness to disclose their general experience and expertise, that is, their thinking processes used in evaluating material, but were required to disclose specific material or knowledge on which they relied to reach a decision, particularly if that knowledge or specific material was adverse to the subject of the decision.

164 [2001] FCA 1642.

165 *Ibid* at [26].

166 [2002] FCA 97.

Estoppel

For tribunal members an argument that they are estopped from making certain findings because of doctrines variously described as *res judicata* or cause of action estoppel or, more commonly, issue estoppel raises vexed issues. They are vexed because there are contradictory opinions in the cases on whether estoppel applies to tribunal proceedings, the issue raises general questions of public policy and abuse of process and it also casts into relief the place of tribunals in the adjudicative system.[167] The policy issue raises the spectre that the denial of the accuracy of an earlier determination in a tribunal proceeding will be used to initiate a collateral attack on the correctness of the findings in the earlier proceedings.

A preliminary question is whether estoppel in any of its forms is a principle which has a place at a tribunal table. The traditional view is that officials exercising public power cannot have that power fettered by an estoppel. In relation to issue estoppel, for example, as Branson J pointed out in *Minister for Immigration and Multicultural Affairs v Ali*,[168] there are sound reasons for saying that the doctrine should not apply on two grounds: the parties before the tribunal are often not the same as the parties to earlier proceedings, a prerequisite to issue estoppel applying;[169] and since tribunals are not bound by the rules of evidence, and issue estoppel is a rule of evidence, to argue issue estoppel is inappropriate.[170] Further, the rules which have emerged in an adversarial court system with a developed panoply of evidential rules may not be appropriate in a tribunal system. Tribunals often operate in an inquisitorial manner, and not under formal rules of evidence.

It would be attractive to dismiss from the tribunal lexicon all references to estoppel. That option is not open. Not only will arguments based on estoppel principles continue to be raised in tribunal hearings, but the underlying rationale for the rules – finality of litigation and the public policy and abuse of process arguments referred to earlier – may surface in another linguistic form. That is not

167 For a good example of the difficulties in both nomenclature but also in application, see *Somanader v Minister for Immigration and Multicultural Affairs* (2000) 178 ALR 677 in which Merkel J was faced with an argument that the dismissal of an application, albeit by consent, under Part 8 of the *Migration Act 1958* (Cth) disentitled the applicants to seek relief under s 75(v) on grounds of either *res judicata* or issue estoppel. In another wide-ranging survey of the cases, his Honour concluded that the consent dismissal of the proceedings under Part 8 disentitled them to claim relief by way of judicial review and prerogative relief under s 75(v).

168 (2000) 106 FCR 313.

169 *Ibid* at [32]. See also *Ramsay v Pigram* (1968) 118 CLR 271.

170 *Minister for Immigration and Multicultural Affairs v Ali* (2000) 106 FCR 313 at [32].

to deny that generally it is the statute itself which determines whether arguments based on estoppel principles may be raised. The judgment of Branson J in *Minister for Immigration and Multicultural Affairs v Ali* contains an analysis of the principles and offers a helpful guide to the approaches to be adopted.

The issue in *Ali* was whether the criminal conviction which was the basis for the deportation order against Mr Ali precluded reconsideration of any of the facts on which that conviction was based in the different context of whether Mr Ali, if released, would reoffend. Recidivism is a factor listed in the Policy Direction concerning Criminal Deportation. Branson J summarised the principles relating to issue estoppel in the context of the power to deport a prohibited non-citizen under the *Migration Act 1958* (Cth). The principles relate to estoppel in the context of an earlier criminal conviction.

The differential weight to be accorded to findings in previous hearings will vary according to the factors outlined by Branson J. Paraphrasing the reasons stated by her Honour and applying those principles to a tribunal rather than an administrative decision-maker they are:

- An administrative tribunal is entitled to receive evidence of a conviction and sentence and to treat it as probative of the factual matters upon which the conviction and sentence were necessarily based.[171]
- Where the conviction and sentence are the foundation of the exercise of the power vested in the tribunal, the tribunal, when reviewing the decision, may not impugn or go behind the conviction or the sentence.[172]
- There is no absolute rule that the tribunal may not consider material which challenges the grounds on which a prior conviction was based,[173] but policy considerations may suggest that it is prudent to recognise that the criminal justice system is pre-eminently suited to the determination of the guilt of persons charged with criminal offences,[174] and that a refusal to impugn the facts on which a conviction is based limits inconsistency between decisions of the criminal courts and those of tribunals.[175] Hence, in circumstances in

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171 *General Medical Council v Spackman* [1943] AC 627 (*Spackman*); *Minister for Immigration and Ethnic Affairs v Daniele* (1981) 61 FLR 354 (*Daniele*); *Minister for Immigration and Ethnic Affairs v Gungor* (1982) 63 FLR 441 (*Gungor*); and *Minister for Immigration and Multicultural Affairs v SRT* (1999) 91 FCR 234 (*SRT*).

172 *Daniele*, *Gungor* and *SRT*.

173 *Ridley v Secretary, Department of Social Security* (1993) 42 FCR 276 at 281–2.

174 *Gungor* (1982) 63 FLR 441 at 445–6 (Fox J).

175 *Ibid* at 469 (Sheppard J).

which the second determination is not based on the fact of the earlier conviction and sentence, the fact of the conviction is strong *prima facie* evidence of the facts upon which it is necessarily based. On that basis, there is a heavy onus on a person who seeks to challenge such facts to show why they should not be accepted.[176] This heavy onus will, as a matter of logic, be more easily satisfied where the criminal conviction and sentence followed a plea of guilty than where the conviction and sentence follow a contested factual hearing.

- Although a tribunal may, in a case in which the heavy onus is satisfied, accept evidence which contradicts such facts, the tribunal is not entitled to reach or express a view that the person was wrongly convicted.[177]
- The limitations on the matters to which a tribunal is entitled to have regard do not mean that the tribunal may not assess the conduct of the person whose claim is before the tribunal, including the nature and seriousness of conduct which led to a conviction, and the significance of such conduct, so far as the risk of recidivism is concerned.

The concessions made by Branson J in *Ali* are not so readily made in other contexts. Hence, in *Lilienthal v Migration Agents Registration Authority*[178] Katz J denied that even a finding of fact contained in a final decision of the Administrative Appeals Tribunal could create an issue estoppel much less, as in the case, where the decision of the Tribunal (two stay orders) were interlocutory only. The most that the Tribunal had decided was that it regarded as 'doubtful' findings by the Migration Agents Registration Authority as to the credibility of Mr Lilienthal. The expression of view reflected the fact that the earlier findings by the Authority had been made without Mr Lilienthal being given the benefit of an oral hearing. Hence, Katz J found that no grounds existed for claiming issue estoppel against a decision of the Authority when a migration agent challenged a decision of the proposal not to re-register the agent.

Another decision which has helpfully analysed these issues was *Re Jebb and Repatriation Commission*.[179] In that case the issue was whether the Repatriation Commission was estopped by its previous acceptance of the veteran's diabetes mellitus as being war-caused from making a finding on a later claim which in effect denied that fact. In the course of his extensive analysis the Deputy

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176 *Spackman* [1943] AC 627 at 635.

177 *Saffron v Federal Commissioner of Taxation* (1991) 30 FCR 578 at 592 (Lockhart J).

178 [2001] FCA 2.

179 (2005) 86 ALD 182.

President of the Tribunal found that neither equitable estoppel, *Anshun* estoppel nor issue estoppel restricted the Commission in so finding.

In summary, the cases confirm that, although generally a tribunal cannot be estopped by previous decisions from making findings relating to the same facts, the opportunity to do so is restricted considerably when the findings have been made by a decision within the criminal justice system, not least because of the lower standards of proof generally applicable to the tribunal system.

The review powers of a tribunal

A question which is encountered increasingly is the extent of the powers of a tribunal on review. As Callinan J remarked in *Coal & Allied Operations Pty Ltd v Australian Industrial Relations Commission*:[180]

> It is perhaps unfortunate that legislatures in enacting rights of appeal usually do not, as they readily might, descend to the detail of the precise functions, roles, procedures and powers of the appellate bodies they have created and the nature of the appeals which may be taken to them.[181]

To so comment is not to cast aspersions on tribunals themselves. It is not for them to define their functions. It is necessary, however, that they be sensitive to the range of possible review options which are available to them. Ideally, those setting up tribunals or revisiting their powers will heed Callinan J's concerns and, in order to avoid unnecessary confusion, use descriptors which reflect accepted classes of such bodies.[182]

Different review powers for tribunals have been identified.[183] The most common are usually described as follows:[184]

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180 (2000) 203 CLR 194. The nature of the appeal in this case arose under the *Workplace Relations Act 1996* (Cth), s 45.

181 *Ibid* at [112].

182 *Stewart v Shuey* [1999] VSC 114 where, in the context of *Police Regulation Act 1958* (Vic), the words 'appeal' and 'review' had been used and the issue arose of whether this distinction was intentional. The Court found that it was intended.

183 For example, *Re Coldham; Ex parte Brideson (No 2)* (1990) 170 CLR 267; *Strange-Muir v Corrective Services Commission* (1986) 5 NSWLR 234 at 250 (McHugh JA); *Builders Licensing Board v Sperway Constructions (Syd) Pty Ltd* (1976) 135 CLR 616 at 621–2; *Coal & Allied Operations Pty Ltd v Australian Industrial Relations Commission* (2000) 203 CLR 194 per majority (Gleeson CJ, Gaudron and Hayne JJ); *Turnbull v New South Wales Medical Board* [1976] 2 NSWLR 281.

184 Although it is sensible to remember the warning of Kirby J (diss) in *Coal & Allied Operations Pty Ltd v Australian Industrial Relations Commission* (2000) 203 CLR 194 at [70] that 'categories will offer a limited measure of guidance' and 'generalities will be dangerous'.

- *Appeals in the strict sense* (*stricto sensu*): A tribunal granted powers to hear appeals in this sense can substitute their own decision provided the decision-maker has made a mistake of law or fact. The tribunal's powers on review are limited to making the decision which the decision-maker should have made at the original hearing.[185] In making the decision, the tribunal must disregard later changes to the law or evidence which has been obtained after the date of the original decision. In other words, the tribunal cannot receive further evidence and must decide on the material before the original decision-maker.[186]
- *Appeals by way of rehearing*: A tribunal established to offer a rehearing will try the case again on the evidence used for the initial decision, together with such additional evidence as it thinks fit to receive. Since it will decide the appeal in the light of the circumstances which exist at the time of the rehearing, changes in the law will also be regarded. If no fresh evidence is received and there has been no relevant change to the law, the tribunal can overturn an initial decision only if there was legal error by the primary decision-maker.[187] Legislation signals that an appeal is to be by way of rehearing if the body may permit that 'new evidence be received' or that it 'take further evidence' and possibly even that on 'review'[188] additional evidence may be considered.[189] The difficulty arises either when there is no express statement indicating the tribunal is to conduct a rehearing,[190] or the legislation simply says the tribunal may exercise 'an appeal by way of rehearing'. Where the description is simply 'appeal by way of rehearing', as Mason J pointed in out in *Builders' Licensing Board v Sperway Constructions (Syd) Pty Ltd*[191] that expression encompasses two types of rehearing – in the

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185 *Allesch v Maunz* (2000) 203 CLR 172.

186 *Quilter v Mapleson* (1882) 9 QBD 672 at 676; *Victorian Stevedoring and General Contracting Co Pty Ltd and Meakes v Dignan* (1931) 46 CLR 73; *Horne v Locke* [1978] 2 NSWLR 88; *Strange-Muir v Corrective Services Commission* (1986) 5 NSWLR 234; *Mickelberg v R* (1989) 167 CLR 259; *Eastman v R* (2000) 203 CLR 1.

187 *Coal & Allied Operations Pty Ltd v Australian Industrial Relations Commission* (2000) 203 CLR 194 at [14]; *Allesch v Maunz* (2000) 203 CLR 172; *CDJ v VAJ* (1998) 197 CLR 172 at 201–2 (McHugh, Gummow and Callinan JJ).

188 Rather than on 'appeal': *Federated Carters and Drivers' Industrial Union of Australia v Motor Transport and Chauffeurs' Association of Australia* (1912) 6 CAR 122 at 123.

189 For example, *Re Coldham; Ex parte Brideson (No 2)* (1990) 170 CLR 267; *Coal & Allied Operations Pty Ltd v Australian Industrial Relations Commission* (2000) 203 CLR 194.

190 *Ex parte Currie; Re Dempsey* [1968] 2 NSWR 378; *A and B, Legal Practitioners v Disciplinary Tribunal* (2001) 10 Tas R 152.

191 (1976) 135 CLR 616 at 619–20.

categorisation adopted here, either a 'rehearing' or a 'hearing de novo'. Some assistance is provided in these circumstances because there is a general proposition that where an appeal is from an administrative order it will be an appeal by way of hearing *de novo*, although there is no absolute rule to that effect.[192] By contrast, there may be a presumption that appeals to the Federal Court are by way of rehearing, in part to avoid the expense and time involved in a retrial.[193]

- *Appeals involving a hearing de novo*: A tribunal which is granted appeal *de novo* powers may consider issues of law or fact, and the body may exercise all the powers and be subject to the same legislative constraints as the original decision-maker. However, the matter is heard afresh and a decision is given on the evidence presented at the later hearing including such evidence presented earlier as the tribunal chooses.[194] The party succeeding at first instance enjoys no advantage, and must argue the case a second time.[195] The tribunal is required to exercise its power whether or not there was error at first instance.[196]

The issue has arisen in several contexts. In *Aldrich v Boulton*[200] a police officer was dismissed following a finding of misconduct because he had purchased steroids for the purposes of body-building contrary to the *Health (Drugs and Poisons) Regulations 1996* (Qld). The Misconduct Tribunal found the penalty excessive and ordered that the penalty be suspended for 12 months, in effect

192 *Ex parte Australian Sporting Club Ltd; Re Dash* (1947) 47 SR (NSW) 283; *Builders' Licensing Board v Sperway Constructions (Syd) Pty Ltd* (1976) 135 CLR 616 at 620; *Stewart v Shuey* [1999] VSC 114.

193 *Branir Pty Ltd v Owston Nominees (No 2) Pty Ltd* (2001) 117 FCR 424.

194 *Allesch v Maunz* (2000) 203 CLR 172.

195 *Sweeney v Fitzhardinge* (1906) 4 CLR 716.

196 *Coal & Allied Operations Pty Ltd v Australian Industrial Relations Commission* (2000) 203 CLR 194 at [14]; *R v Pilgrim* (1870) LR 6 QB 89 at 95 (Lush J); *Sweeney v Fitzhardinge* (1906) 4 CLR 716; *Turnbull v New South Wales Medical Board* [1976] 2 NSWLR 281 at 297–8 (Glass JA); *Southwell v Specialised Engineering Services Pty Ltd* (1990) 70 NTR 6 at 7–8 (Kearney J).

197 *Allesch v Maunz* (2000) 203 CLR 172.

198 *Sweeney v Fitzhardinge* (1906) 4 CLR 716.

199 *Coal & Allied Operations Pty Ltd v Australian Industrial Relations Commission* (2000) 203 CLR 194 at [14]; *R v Pilgrim* (1870) LR 6 QB 89 at 95 (Lush J); *Sweeney v Fitzhardinge* (1906) 4 CLR 716; *Turnbull v New South Wales Medical Board* [1976] 2 NSWLR 281 at 297–8 (Glass JA); *Southwell v Specialised Engineering Services Pty Ltd* (1990) 70 NTR 6 at 7–8 (Kearney J).

200 [2001] 2 Qd R 235.

making a decision de novo. At first instance the Supreme Court held that the Tribunal had exceeded its jurisdiction since it was limited to seeing whether the original decision had been erroneous. In other words, its review powers were limited to an appeal in the strict sense. The *Misconduct Tribunals Act 1997* (Qld) s 23(6) provided for a hearing which was described as 'by way of rehearing on the original evidence' and 'on the new evidence' before the Tribunal. The Court of Appeal concluded that since the purpose of establishing the tribunal was to provide independent external review, the tribunal had a power to rehear the matter, and it was required to make its own decision on the available evidence rather than to treat the matter as an appeal *stricto sensu*. Hence the findings of the Misconduct Tribunal were open to it.

In *Re Minister for Local Government: Ex parte Buddhist Society of Western Australia Inc*[201] the *Local Government Act 1995* (WA) s 9.8(3a) provided simply that the Minister may hear and determine an appeal from a relevant decision 'as the Minister thinks fit'. It was argued that the Minister only had jurisdiction to conduct a rehearing and not a hearing *de novo*. That was consistent with an alternative right of appeal to the Minister which involved an appeal to the Local Court by way of rehearing unless the court provided otherwise. The Western Australian Court of Appeal rejected that argument and held that, as the Minister's powers were at large, it was up to the Minister to decide how to deal with the matter. In those circumstances, the nature of the function to be performed on appeal or review may be determinative. In fact, the officials advising the Minister and the Minister when considering their report did operate in a *de novo* manner and that was appropriate given the administrative nature of the process.

Applying that functional test, in *Compaction Application Tips Pty Ltd v Australian Waste Pty Ltd*[202] the South Australian Supreme Court found that a planning authority or appellate body was not limited to consideration of the development as described in the application but could form its own view from evidence in addition to that in the application to decide what constituted a development for the purposes of a development application.[203]

It is clear that, in the absence of legislation specifying clearly what form of appeal or review was intended, the review powers of a tribunal are to be

201 [2001] WASCA 380.

202 (2001) 80 SASR 435.

203 See also *NSW Thoroughbred Racing Board v Waterhouse* (2003) 56 NSWLR 691.

determined by the statutory provisions, the nature of the appeal body and the kind of decision under appeal.[204]

Decision based on wrong provision but justified by another provision in same legislation

Tribunals often face an ethical and legal issue when, on review they find that the decision has not been based on the correct provision of the legislation, but there is another provision which justifies the outcome. In those circumstances is the tribunal obliged to affirm the decision? The answer lies in part on the role of the review body. If the review is *de novo*, the body is required to reconsider the matter as if confronted for the first time with the facts, the legislation and any relevant policy. On that basis it is for the review body to make the correct decision relying on the correct provision. The usual obligation to either 'affirm, vary or substitute a decision' does not prevent an affirmation for reasons which differ from those given by the primary decision-maker. That view was supported by Kirby J in the NSW Supreme Court in *Fairfield City Council v Liquor Administration Board*.[205]

To adopt that approach may, however, not always be straightforward. If the applicant has provided evidence which relates to the wrong provision, it does not follow that the evidence will support the outcome on the correct provision. That may create a dilemma for the review body. If it decides the matter according to the correct provision but with inadequate evidence, has it properly completed the task? If the decision is affirmed on inadequate evidence there is a possibility that the decision will be successfully challenged. This may be one situation which justifies, on efficiency grounds, the review body exercising its statutory or common law powers to call for further evidence relating to the correct provision. Alternatively, the review body could reverse the decision and remit it to the decision-maker with a direction that the decision-maker reassess the matter correctly, obtaining any evidence required

In the *Fairfield City Council* case there had been an appeal by the Council against a decision of the Liquor Administration Board granting permission to a hotel to use gaming machines at its premises. The Council had challenged the decision because it was based on a provision in the *Registered Clubs Act 1976* (NSW) rather than the correct provision in the *Liquor Act 1982* (NSW). A second ground was that the social impact assessment undertaken did not comply with

204 Robin Creyke and John McMillan, *Controlling Government Action* (2005) at [3.3.27]–[3.3.32].

205 [2001] NSWSC 870 (Kirby J).

the requirements of the provision in the *Liquor Act 1982* (NSW). Both arguments were rejected. The first on the basis that applying *Minister for Immigration and Ethnic Affairs v Wu Shan Liang*,[206] the Court should not be over-zealous to scrutinise the reasons of a tribunal, particularly when its reasons had dealt with the relevant issues of social impact, gaming turnover and gambling harm minimisation. In addition, the failure to refer expressly to some considerations did not mean inevitably that they had not been taken into account. The second argument was also rejected on the ground that it was open to the Board to find that the consultations satisfied the Act's requirements. Nevertheless, the case illustrates the potential difficulties which may arise if a review body affirms a decision under a provision not overtly considered by the primary decision-maker.

Unreasonable delay

What amounts to an unreasonable delay is often difficult to ascertain. Hence, there has been limited use made of the ADJR Act s 7 and other such provisions. In *Bidjara Aboriginal Housing and Land Company Ltd v Indigenous Land Corporation*[207] the Bidjara Aboriginal Housing and Land Company Ltd (Bidjara) had challenged the delay of the Indigenous Land Corporation in making a grant to Bidjara of a pastoral lease in Queensland. The Corporation had acquired the land. The *Aboriginal and Torres Strait Islander Commission Act 1989* (Cth) provided that the 'grant must be made within a reasonable time after … acquisition': s 191D(3). Bidjara claimed either that the delay was a breach of s 191D(3) or was unreasonable delay within the ADJR Act s 7. The land was an area to which Bidjara was one of several native title claimants. Attempts to mediate the claims before the National Native Title Tribunal had failed. The matter subsequently went to the Federal Court. In the application claiming delay the Federal Court at first instance found that it was not unreasonable to await the outcome of the Federal Court native title proceedings. The Full Federal Court also found that there was no shorter time limit under s 191D(3) than that imposed under the ADJR Act s 7. The test was whether a reasonable person would consider the delay justified and not capricious and whether it was delay for a considered reason rather than in consequence of neglect, oversight or perversity. The application was dismissed.

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206 (1996) 185 CLR 259.

207 (2001) 65 ALD 367. See also *Thornton v Repatriation Commission* (1981) 35 ALR 485; *Re O'Reilly; Ex parte Australena Investments Pty Ltd* (1983) 50 ALR 577; *Wei v Minister for Immigration, Local Government and Ethnic Affairs* (1991) 29 FCR 455; *Kimia v Minister for Justice and Customs* (2000) 60 ALD 203 at [59].

Another 'delay' case is the High Court decision in *NAIS v Minister for Immigration and Multicultural Affairs*[208] where the RRT had taken over five and a half years to conduct a review. The High Court (by majority[209]) decided that the decision was vitiated for jurisdictional error on the ground of unreasonable delay. Because the outcome depended on an assessment of the credibility of the parties, delay in making the decision meant, as Gleeson CJ put it, 'that the procedure was flawed; and flawed in a manner that was likely to affect the [Refugee Review] Tribunal's capacity to make a proper assessment of [the applicants'] sincerity and reliability'.[210] As his Honour went on: 'If the Tribunal, by its unreasonable delay, created a real and substantial risk that its own capacity for competent evaluation was diminished, it is not fair that the appellants should bear that risk'.[211]

The case is valuable because Gummow J[212] identified the remedies which should be sought in cases of delay. There are alternative circumstances which give rise to delay: delay in making the initial decision; and delay in finalising and announcing the decision once made. In both cases, the appropriate remedy is either an order for mandamus, or for the applicant to rely on the ADJR Act ss 7(1) and 16(3) or their State or Territory equivalents. The ADJR Act s 7(1) provides:

> Where:
> (a) a person has a duty to make a decision to which this Act applies;
> (b) there is no law that prescribes a period within which the person is required to make that decision; and
> (c) the person has failed to make that decision;
> a person who is aggrieved by the failure of the first-mentioned person to make the decision may apply to the Federal Court or the Federal Magistrates Court for an order of review in respect of the failure to make the decision on the ground that there has been unreasonable delay in making the decision.

Section 16(3) of the ADJR Act permits the Federal Court to make appropriate orders following a finding under s 7(1).

Mandamus may be sought for failure to act or to decide and that failure may be actual or constructive. The first involves an 'abdication or abandonment of the statutory function to proceed in the matter'; the second is where 'what

208 [2005] HCA 77.

209 Gleeson CJ, Kirby, Callinan and Heydon JJ; Gummow and Hayne JJ dissenting.

210 [2005] HCA 77 at [10].

211 *Ibid.*

212 Although Gummow J dissented on the outcome, his comments on these issues were not disputed by those in the majority.

purports to be the performance of a duty to decide is vitiated because the decision-maker misconceived its role, misunderstood the nature of its jurisdiction (including the nature of the opinion which it was to form), or failed to apply itself to the question which the relevant statute prescribed'.[213]

This expansion of the kinds of delay giving rise to error – in particular to encompass constructive failure to decide – has the potential to enlarge significantly the opportunities for applicants to challenge decisions on this ground.

Conclusion

This survey has touched on a variety of issues of general interest to tribunals with a view to giving some indication of current thinking by judges exercising a supervisory jurisdiction. At the same time, there are themes which permeate the cases. These themes indicate that courts more often than not exhibit a general reluctance to permit tribunals to be the final arbiter, even of factual material. Apart from statements such as those in *Craig* which indicate an unfortunate perception by courts of the inferior status of tribunals, the cases also illustrate that the courts are expanding the means by which their supervisory control can be exercised. In particular there is a noticeable trend to extend the elastic concept of jurisdictional error. Tribunals should be wary of such moves since they signal an increased possibility of intervention by courts. The moves also undermine what in other circumstances, such as those outlined in *Yusuf*, might suggest a relaxation of that supervision.

Against this background it is timely for government to focus more on tribunals with a view to enhancing tribunals' stature, rather than the reverse. It will only be when tribunals are seen as providing a high quality, professional adjudicative service that the courts will be content to draw back from their strict supervisory role. In order to achieve that end, it will be necessary to shore up tribunals' independence and to ensure that their members are of a calibre which will engender respect. Attention to these matters has become urgent. It is an issue which the Council on Australian Tribunals could usefully tackle and to which it should give priority if tribunals are to achieve their proper adjudicative status in Australia.

213 *NAIS v Minister for Immigration and Multicultural Affairs* [2005] HCA 77 at [41] (Gummow J).

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