



## THE STATE OF ADMINISTRATIVE JUSTICE IN AUSTRALIA

**The Hon. Justice Garry Downes AM  
President of the Australian Administrative Appeals Tribunal  
Judge of the Federal Court of Australia**

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### **The Australian Scene: Federal or Commonwealth Law**

#### *The Reforms of the 1970s and Merits Review*

I studied law at the University of Sydney. I was there between 1963 and 1966. My class included the present Attorney-General of Australia and the recently retired Attorney-General of New South Wales. They come from the opposite sides of politics. It was an interesting class.

Administrative law was an optional subject. It was taught by Professor Harry Whitmore. Professor Whitmore was a charismatic lecturer and he had a significant influence on me. It was through him that I developed my interest in what is now called public law – a kind of companion to constitutional law.

In the early 1960s the United Kingdom Franks Committee Report was prominent. Professor Whitmore was influenced by it. It was an important background to his lectures. He was also influenced by the Scandinavian concept of an ombudsman.

These matters were given prominence in Professor Whitmore's thinking because of the ever increasing influence of government decision-making on citizens - whether it be taxation, social security and pensions or licences and permits. Government decision-making was coming to effect every citizen's everyday life. So extensive and pervasive had this decision-making become that some mechanism wider than judicial review began to seem appropriate. It seemed necessary for decisions to be reviewed on their merits by someone independent of Government.

There is nothing new about independent tribunals which review administrative decisions on their merits. They existed before the 1960s. However, there were not so many of them. They were all specialised. At the Commonwealth level, Australia had Taxation Boards of Review. The Australian states had tribunals reviewing decisions relating to land development. There were guardianship and mental health tribunals. However, the intervening years have seen ever increasing numbers of tribunals established in common law countries such as the United Kingdom, Canada and New Zealand. Australia was no exception. However, Australia adopted a new approach to the problem.

On 29 October 1968 the Australian Government established a committee which became known as the Kerr Committee. The Chairman was Sir John Kerr who later became Governor-General for a time. However, in what was the most important constitutional crisis in Australian history, Sir John dismissed the elected Government. The dismissed Prime Minister said that nothing would save the Governor-General. He ultimately proved to be right.

Sir Anthony Mason, subsequently Chief Justice of Australia, who was Solicitor-General at the time, was a member of the Kerr Committee. Robert Ellicott QC, subsequently Solicitor-General, Attorney-General and also a Federal Court judge, was also a member. The final member was Professor Whitmore.

There is no doubt in my mind that Professor Whitmore was the driving force behind the Committee. He certainly wrote the first draft of its Report.

The Kerr Committee had been appointed to advise the Government about a proposal for a Commonwealth superior court to review administrative decisions. In the opening paragraphs of its Report the Committee explained that review of administrative decisions necessarily involved the notion of merits review. The Committee spent a large portion of its Report addressing that issue.

The result was, after another intervening report, that Australia adopted a completely new regime for administrative law at the federal level. This was in the mid 1970s. The Administrative Appeals Tribunal was established. But that was just part of a larger package.

The establishment of the Federal Court of Australia was part of the scheme. Part of the jurisdiction of the court arose under the *Administrative Decisions (Judicial Review) Act 1977* which codified the common law grounds of judicial review. Most importantly, that Act imposed a statutory obligation upon decision-makers to give written reasons for their decisions. The common law had stopped short of requiring reasons for all administrative decisions. Without reasons it was difficult to challenge decisions because there was usually nothing upon which to base a challenge.

The legislative scheme also included the establishment of the Administrative Review Council, to advise the Government on all matters of administrative law, and the establishment of the office of Ombudsman.

By now I expect that you may see the hand of my old professor, Harry Whitmore, behind all this. The Franks Committee had reminded him of the need for merits review. The Scandinavian office of Ombudsman had demonstrated to him the need for an independent office to scrutinise the process of decision-making, particularly at the mundane and ordinary level. He did not forget the need for regularisation of judicial review. The role of Sir Anthony Mason, one of Australia's greatest administrative lawyers, should not be underestimated, but to my mind the similarity between what I was taught at law school in the mid 1960s and the reforms which occurred in Australia in the mid 1970s is no coincidence.

### *The Administrative Appeals Tribunal*

The Administrative Appeals Tribunal was 30 years old in July last year. The first President of the Tribunal was Sir Gerard Brennan who ultimately became Chief Justice of Australia. He published a number of landmark decisions in the first years of the Tribunal's operation. They set the Tribunal on its path to success. They still guide its decision-making today.

What is the Tribunal? Why is it different to a collection of specialised tribunals? To understand the Tribunal fully requires an understanding of the Australian constitutional arrangements.

Australia, like Canada, is a federation – a federation of the former colonies as states. The Constitution confers legislative power on the Federal Parliament in a number of defined areas. The residue belongs to the states.

The Constitution is divided into chapters. Three of them are devoted respectively to the Legislature, the Executive and the Judiciary. From this division the High Court of Australia divined a separation of powers doctrine. Most importantly, for present purposes, the Executive could not exercise judicial power. Judicial power could only be exercised by a court. Being a court implied, amongst other things, appointees having security of tenure, at first for life, but since a constitutional amendment, until age 70.

Tribunals are generally not courts in the strict sense. They will nearly always fail the security of tenure test. In the United Kingdom that does not matter. It does not even matter in the Australian states. All these places have residential tenancy tribunals. They are exercising judicial power. They are determining disputes between individuals. However, in Australia, at the Commonwealth level, it does matter. A tribunal whose task was to determine disputes would be unconstitutional. The High Court would strike it down. It would be a body exercising judicial power which was not a court.

If the Executive is not to exercise judicial power, perhaps courts should not exercise administrative power. However, that line of demarcation is not so clear.

These distinctions are behind the establishment of the Administrative Appeals Tribunal as a general tribunal whose sole function is to exercise executive power.

The Tribunal was unique when it was established. It remains unique. I know of no similar Tribunal with a broad jurisdiction to review government decisions generally, including decisions of Cabinet ministers, anywhere outside Australia (including civil law countries as well as common law countries). The Tribunal's jurisdiction does not extend to decisions with substantial government policy content but it does include operational policy. It was established early on that the Tribunal was not bound by government policy although it should proceed carefully before departing from it. The model of the Administrative Appeals Tribunal has now been followed in a number of Australian states. The New Zealand Law Commission has recommended the establishment of a similar body but this has not yet occurred. In the United Kingdom the establishment of a Unified Tribunals Service which brings together the existing specialised tribunals under one umbrella is well underway. It remains to be seen whether a general review tribunal will become part of those reforms.

When the Tribunal opened its doors on 1 July 1976 Sir Gerard Brennan and his Registrar were looking for work. At first it came slowly. However, that position did not last. Now the Administrative Appeals Tribunal receives 8,000 applications each year. It has jurisdiction conferred on it by more than 400 acts of the Commonwealth Parliament or legislative instruments made under those acts. Most acts confer jurisdiction with respect to more than one area of executive decision-making. Many acts confer jurisdiction with respect to a multiplicity of subjects.

The jurisdiction of the Tribunal covers a huge range of executive decision-making. In some areas a high level of discretion is involved. In others the Tribunal is acting more like a court. In all cases, the role of the Tribunal is to substitute its decision for the decision of the original decision-maker. It stands in the shoes of the original decision-maker. It must arrive at the correct or preferable decision in the cases before it: correct if only one decision is available; preferable when it is choosing from a range of equally satisfactory decisions. We call this merits review. Let me illustrate.

I have heard an appeal from a decision of the Commonwealth Minister for the Environment authorising the importation into Australia of eight Asian elephants for the Sydney and Melbourne Zoos. That case involved discretionary decision-making. It was not judicial review. The Tribunal did not decide whether the Minister's decision was lawful. It determined the matter afresh uninfluenced by the decision and reasons of the Minister.

More recently I have determined how the wine growing districts of North East Victoria should be divided and what they should be called. The most recent case I have heard relates to the protection which should be afforded to an endangered species of shark, called the grey nurse. As in the elephants case, this involves reviewing a decision of a member of the Cabinet.

However, the Tribunal also hears claims for workers' compensation. Most of these claims relate to the entitlements of Commonwealth employees. This sounds like the work of a court. But in form, they are reviews of administrative decisions of a government agency which determines whether and to what extent compensation should be paid. There are complex and detailed statutory provisions setting out how compensation claims are to be determined so that they involve much less discretionary decision-making.

What we call the bulk jurisdictions in the Tribunal are taxation, workers' compensation, social security and veterans' entitlements. The other jurisdictions range through broadcasting licences, corporate and insurance regulation, aviation, bankruptcy, customs, fishing and many other areas. Sometimes the decision-making is broad. In a broadcasting case the question is often simply whether fairness requires that a condition should or should not be imposed on a licence. What is involved is simply a matter of judgment. In others the decision-making is quite constrained.

This brings me to what I think is the essence of the success of the general tribunal in Australia. I refer to its success although I am not sure that all politicians and public servants welcome their decisions being scrutinised by an outside body. Nevertheless, there is broad general acceptance now in Australia of the Administrative Appeals Tribunal. The Attorney-General, the Hon. Philip Ruddock MP, has often referred to the important normative role of the Tribunal in improving the quality of Government decision-making generally. Providing individual justice is a critical task for the Tribunal but influencing the quality of decision-making generally may be just as important. The Tribunal has also been described as the back-bencher's friend. Harassed back-benchers in their electoral offices can earn thanks by advising constituents about their rights of appeal to the Administrative Appeals Tribunal. This will often save them from time consuming work interceding with government agencies.

The reason for the large jurisdiction of the Tribunal, the reason for its success, is largely because it is a general tribunal. If the Parliament is considering legislation on a new topic and the question arises whether a decision should be subject to merits review there is a readily available Tribunal to undertake the review. In other jurisdictions it will usually be necessary to create a new tribunal with the cost, both initial and recurring, and delay associated with increasing bureaucracy.

The need for the Administrative Appeals Tribunal to be ready for anything requires it to be flexible. Accordingly the Tribunal has four levels of members. In addition to the President, who must be a Judge of the Federal Court of Australia, there are other members who are judges. This does not mean the Tribunal is in any sense a court. The judicial members of the Tribunal exercise administrative or executive power. There are then deputy presidents, senior members and members. The Tribunal can sit in panels of one, two or three members.

The Tribunal's greatest flexibility comes from its diversity in membership. The Tribunal now has over 90 members. A number of them are part time. In addition to lawyers the members include former military personnel (majors-general, brigadiers, a rear admiral and an air marshal), medical practitioners (both general and specialist), scientists, accountants, business people, aviators and many others. A number of members have expertise in more than one discipline.

This breadth of expertise enables the Tribunal to tackle most of the matters coming before it from an informed background. However, that is not always so. Sometimes we must be wholly dependent on expert evidence. An example is the case relating to the Asian elephants.

If the most unique aspect of the Tribunal is its general jurisdiction and what inevitably flows from this, there is, nevertheless, another distinguishing characteristic, namely the way the Tribunal carries out its role.



Assisting the early compromise by the parties of the matters before it has always been an important object of the Tribunal. This role has been enhanced by recent amendments to the legislation governing the Tribunal. However, not all cases can be settled. The essential work of the Tribunal remains the determining of the matters before it. It is, after all, quality and consistency in these decisions which enhance the prospects of compromise.

Many Australian administrative review tribunals carry out their roles in an informal environment. In the Social Security Appeals Tribunal and the Veterans' Review Board, from both of which the Administrative Appeals Tribunal hears appeals, the government agency is not represented. However, before the Tribunal the applicant and the agency are parties. There must be a hearing. There is a right to legal representation.

Accordingly, while the Tribunal is informal in its procedures it goes about its task in a court-like manner. Procedural fairness reigns. The decision under review is examined thoroughly and with care – often in a way that the original decision-maker could not undertake. This is because original decisions are usually taken in an office atmosphere, without the dialogue that a hearing permits. Sometimes public servants whose decisions have been overruled might be sceptical, but experience demonstrates the value of having something pointed out in person with the opportunity to query and analyse. It seems to me that this process of combining informality with a careful process giving both sides every opportunity to elucidate its point of view is another aspect of the Administrative Appeals Tribunal which adds to its reputation.

The Administrative Appeals Tribunal was an important experiment in 1976. I think we are indebted to Professor Harry Whitmore and the rest of the Kerr Committee for their vision. However, the experiment is now over. The Tribunal has a significant reputation. Other countries may care to look at it as a model for high quality and effective review of administrative decision-making.

### *Other Federal Tribunals*

The Administrative Appeals Tribunal is not the only tribunal at the federal level undertaking administrative review. There are a number of specialist tribunals which provide external review in particular areas of high-volume government decision-making.

I have already mentioned the Social Security Appeals Tribunal and the Veterans' Review Board, the decisions of which are reviewable by the Administrative Appeals Tribunal. Two other significant tribunals that undertake merits are the Migration Review Tribunal and the Refugee Review Tribunal which review a broad range of decisions concerning the right of non-citizens to enter and stay in Australia.

### *Judicial Review*

Important though merits review may be, it does not displace the need for judicial review. Judicial review is available in relation to decisions of tribunals, including the Administrative Appeals Tribunal, as well as in relation to areas of government decision-making that are not subject to merits review.

At the Commonwealth level in Australia, the Federal Court, of which I am a judge (although I only sit there for about 4 weeks each year), is the primary place for judicial review. The Federal Magistrates Court, established in 2000, provides judicial review of decisions of less significance including immigration decisions.

At the federal level, common law judicial review of decisions has a constitutional and statutory basis. Common law grounds of review are supplemented by the *Administrative Decisions (Judicial Review) Act 1977*.

The ultimate Australian court, the High Court of Australia, has judicial review power conferred on it by section 75(v) of the Australian Constitution. It gives the High Court original jurisdiction in all matters in which a writ of mandamus

or prohibition or an injunction is sought against an officer of the Commonwealth. Certiorari, declaration and habeas corpus may be granted where these are ancillary to one of the nominated remedies.

The Federal Court has jurisdiction to issue each of the so-called constitutional writs under section 39B(1) of the *Judiciary Act 1903*. These common law remedies will commonly be sought in addition to, or as an alternative to, orders under the *Administrative Decisions (Judicial Review) Act 1977*.

### **Administrative Justice in the States**

Quite apart from the Commonwealth, each of the states and territories of Australia have their own set of institutions which are designed to provide administrative justice. A comprehensive review is beyond the practical scope of this paper but I will make some key points.

The Administrative Appeals Tribunal model of a general merits review tribunal has been followed in the Australian Capital Territory, which has its own Administrative Appeals Tribunal. It has also been followed in some states. New South Wales has the Administrative Decisions Tribunal, Victoria has the Victorian Civil and Administrative Tribunal and there is the State Administrative Tribunal in Western Australia. It is important to note, however, that the state-based tribunals exercise both executive and judicial power. One of their functions is to review executive decisions of government. In that role they are modelled on the Administrative Appeals Tribunal. However, they also have roles which might be conferred on courts.

While the other states and the Northern Territory have not moved to introduce a general tribunal, mechanisms are available for merits review of at least some administrative decisions.

The Supreme Courts of each of the states and territories have an inherent judicial review jurisdiction. This is derived from the jurisdiction of superior courts at common law to issue the prerogative writs. The Australian Capital

Territory, Queensland, Tasmania and Victoria have introduced statutes similar to the *Administrative Decisions (Judicial Review) Act 1977* but the prerogative writs continue to be available.

### **Administrative Review Council**

The President of the Administrative Appeals Tribunal is an *ex officio* member of the Administrative Review Council, an independent advisory body created under the Administrative Appeals Tribunal Act. One of the roles of the Council is to provide advice to the Commonwealth Attorney-General on emerging issues in administrative law. The Council does this through reports tabled in Parliament which are published. Two recent reports of the Council are worth mentioning:

- the scope of judicial review<sup>1</sup>; and
- the use of computer systems in administrative decision-making.<sup>2</sup>

#### *The Scope of Judicial Review*

The Council undertook this project on the scope of judicial review because there was no rigorous analysis of the subject and, particularly, of the circumstances in which it might be appropriate for judicial review to be limited. The outcome of the project was a set of principles calculated to assist legislators and those advising government whether limitations on judicial review might be appropriate.

The Council reviewed the present scope of judicial review and identified the public law values that underlie judicial review: the rule of law, the safeguarding of individual rights, accountability and consistency and certainty in the administration of legislation. The Council took the view that “these values are fundamental and that the strongest reasons would be needed if

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<sup>1</sup> Administrative Review Council, *The Scope of Judicial Review*, Report No. 47, 2006. All reports are available through the ARC website:  
<http://www.ag.gov.au/agd/WWW/arcHome.nsf/Page/Home>.

<sup>2</sup> Administrative Review Council, *Automated Assistance in Administrative Decision Making*, Report No. 46, 2004.

judicial review were to be reduced in a way that might allow unlawful conduct to proceed without any kind of remedy”.<sup>3</sup>

The Council identified a range of types of decisions and the justifications claimed for limiting judicial review. In relation to each type of decision, the Council assessed whether limits on judicial review could be justified and the extent of those limits.

The Council noted that the courts themselves have developed principles to accommodate situations such as urgency, unmeritorious claims, preliminary steps in decision-making and the availability of alternative remedies. Judges have also developed the rules of “procedural fairness” and the general ground of “unreasonableness” to accommodate circumstances where limits on judicial review are appropriate. Legislation is not desirable in these areas.

The Council concluded that restrictions are justified in certain limited circumstances. The following are examples:

- Decisions relating to proceedings for criminal or civil penalties or extradition should be reviewed exclusively by the court hearing the substantive proceeding. This only limits the forum available for review, not the actual opportunity for review.
- If a decision-maker refuses to exercise a discretion to award a benefit and the applicant has no legitimate expectation or right to that benefit, for example an ex gratia payment, the decision should only be reviewable if it was made in bad faith or for an improper purpose.
- If invalidating a decision would have a significant effect on third parties and a reasonable period for challenging the decision has passed, specific legislation upholding the validity of the decision could be passed.

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<sup>3</sup> Administrative Review Council, *The Scope of Judicial Review*, Report No. 47 at vii.

## *The Use of Computer Systems in Administrative Decision-Making*

This report of the Council looks to the future of administrative decision-making and how computer systems feature within it. A number of government agencies in Australia make automated decisions using computer systems. Council members visited an office of Centrelink, the agency which processes all social security payment claims in Australia, and saw customer service officers calculating pension entitlements as applicants waited at the counter. Such systems are invaluable for high volume decision-making. However, each determination is an exercise of government administrative power subject to both merits review and judicial review. One problem is, how can such decisions be scrutinised in the detail necessary for both merits review and judicial review? How can the reasoning and its correctness even be known when it has been made by a computer program?

Given the growing use of expert computer systems, the Council decided it would be appropriate to inquire into these issues and others, such as:

- how and by whom the systems are designed and used;
- how the systems operate and how they are tested to ensure that they reflect the relevant legislation;
- opportunities for independent scrutiny of the systems; and
- the features of an optimal system.

The Council drew an important distinction in its report between administrative decisions for which the decision-maker is required to exercise discretion and those for which no discretion is exercisable once the facts are established. Existing systems are only used to generate non-discretionary decisions. This poses little concern, provided that all inputs into the system are up-to-date, the system has been robustly tested and the system complies with privacy standards. However, ensuring that these matters are all correctly dealt with is very important.

What about discretionary decisions? While it is technically possible to automate the exercise of discretion, the Council concluded that this is

undesirable. It would erode the fundamental principles that a decision-maker must personally exercise a discretion, must not act under dictation and must not inflexibly apply a policy or rule. Nevertheless, computer systems can be used as a tool to assist in the exercise of discretion. The evolution of computer systems will continue. There will come a time when computers do exercise discretions because of the amount and complexity of the information with which they are programmed. We must ensure that there are administrative law systems in place to address this inevitable development.

The Council's report contains 27 best-practice principles for automated decision-making. These reflect standards applicable to all decision-makers as well as particular considerations relevant to the design and maintenance of expert computer systems. The principles have been expanded upon by the Automated Assistance in Administrative Decision Making Working Group which was created on the recommendation of the Council to monitor the issues which the report discussed. It recently produced a guide directed at executives and managers which provides detailed advice to agencies on the practical implementation of the best-practice principles.<sup>4</sup>

### *Current Projects*

The Council currently has two major projects. The first concerns the coercive powers available to government agencies to obtain information, whether through compulsory production of documents or through interrogation. The Council's primary objective is to determine whether greater consistency in the use of these powers across different agencies is desirable or achievable. The Council is also considering the accountability mechanisms associated with the exercise of the powers and the protections available to individuals against whom the powers might be exercised.

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<sup>4</sup> AAADM Working Group, *Automated Assistance in Administrative Decision-Making: Better Practice Guide*, 2007:  
[http://www.agimo.gov.au/\\_\\_data/assets/pdf\\_file/55582/AAADM\\_Better\\_Practice\\_Guide.pdf](http://www.agimo.gov.au/__data/assets/pdf_file/55582/AAADM_Better_Practice_Guide.pdf)

The second project involves reviewing the administrative accountability mechanisms that are available for decisions in areas of complex and specific business regulation. These would include corporations, the banking, insurance and superannuation industries as well as the broadcasting and telecommunications sectors. The project is motivated by a well-founded belief that business regulation is now too detailed and complex and, most importantly, there is too much overlap in regulations sourced from many different departments and agencies.

The terms of reference for the inquiry note the increasing complexity of regulatory regimes which apply to Australian business, the role of the administrative law system in promoting lawfulness and accountability in government decision-making and the importance of maintaining the most efficient and effective interaction between the administrative review system and government business regulation. In that context, the Council has been asked to consider the following matters specifically:

- the circumstances in which administrative review mechanisms should be available for decisions in these areas;
- the adaptations, if any, that may be desirable to merits review processes to maximise the efficiency and effectiveness of such processes in these areas; and
- the potential for the development of a framework of national guideline principles for administrative review, including merits review, of decision in these areas.

### **Issues in Administrative Law Jurisprudence in Australia**

In this last part of my paper, I will note some issues relating to administrative law jurisprudence in Australia. The first is the re-emergence of the significance of jurisdictional error in Australia. Secondly, I will touch on the concept of unreasonableness and the different ways in which this concept has developed in Australia, the United Kingdom and Canada.



## *Jurisdictional Error*

In an article published in 2005, Caron Beaton-Wells noted:

*The last two decades have witnessed a colossal struggle between the government and the courts over judicial supervision of executive decisions with respect to migration.*<sup>5</sup>

Administrative law jurisprudence in Australia has been shaped significantly by judicial review decisions in this area.

In the early 1990s, the Government introduced into the *Migration Act 1958* specific provisions governing judicial review by the Federal Court of migration decisions. A number of the grounds of review available under the *Administrative Decisions (Judicial Review) Act 1977* were specifically excluded. These included breach of the rules of natural justice, taking into account an irrelevant consideration, failing to take into account a relevant consideration and unreasonableness.

The introduction of the restricted grounds of review meant that the High Court's jurisdiction under section 75(v) of the Constitution was broader than that of the Federal Court. The number of applications made to the High Court seeking constitutional remedies increased over time.

In considering judicial review cases the High Court began to develop the concept of jurisdictional error in the making of administrative decisions by administrative tribunals. Jurisdictional error occurs when an error of law is such that the decision-maker is not authorised by the enabling provision to make the decision. Jurisdictional error might be narrower in its extent than ordinary error of law amenable to review under the *Administrative Decisions (Judicial Review) Act 1977* or the common law.

Traditionally, jurisdictional error only encompassed errors made by decision-makers in ascertaining whether or not they had jurisdiction. The landmark decision in *Craig v South Australia* led to a broader concept of jurisdictional error that included errors in the exercise of discretion by administrative tribunals.<sup>6</sup> The High Court said:

*If... an administrative tribunal falls into an error of law which causes it to identify a wrong issue, to ask itself a wrong question, to ignore relevant material, to rely on irrelevant material or, at least in some circumstances, to make an erroneous finding or to reach a mistaken conclusion, and the tribunal's exercise or purported exercise of power is thereby affected, it exceeds its authority or powers. Such an error of law is jurisdictional error which will invalidate any order or decision of the tribunal which reflects it.*<sup>7</sup>

Since *Craig's* case, the concept of jurisdictional error has been developed and refined in a number of migration cases. In *Minister for Immigration and Multicultural Affairs v Yusuf*, the High Court held that the 1992 amendments to the Migration Act limiting the scope of judicial review were ineffective in relation to decisions affected by jurisdictional error.<sup>8</sup>

In 2001, the Government amended the Migration Act again to seek to limit judicial review of migration decisions. Application could be made to the High Court, the Federal Court or the Federal Magistrates Court for one of the constitutional remedies but these applications were subject to a privative clause. The Migration Act provided that, subject to certain exceptions, any administrative decision made under the Act:

(a) *is final and conclusive;*

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<sup>5</sup> Beaton-Wells C, 'Judicial Review of Migration Decisions: Life after S157', (2005) 33 *Federal Law Review* 141 at 141.

<sup>6</sup> (1995) 184 CLR 163.

<sup>7</sup> (1995) 184 CLR 163 at 179. A breach of the rules of natural justice has also been held to constitute jurisdictional error. See, for example, *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82.

<sup>8</sup> (2001) 206 CLR 323

- (b) *must not be challenged, appealed against, reviewed, quashed or called in question in any court; and*
- (c) *is not subject to prohibition, mandamus, injunction, declaration or certiorari in any court on any account.*<sup>9</sup>

In *Plaintiff S157/2002 v Commonwealth* the High Court held that the privative clause did not operate to prevent judicial review of decisions that involved jurisdictional error.<sup>10</sup> Such decisions were not validly made under the Act and therefore fell outside the scope of the privative clause. As it did not operate to prevent the High Court from exercising its judicial review jurisdiction under section 75(v) of the Constitution, the privative clause was held to be valid but without any significant effect.

Subsequent decisions of the High Court, Federal Court and Federal Magistrates Court have examined further the circumstances in which it can be said that migration decisions are subject to jurisdictional error. While the gap between the boundaries of jurisdictional error and conventional error of law is not yet clear it appears that it is not significant.

The judicial review provisions in the Migration Act were amended again in 2005. While most judicial review applications must be made to the Federal Magistrates Court, the Federal Court continues to have a limited jurisdiction. Significantly, the jurisdiction of both of these courts is now defined as that which may be exercised by the High Court under section 75(v) of the Constitution. The difficulties which arose during the 1990s with differences in the grounds of review between courts have been avoided.

The *Plaintiff S157* decision and the recent amendments to the Migration Act have cemented the centrality of jurisdictional error in one of the largest areas of judicial review in Australia. The limits of what constitutes jurisdictional error will continue to be examined by the courts in the context of reviewing migration decisions.

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<sup>9</sup> Subsection 474(1) of the *Migration Act 1958*.

Of course, the jurisprudence relating to jurisdictional error has implications for judicial review beyond migration law. It will contribute to the general law relating to judicial review.

### *Unreasonableness as a Ground of Review*

An administrative decision can be described as “unreasonable” for a range of reasons. I will focus on the concept of unreasonableness as the specific ground of review which can be traced back to the decision in *Associated Provincial Picture Houses Ltd v Wednesbury Corp.*<sup>11</sup> It was given statutory recognition in the *Administrative Decision (Judicial Review) Act 1977* as one of the examples of an improper exercise of a power:

*an exercise of a power that is so unreasonable that no reasonable person could have so exercised the power.*<sup>12</sup>

The principle was articulated by Lord Greene MR in *Wednesbury* in the following context:

*It is clear that the local authority is entrusted by Parliament with the decision on a matter which the knowledge and experience of that authority can best be trusted to deal with... It is true to say that, if a decision on a competent matter is so unreasonable that no reasonable authority could ever have come to it, then the courts can interfere... but to prove a case of that kind would require something overwhelming.*<sup>13</sup>

Lord Greene’s judgment reflects the traditional caution that courts carrying out judicial review should not stray into the merits of a matter. It also reflects an expectation that this ground of review would apply only in exceptional cases.

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<sup>10</sup> (2003) 211 CLR 476.

<sup>11</sup> [1948] 1 KB 223.

<sup>12</sup> Paragraph 5(2)(g) of the *Administrative Decisions (Judicial Review) Act 1977*.

The development of this ground of review and related concepts has been different in Australia to the United Kingdom and Canada. The approach in Australia has been more conservative. A primary reason for this distinction is that the United Kingdom and Canada have introduced domestic human rights legislation. Concerns over the separation of judicial and executive power are superseded by a statutory imperative to ensure that administrative acts which adversely affect fundamental human rights are proportionate.

Lord Diplock's judgment in *Council of Civil Service Unions v Minister for the Civil Service* marked a turning point in the jurisprudence in England in this area and, in particular, his classification of the grounds for judicial review under the heads of illegality, irrationality, procedural impropriety and possibly proportionality.<sup>14</sup> The concept of *Wednesbury* unreasonableness, which fell under the irrationality head, was described by Lord Diplock in the following way:

*It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system.*<sup>15</sup>

The application of *Wednesbury* unreasonableness, and particularly whether it has been unnecessarily restrictive, has been the subject of ongoing debate in the United Kingdom. Lord Cooke criticised its tautologous formula and advocated a simpler test noting that judges were used to respecting the proper scope of administrative discretions.<sup>16</sup>

Perhaps more important than the debate around the appropriate scope of *Wednesbury* unreasonableness, proportionality has now emerged in the

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<sup>13</sup> [1948] 1 KB 223 at 230.

<sup>14</sup> *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374.

<sup>15</sup> [1985] AC 374 at 410.

United Kingdom as a significant ground of judicial review, particularly in light of the operation of the European Convention for the Protection of Human Rights and Fundamental Freedoms and the *Human Rights Act 1998* (UK). Although its use is more significant in the United Kingdom, Canada also recognises the concept of proportionality flowing from its Charter of Rights and Freedoms.

In determining whether a limitation by an act, rule or decision is arbitrary or excessive, courts in the United Kingdom will inquire whether:

- (i) the legislative objective is sufficiently important to justify limiting a fundamental right;
- (ii) the measures designed to meet the legislative objective are rationally connected to it; and
- (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective.<sup>17</sup>

Lord Steyn has noted that “these criteria are more precise and more sophisticated than the traditional grounds of review”.<sup>18</sup> Proportionality authorises a more intense review and may go further than the traditional grounds. It will be interesting to see what ongoing significance the *Wednesbury* unreasonableness doctrine has in the United Kingdom.

In the Australian context, the principle of proportionality has been applied in determining the validity of delegated legislation but not in judicial review of administrative decisions. *Wednesbury* unreasonableness remains a valid but indeterminate ground of judicial review in Australia. The courts have continued to express caution in its application and prefer to identify other grounds on which a decision-maker may have erred. As Gleeson CJ stated in *Re Minister for Immigration and Multicultural Affairs; Ex parte S20/2002*:

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<sup>16</sup> *R v Chief Constable of Sussex; Ex parte International Trader's Ferry Ltd* [1999] 2 AC 418.

<sup>17</sup> *de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1AC 69 at 80.

<sup>18</sup> *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532 at 547.

*... to describe reasoning as illogical, or unreasonable, or irrational, may merely be an emphatic way of expressing disagreement with it. If it is suggested that there is a legal consequence, it may be necessary to be more precise as to the nature and quality of the error attributed to the decision-maker, and to identify the legal principle or statutory provision that attracts the consequence.*<sup>19</sup>

The scope of *Wednesbury* unreasonableness and related concepts of irrationality or illogicality have received some attention in recent times. In *S20/2002*, three judges of the High Court appear to have limited the application of *Wednesbury* unreasonableness to decisions that involve a statutory discretion. It would not apply to cases where the decision-maker is required to be satisfied that certain criteria are met.<sup>20</sup> However, in *Minister for Immigration and Multicultural Affairs v SGLB*, Gummow and Hayne JJ noted in relation to cases of this latter kind that:

*the critical question is whether the determination was irrational, illogical and not based on findings or inferences of fact supported by logical grounds.*<sup>21</sup>

## **Conclusion**

Australia has a sophisticated system of administrative justice. It is underpinned by the Westminster system of government with at least informal separation of powers and the checks and balances which follow. At the federal level the separation of powers is rigid. This has led to separate systems of merits review within the executive and judicial review within the judiciary.

Australia's system of merits review of administrative decision-making is unique. At the apex is the Administrative Appeals Tribunal which is a general

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<sup>19</sup> (2003) 198 ALR 59 at 61.

<sup>20</sup> (2003) 198 ALR 59 per McHugh and Gummow JJ at 76 and Kirby J at 90-91.

<sup>21</sup> (2004) 207 ALR 12 at 20.

tribunal reviewing Commonwealth administrative decisions at all levels. It reviews decisions by specialist tribunals and it reviews directly the decisions of Ministers, including Cabinet Ministers, departments and agencies of the Commonwealth Government. The complimentary system of judicial review in the courts is also highly developed.

The Australian states and territories have parallel systems of judicial review and in some places an equivalent of the Administrative Appeals Tribunal. Tribunals in the states are not limited to exercising executive administrative power and can, and do, exercise judicial power.

The Administrative Review Council, a Commonwealth Government Agency, advises the Commonwealth on administrative law issues. It has recently produced significant reports on Judicial Review and Automated Decision Making. It is presently considering Coercive Investigative Powers of Agencies and Complex Business Regulation.

Judicial review issues in Australia have been substantially driven in recent years by migration legislation. This has led to the development of particular jurisprudence in relation to jurisdictional error. In other jurisdictions, the introduction of domestic human rights legislation has led to modernisation of the principle of *Wednesbury* unreasonableness and, in particular, to the embracing of the concept of proportionality. Proportionality has not been enshrined in Australia and the conventional principle of *Wednesbury* unreasonableness remains largely unchanged.