CURRENT AND FUTURE CHALLENGES IN JUDICIAL REVIEW JURISDICTION: A COMMENT[1]

*Robin Creyke**

Decision-making by government is the focus of a range of accountability mechanisms, review by the courts being the most formal and demanding. That review process is designed not only to determine the lawfulness of the action under scrutiny but also to fashion guidelines on legality issues which will be of assistance to primary decision-makers and other review bodies. Given their stature and authority, it can be expected that in the exercise of their judicial review jurisdiction, the courts have an obligation to define with some precision the standards they are imposing on public administration. That has not always been achieved. In defence of the courts, judicial review is a dynamic area of jurisprudence and the range of matters subject to the courts' jurisdiction is broad and continually expanding to match developments in public administration. Nonetheless, given the courts' position as the final arbiter of judicial review standards, these features of the jurisdiction only emphasise the need for the courts to exercise vigilance in the performance of this aspect of their task.

This paper discusses some current and future challenges to review by the courts in light of the courts' standard-setting role. The discussion concerns not only the elasticity of the legal standards but also the administrative context in which review occurs.

Number and quality of public sector decisions

Despite downsizing and contracting out there appears to be no diminution in the volume of decisions being made in the public sector. In the context of decision-making by government it was salutary to be reminded[2] that Centrelink processes over 6.5 million new claims each year.[3] To further illuminate that picture, the Attorney-General in 2000 calculated that the Australian Public Service made some 50 million decisions a year, of which some 35 million relate to income support.[4] The focus for courts and tribunal, however, is not on the number of decisions but on their legality and quality. That in turn requires attention to the number of errors made by decision-makers in the application of the law and its administrative standards.

Estimating the level of errors of public administration Australia-wide is no easy task,[5] but some figures for the Commonwealth at least are available. A study by the

* *Professor of Law, Australian National University; Special Counsel Phillips Fox Lawyers; Commissioner, ACT Independent Competition and Regulatory Commission; Member, Administrative Review Council.*

Commonwealth Auditor-General of new age pension claims made to Centrelink found that the 'actionable error'[6] rate was 52.1 per cent (+/-6.8 percentage points).[7] Softlaw Corporation which has had access to files in high volume decision-making departments for the purpose of developing legal expert systems[8] for use by government has concluded, more conservatively, that: 'audits in most agencies would disclose error rates in primary decision-making of at least 25-30 per cent'.[9] These figures support the comment in Mr Blunn's paper that 'he suspects that the number of wrong decisions, on both sides of the ledger, is still too high'.[10]

The disparity in the figures for errors provided by the ANAO and by Softlaw are significant. Even more disturbing was the difference between the figures provided under Centrelink's internal auditing figures at the time of the ANAO study. The current position in Centrelink may now be different,[11] but at the time the Auditor-General was conducting the survey referred to, Centrelink's internal auditing system showed an error rate of only 3.2 per cent for the period in which the ANAO figure for actionable errors was over fifty per cent.[12] So the comment in the paper that as part of agencies' internal monitoring of the accuracy of decisions 'statistically sound systems are used to check decisions randomly'[13] may need qualification.

Although there is debate about the methodology used by the ANAO[14] and what qualifies as an 'actionable error', the available figures, even if closer to the Softlaw more conservative error rates, suggest that there is considerable room for improvement in decision-making within government. They also indicate that there is a continuing need for robust checking by external review bodies including the courts and tribunals.

Impact on decision-making of introduction of legal expert systems

One emerging development which has the potential to address some of these issues is the introduction within government of legal expert systems[15], particularly rule-based systems.[16] This is an era when decisions are increasingly being made or assisted by computer systems, a prime reason being the capacity of such systems to produce more consistent and accurate outcomes at the initial decision-making stage.[17]

Australian public administration leads the world in this field.[18] The Department of Veterans' Affairs introduced the first computer-assisted automated decision-making in Australia in 1994; Centrelink has embraced the technology and its family assistance payments, since 2002, have been made with the benefit of the Legal Edge program - the first of its suite of payments decisions which will be computer-assisted. At the time of writing at least eight other Commonwealth and several State agencies had also adopted the rule-base technology in some form.[19]

The novelty of these changes and their potential impact on standards of decision-making has as yet not been the subject of any comprehensive assessment. In this context, it is easy to concur with the conclusion in Blunn's paper that it is opportune for the Administrative Review Council to be investigating the introduction of such systems to assist decision-makers in high volume decision-making agencies.[20]

At the same time, there are dangers in this development from an administrative law viewpoint, as the following anecdote illustrates. A colleague recently wanted to negotiate periodic payment of a tax debt. He telephoned the Tax Office to be connected to an automated system. Having negotiated his way through the predetermined questions he was finally advised by the computer-generated voice: 'You will be notified if the Tax office has approved your application'. Subsequently he received a letter, possibly also computer-generated, imposing a payment schedule different from the one he had proposed.

Apart from the impersonal nature of the process, the example raises a number of questions. In the first place, there was nothing in the letter to indicate whether the reply was produced by a process involving an automated system. That knowledge would prompt a different response to one generated by conventional individual decision-making. For example, are the options offered by the automated system comprehensive? Or, in other words, has there been a failure to consider relevant matters? [21] If the claim is automatically decided unless the application falls outside the guidelines has the claim been decided by the statutorily nominated decision-maker?[22] If there has been no intervention of an official into the process, has there been a proper exercise of discretion? In restricting the range of questions which have been programmed into the database, has an inflexible policy been applied? If so, how is the special case to be taken into consideration?

Given that there is nothing on the face of the decision to alert recipients to its computer-assisted status, a major difficulty for individuals, and for courts and tribunals on review, is to know when these questions should be asked. A search of the database has identified only one decision which even adverts to the issue and it was not officially reported.[23] A degree of vigilance will be required by applicants, review bodies and advocates to identify whether the decision was expert system-assisted and then, if necessary, to identify whether there might have been a breach of an administrative law standard.

Development of new grounds of review

Another challenge to those involved with judicial review arises from the emergence of new legal concepts and administrative law standards not easily related to the codified grounds, typified by those in the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (ADJR Act). This creates several difficulties.

Codification of the judicial review grounds in the 1970s was intended to be all-embracing and to provide more clearly defined precepts for those in public administration. Courts and tribunals were given the supplementary function of fleshing out the grounds. That task, as Justice von Doussa described it was:

> … to develop coherent and explicable legal principles which provide administrators, the public, and their legal advisers, with clear guidelines whilst at the same time retaining sufficient flexibility to allow an appropriate balance between the public and private aspects of the public interest in the infinite variety of circumstances that come before the courts.[24]

The question which may be asked is how well is administrative law meeting that challenge?

Traditionally, it was accepted that a court could review a matter only if it came within one of the codified grounds of review.[25] Applicants needed to be able to tie their claim to a ground in section 5, 6 or occasionally 7 of the ADJR Act or face exclusion from the court. At the same time, from its inception some room was allowed for flexibility with the inclusion of grounds such as 'otherwise contrary to law'[26] and 'any other exercise of a power in a way that constitutes abuse of power'[27]. In the years following the introduction of the ADJR Act it was clearly understood that these concessions justified the rejection of applications for review unless an applicant could bring a claim within one of the legislative grounds.

Subsequently, that principle appears to have been abandoned. Today it is more common to find new legal standards broadly accommodated under various ADJR Act grounds of review, some might say by stretching the grounds beyond their intended territory. This development imposes dual burdens on decision-makers: first, they must gauge which of the existing grounds to rely on, and here guidance has not been consistent; second, the decision-maker is faced with the need to apply disparate factual and legal tests depending on which ground is chosen.

There are now, in effect, several new legal standards, breach of which will lead to a finding of invalidity by the courts. None are listed in the statutory judicial codes.[28] The novel grounds include a failure to give a 'proper, genuine and realistic consideration'[29] to a matter, the probative evidence rule,[30] and the duty to enquire.[31] There are others.[32]

A failure to give proper, genuine and realistic consideration to a matter has variously been said to be unreasonable,[33] a failure to follow lawful procedures,[34] a failure to consider a relevant matter,[35] an error of law,[36] a breach of procedural fairness,[37] or a breach of the non-dictation rule.[38] Similarly a decision-maker who has not met the standard embodied in the probative evidence rule has been said to breach procedural fairness,[39] and to have made an error of law.[40] The duty of inquiry has founded invalidity on the basis of a breach of the duty to follow statutory procedures,[41] a failure to take account of relevant matters,[42] breach of procedural fairness,[43] unreasonableness,[44] and error of law.[45] Imposition of additional requirements such as these imposes a considerable burden on decision-makers,[46] not least because the elements of the particular ground chosen must be established and these vary widely.

To continue to accept the continued expansion of the grounds in this manner negates the value of the codification of the judicial review grounds and a quarter of a century of jurisprudence explaining and clarifying those statutory standards. Blurring the boundaries of the existing grounds by using them as host to novel legal concepts not envisaged by the drafters of the codified grounds tends to return courts to the indeterminate standards captured in Lord Diplock's judgment in *Council of Civil Service Unions v Minister for the Civil Service* - illegality, irrationality, and unfairness[47] and does nothing to promote the approach advocated in the passage of Justice von Doussa.

To stem this development necessitates attention being paid to this expansion of the grounds. If agreement could be reached about whether these novel grounds or concepts should be accepted in their own right - a matter which will require

legislative attention - that would be a start. In the interim, if these grounds are not to be banished it would be helpful if consensus could be reached as to which of the existing grounds is to act as host for these emerging concepts. That should not be too difficult, given their flexibility - a quality aptly captured by Professor Carol Harlow when she referred to unreasonableness - as 'the judge's flexible friend'.[48]

Regulated industries

The expansion of judicial review is illustrated graphically by its use in another area of growing importance, namely, regulation of utilities. This is likely to be a growth area for the courts and to pose particular challenges. Administrative law has now impacted on regulators of utilities - gas, electricity and water - in two significant decisions: *TXU Electricity Ltd v Office of the Regulator-General*, [49] a decision of the Victorian Supreme Court, and the more recent decision of the Court of Appeal of the WA Supreme Court in *Re Michael; Ex parte Epic Energy (WA) Nominees Pty Ltd*. *TXU* dealt with the regulation of electricity; *Epic Energy* with gas.[50] Although it had been anticipated that appeals from decisions of regulators would be handled by the statutory appeal bodies such as the Australian Competition Tribunal, these cases clearly signal that applicants will increasingly choose the remedies offered by courts exercising judicial review. The impact of this development is that there needs to be a shift in focus from a largely economically regulatory model to one in which more attention will need to be paid to the application of administrative law standards.

In *TXU*, the Victorian Regulator-General had set the rates which could be charged by Electricity distributors in the State. TXU, an electricity distributor, challenged the decision on the basis that the calculation of the charges had been based on the interpretation of expressions in Tariff Orders made under the *Electricity Industry Act 1993* (Vic) which it claimed were incorrect according to the standards of orthodox economics, a challenge which was ultimately unsuccessful. In *Epic Energy*, the concern of the applicant was the tariffs set by the regulator which Epic could charge third parties for access to the Dampier to Bunbury Natural Gas Pipeline which Epic had purchased from Western Australia's Gas Corporation. The tariff was based on a capital cost for the purchase adopted by the Regulator which was much lower than the price paid and would not permit Epic Energy to recover the costs of its investment. Epic Energy argued that the capital base on which the reference tariffs were calculated involved a misconstruction of terms in the relevant gas code,[51] a claim which was successful. The Court did find errors by the Western Australian Independent Gas Pipeline Gas Access Regulator in his draft decision.

Several messages have been delivered by these cases. The first is that interpretation of terms in the electricity, gas, and it is predicted, soon, water legislation and codes require interpretation. In the TXU decision, for example, the principal issue involved a decision on the meaning of 'price based regulation adopting a CPI-X approach' as compared with a 'rate of return approach'.[52] *Epic Energy* involved examination, among others, of the expressions 'competitive market', 'abuse of monopoly power' and 'efficient costs'.

The interpretations of the terms (including economic formulae) involved in both the electricity and the gas codes are terms of art - the art of the regulation of public utilities. Under standard interpretation rules, a court may receive evidence from

experts as to the technical meanings of terms of this nature.[53] Expert evidence, however, is not a complete answer. As the Victorian Court noted 'on any view of the evidence, there is a degree of uncertainty as to what each formula means'[54] and, as the Court pointed out in *Epic Energy*, the terms under examination had no uniform or accepted meaning, even among economists.[55] Parker J (with whom Malcolm CJ and Anderson J agreed) (hereafter the Court) noted in *Epic Energy*:

> How best to determine the efficient level of costs or the outcome of a competitive market are matters of economic theory and practice which, on the evidence, are in the course of constant revision, development and refinement.[56]

The issue is further complicated since these technical formulae must be interpreted against the purposes of the legislation. That task is never easy. Even articulation of rules for concepts such as fairness and good administration is fraught with difficulties and these are terms operating in relatively familiar territory for courts.[57] That task is the more difficult when courts are reviewing the regulated industries because not only are the expressions complex and necessitate input from economists but the relevant legislation commonly requires weight to be given to conflicting objectives. For example, how can the requirement 'to promote economic efficiency' be measured alongside the need 'to protect the interest of consumers'[58], or the maintenance of 'ecologically sustainable development' be measured against 'the need to promote competition' and 'the social impact' of determinations?[59] Social and environmental goals may not lead to economically efficient choices, nor will a measure which is economically efficient necessarily promote business investment.[60]

The issue was appreciated at the time of the Hilmer Report into competition policy[61] which underpin these legislative standards. As the Court noted in *Epic Energy*:

> … at the time of the Hilmer Report, it was recognised that economic theory offered no clear answer to how best to resolve many competing considerations, including how to achieve the most appropriate balance between the interests of consumers in obtaining low prices and the service provider in receiving higher prices, including monopoly rents, that might otherwise be obtainable … .[62]

Further, as the Court concluded:

> The evidence before this Court does not establish that by December 1997, or even today, economic theory had resolved these competing considerations, or has come to a settled view as to the most appropriate balance.[63]

Not surprisingly, given these difficulties, in *Epic Energy*, the Regulator sought the advice of the Court as to how to weigh these competing considerations, a request, the Court, in its supplementary decision,[64] declined to provide.[65] However, these issues will come before the courts in the future. It will then not be a case for courts and tribunals to 'Brush up their Shakespeare' but to 'Excavate their economics!'

The third lesson is the stage at which challenge is likely. The decision in *Epic Energy* related to a draft, not the final, decision. The decision was said to be justiciable because of the strong likelihood 'that the position of the Regulator revealed in the draft decision may well prevail to the end of the decision-making process'.[66] If that conclusion was imposed generally on regulators it could impose a significant burden on them.

Regulatory bodies routinely produce preliminary discussion or issues papers for consideration by stakeholders. To require that the regulators give the same careful attention in these preliminary reports to the issue of what weight they are assigning to the applicable standards in the legislation will change the character of these reports to something much closer to the final product. The expression of too settled or final a view in the draft, carefully weighing all the factors, may leave little room for commentators to counter the reasoning underlying the preliminary conclusions. The requirement would undermine the purpose behind publication of such papers which is to stimulate discussion and provoke suggestions for alternative approaches. If imposed uniformly the principle which underpinned the findings of invalidity in Epic Energy could be counterproductive since it may inhibit those with views on the subject from making alternative suggestions about the direction in which the findings might go and will inevitably elongate the preliminary report-writing process.

The early caution exhibited by courts against too ready an incursion[67] or too early an involvement in judicial review processes[68] is increasingly ignored, as this example illustrates. Procedural fairness led the way in abandoning this sensible limitation,[69] and sadly the same disregard for prematurity appears to be spreading to other grounds of review.[70] It may be time to be reminded about the need for caution about intervention by the courts at preliminary stages in the proceedings. Otherwise, as one judge mused 'One simply asks - where would such a process stop?'[71]

Oil & Vinegar - to borrow an analogy[72]

The following discussion also illustrates the complexity of the judicial review task. Although the common law is the genesis of administrative law standards, for the most part those standards were derived from the prerogative remedies. Those remedies primarily had a public law function, and were supplemented in part by equitable remedies refashioned for public law purposes. It is clear that on occasions elements of the common law with a more private law focus are also co-opted into the public arena. Experience shows that some of this common law jurisprudence is not easily miscible with public law doctrines. What is needed is legislative attention to these doctrines to fit them for their public law role. The courts too have a role in identifying the difficulties posed by the simple transposition of common law principles into a public law decision-making context.

The issue arises because there is no well defined standard against which to judge whether incorporation of private common law principles into administrative law will work effectively. As it has been acknowledged: 'English law … has no tradition whereby distinct legal principles are created specifically for the purpose of structuring and regulating the achievement of public objectives'.[73] Two examples are the impact in the public sector of the private law's guardianship principles and the operation of the delegation/agency dichotomy.

Guardianship law

The first illustration involves the imposition on officials, under Commonwealth legislation, the *Guardianship (Immigration of Children) Act 1946* (Cth), of the essentially private law functions of guardians. The effect of the Act has recently received the attention of the Federal Court in at least three decisions.[74]

Guardianship law is ancient law originating in the prerogative.[75] Although modern guardianship law is generally regulated by legislation, the foundation principles which impose obligations on guardians and property managers, and which are incorporated in the legislation remain essentially those carved out by the Court of Chancery, as expanded by internationally agreed concepts.[76] The *Guardianship (Immigration of Children) Act 1946* (Cth) provides for the Minister to be the guardian of 'non-citizen' children who arrive in Australia.[77] The cases have found that the absence of any statutory guidance for the operation of the guardianship role clearly indicates that the common law's principles apply to the Minister.[78]

The primary tenet of guardianship law is that the guardian acts in the best interests of the person under guardianship. In the case of a child, this requires that the guardian ensure the basic needs of the child - food, housing, health and education - are provided, and, when necessary, this may include legal assistance, through a tutor or legal guardian.[79] Significantly, the focus of the guardian must be exclusively on the interests of the child at the expense of the interests of the guardian or of third parties.

Here the anomaly arises, at least in relation to the Minister's guardianship of children who are asylum-seekers. The Minister also has other duties under the *Migration Act 1958* (Cth), such as to detain certain would be asylum-seekers, including children, and to resist challenges to decisions of the Department or the Refugee Review Tribunal refusing applications for refugee status.[80] In these circumstances, as the cases have conceded, there is an inherent conflict between the interests of the Minister under the *Migration Act 1958* (Cth) and the Minister's obligations as guardian.[81]

Although the Minister's guardianship functions are delegated to state and territory welfare officers and staff in detention centres, and this may appear to distance the Minister from day-to-day decision-making, thereby avoiding the conflicts of interest problem, the Federal Court has identified another issue arising from this practice, which again breaches the best interests standard.

As the Full Court of the Federal Court noted in *Odhiambo*, '[t]here do seem to be difficulties in a solution that involves a delegation to many state officials, none of whom is normally concerned with the operation of the Migration Act, rather than to a specified independent person'.[82] Indeed, the Court found in *Odhiambo* that although a notice of the review tribunal proceedings was served on the relevant State agencies to whom guardianship functions had been delegated, and letters in response were received from the State officers concerned, 'Each officer indicated lack of interest in the proceedings' and 'Neither responded to the court's concern that one or other of these departments might have a statutory obligation to assist the appellant'.[83] In other words, although delegation of the function by the Minister avoids the conflict of interest inherent in the dual roles the Minister performs under the relevant migration Acts, that is replaced by the danger that the alternative guardians are either from ignorance of the Commonwealth's legislative framework or due to excessive caseloads incapable of providing children under guardianship with the attention that the common law's guardianship principles enjoin.

The absence of a dedicated office or individual with the function of representing the best interests of the child in detention presents both a conceptual and a practical impediment to the implementation of the common law's injunction that guardians focus solely on what is best for the child. The problem suggests that too little attention was given by Parliament to the consequences of the assumption that the private law's principles could be tacked on to the *Guardianship (Immigration of Children) Act 1946* (Cth) scheme under which the Minister is titular guardian.

A preferable legislative alternative which would demonstrate an understanding of the common law guardianship standards would be to require that the guardianship function be provided by an independent person or body which could properly fulfil this role. An obvious candidate is a state or territory office of the public guardian, for example. That office, of its nature, possesses the expertise to ensure that the interests of the child are safeguarded and the child's needs for, among other things, independent assistance with legal proceedings, are met. Further such an office could be excused, legislatively from balancing countervailing interests under related legislation such as the *Migration Act 1958* (Cth), while still being required to acquire that knowledge of migration law which would ensure that the child's interests are adequately protected. In other words, the operation of this guardianship role needs to be spelled out in legislation which incorporates the common law's standards but tailors those principles so that they operate effectively in a public law context and avoid the difficulties identified.

Although these are legislative solutions, it is as well for the courts too to be sensitive to these issues. The few cases to date which have come before the Federal Court have found against the need for tutorship assistance for tribunal hearings.[84] In *Odhiambo*, for example, the Court held that the Refugee Review Tribunal had not erred in conducting its hearing without having a guardian or legal tutor present to represent the applicants. The Court found that the presence of a tutor would not have given any more legal assistance than had been provided under the standard forms of assistance provided to applicants to the Tribunal, and that the two 16 or 17 year old boys were well able to manage without additional support.

Certainly the boys had been offered the legal advice and support generally provided by registered migration agents and their associated firms of solicitors, but the advisers did not appear to pay any particular attention to the fact that they were minors and possibly entitled to special treatment and protection. Nor was it readily apparent that the two were capable of managing the process unaided. The boys may have been street-wise, having survived homeless in Mombasa for a number of years prior to their arrival in Australia, but it appears that neither appreciated that they could apply for a bridging visa after their arrival in Australia, a critical step in the process.[85]

This is not to suggest that the courts have hitherto been insensitive to these issues. However, the findings that either the apparent maturity of the children,[86] or the need not to burden the child with additional procedural hurdles or costs,[87] denied the need for a tutor gives undue weight to one aspect of the 'best interests' test over the child's need for advice and assistance in a complex legal process. Had a tutor been appointed, a different style of advocacy and more information on the individual child's circumstances might have led to a different outcome, an outcome of considerable

importance to the long-term future of the individuals concerned. Again, if there had been a legislative standard spelling out when a tutor was needed and the processes for applying for one, the courts might have found it easier to make a positive finding that a tutor should be provided.

Delegation/agency

A second illustration of the problems of co-option, without modification, of common law concepts is provided by a consideration of delegation/agency principles. These principles have been developed in the private sector in the context of personal decision-making by an individual with the need, at times, to act through others. In defined and limited circumstances, either a formally appointed delegate or a less formally appointed agent are permitted to make decisions or undertake action with legal consequences on behalf of the principal. These relationships - between principal and delegate, or principal and agent - operate in the private sector in a relatively simple, one-dimensional decision-making context. To adapt these concepts and their attendant principles such as the no sub-delegation rule, for use within the more complex and hierarchical environment of government decision-making creates problems.

The following examples illustrate the difficulties. In orthodox delegation law there is a prohibition on sub-delegation - the delegatus non potest delegare principle. In a government agency which comprises multiple layers of decision-makers and inter-related structures and processes for making decisions, it is frequently impracticable to limit formal decision-making to either the nominated decision-maker or the formally appointed delegate.[88] Circumstances arise in which the volume of matters for decision, rapid change of personnel with delegations, slowness to exercise the delegation-granting power, or reluctance to appoint junior officers as delegates, has meant decisions are made by persons with no formal legal authority. The courts have been reluctant to permit reliance in such circumstances on a relationship of principal and agent[89] and the consequence of their strict application of the delegatus rule has invalidated many decisions within public administration.

In part, the rigidity of the non-delegation principle has been softened by legislative extension of the concept, notably for public service employment laws in the Commonwealth.[90] For example, the *Public Service Regulations 1999* state:

> 9.3(5) A person (the first delegate) to whom powers or functions are delegated … may, in writing, delegate any of the powers or functions to another person (the second delegate).

These limited exceptions only expand by one layer those to whom lawful decision-making powers are granted. Hence, the statutory modification is capable of remedying the problems created by the no sub-delegation rule only if used widely. However, few agencies appear to have adopted this change. Statutory authority to extend the delegatus rule in this fashion or to provide for some other form of formally appointed alternative needs to be adopted generally within public administration if the limitations of the common law rule are to be avoided.

Can these difficulties be ameliorated by reliance on agency principles, another common law doctrine? At least the principal/agent relationship is established easily -

indeed the appointment may be ad hoc and oral - and this flexibility avoids the problems due to the sometimes volatile personnel arrangements within the public sector. The disadvantage is that agency principles have the potential to undermine the impetus for public administration to establish clear and publicly ascertainable rules for choice of authorised decision-makers. If informal processes are acceptable for appointments, it becomes harder for the public to discover who has the authority to make decisions, a necessary prerequisite if an effective challenge is to be made. The informality of the arrangement may also diminish a sense of responsibility by the agent for ensuring that the administrative law standards are adhered to.

The importation of the delegation concept for identifying who, apart from the statutorily nominated decision-maker, is an authorised decision-maker has focused attention within the public sector on the need for a formal appointments process and for care in the choice of delegates. Ideally, delegates are appointed at an appropriate level of seniority and possess a suitable level of skills. The informal nature of the processes for appointment of agents undermines these desirable criteria for appointment and any indiscriminate reliance on agency principles has the potential to negate these advantages.

The prohibition on sub-delegation and the indeterminate nature of the agency appointments processes are not the only problems. The technicalities at common law of the distinction between delegation and agency also impinge unnecessarily on the administration. This was illustrated in a recent challenge to a decision in the veterans' jurisdiction.[91] The challenge was made to a decision by a delegate of the Principal Member of the Veterans' Review Board to dismiss an application to the Board for failure to bring on the application within time. The veteran argued before the Federal Court that the decision was invalid because the delegate had no authority to act since the instrument of delegation under which he was acting had not been replaced when a new Principal Member was appointed. In other words, the delegate's authority lapsed with the change of Principal Member

That argument was rejected by the Court relying on the presumption of regularity and the convenience of public administration.[92] However, *obiter*, the Court noted that if the relationship had been one of principal and agent the result would have been different. Presumably the comment was based on the common law principle that the authority of an agent or *alter ego* is wholly dependent on the continued existence of the principal. Strict enforcement of that principle within the public sector with its constant change of staff would be unworkable. Further, it is difficult to see that arguments of administrative efficiency and the needs of collective decision-making which sustain the validity of the appointment of a delegate when there is a change of principal are any the less persuasive when the decision-maker nominated in legislation is relying not on a delegate but an agent. The distinction, although orthodox in common law jurisprudence, has no place in appointments within the public sector and again underscores the awkward consequences of applying these concepts within public administration.

There are considerable difficulties for the public sector in adoption of the principal/delegate and principal/agent dichotomies as these examples illustrate. In the multi-faceted, multi-layered processes of decision-making within public administration there is a need for more creative legislative thinking as to the

identification and allocation of those with decision-making responsibilities. That is essential if the benefits of ease of identification and care in choice of alternate decision-maker are to be preserved, while at the same time injecting greater flexibility into the processes.

Conclusion

This paper has outlined some challenges for courts arising from developments in administrative law doctrine and from the expanding reach of administrative law standards. They suggest avenues for development or rethinking of existing jurisprudence, and possible legislative changes.

If these suggestions indicate any dissatisfaction with the performance by the courts of their supervisory jurisdiction, that criticism should not be seen as pervasive. In the eyes of many the challenge posed by Justice von Doussa[93] has been met. Empirical research into the impact of external review bodies on the Australian Public Service found that the Federal Court of Australia was the review body which has the most beneficial impact on administrative decision-making (by over 30 per cent of the nearly 400 respondents to the survey conducted in 1999-2000).[94] There is no reason to assume that a similar survey of the State and Territory superior courts by State and Territory administrators would produce different results with respect to the superior State and Territory courts.

At the same time there are further challenges, as this brief survey indicates, which will test the courts in their exercise of the judicial review jurisdiction. The creditable approval rating identified in the empirical survey will only be maintained if the courts embrace their task of standard-setting with the same will, perceptiveness and enthusiasm exhibited over the twenty-five or so years in which administrative law has become a significant area of their jurisprudence.

Endnotes

1 This paper emerged from a commentary on the paper by AS Blunn delivered to the Supreme Court and Federal Court Judges Conference in Adelaide in January 2003 that is published above at 35.
2 Blunn at 37.
3 Id.
4 The Hon D Williams QC AM MP, opening the joint AIAL, Legal and Constitutional Legislation Committee Seminar on the proposed Administrative Review Tribunal, 25 October 2000.
5 The Australian National Audit Office (ANAO) noted that 'there is no readily-available data' on costs and 'the expense of obtaining such data to make a reasonable comparison would be prohibitive' (ANAO Audit Report No 29, 2000-2001 at [2.21]).
6 An 'actionable error' is one which involves an incorrect payment, but also a potential for an incorrect payment because significant information was not provided by the claimant (ANAO Report No 34 *Assessment of New Claims for the Age Pension by Centrelink* Audit Report No 34 2000-2001, Glossary, 8).
7 Ibid at [29].
8 A legal expert system has been defined as 'a computer program that performs tasks for which the intelligence of a legal expert is usually thought to be required - whether the legal expertise be that of a lawyer or of a non-lawyer with legal expertise in a particular area of the law' (D Baker, *The Probable Impact of Legal Expert Systems on the Development of Social Security Law* a paper submitted for the Research Unit, Faculty of Law, Australian National University, October 2001, 6. An expert system is 'a computing system, which, when provided with a certain amount

of basic information and a general set of rules instructing it how to reason and draw conclusions, can then mimic the thought processes of a human expert in a specialised field'(*The Macquarie Dictionary* (3rd ed) (The Macquarie Library Pty Ltd, 1998) 743).

9 P Johnson and S Dayal, unpublished paper, presented to a seminar of the Institute of Public Administration Australia in March 1996. See also, by the same authors, 'Knowledge Management, Knowledge-Based Systems and the Transformation of Government', paper presented to a conference organised by the Australian Human Resources Institute and the Public Service and Merit Protection Commission, Canberra, 1999, 21.

10 Blunn, above at 38.

11 Centrelink responded to that report with several strategies to improve its decision-making (*Centrelink Annual Report 2000-2001,* 61).

12 ANAO *Assessment of New Claims for the Age Pension by Centrelink* Audit Report No 34, 2000-2001 at 21.

13 Blunn, above at 38.

14 *Centrelink Annual Report 2000-2001* 6. See also Administrative Review Council *Automated Assistance in Administrative Decision-Making* Issues Paper (2003) (forthcoming) at footnote 88 and accompanying text.

15 See note 8.

16 A rule-base system is a sub-set of an expert system. The distinctive feature of the rule-base is that it involves 'the modelling of complex or intricate rules accompanied by an 'engine', that is, able to automate the process of investigating those rules by interacting with users to establish relevant client details. Such systems create a 'decision tree', that is, the response to each question leads to another question and so on until all the requirement for the decision have been considered' (Administrative Review Council *Automated Assistance in Administrative Decision-Making* Issues Paper (2003) (forthcoming), 3).

17 Ibid.

18 Softlaw Corporation Pty Ltd, the Australian company which has spearheaded these developments, opened an office in London in the last three years and in 2002, expanded its operations into North America.

19 Administrative Review Council *Automated Assistance in Administrative Decision-Making* Issues Paper (2003) (forthcoming), Part 2. Appendix 2 of the Issues Paper lists agencies which have adopted expert systems other than rule-base systems.

20 At 39.

21 *ARM Constructions Pty Ltd v Deputy Commissioner of Taxation (NSW)* (1986) 65 ALR 353; *ARM Constructions Pty Ltd v Deputy Commissioner of Taxation (NSW) (No 2)* (1987) 71 ALR 376.

22 In some areas such as social security this issue has been dealt with by providing in the authorising statute that a decision made with computer assistance is deemed to be a decision of the nominated decision-maker (*Social Security (Administration) Act 1999* s 6A; *A New Tax System (Family Assistance)(Administration) 1999* s 223).

23 *MC and Department of Social Security* (1996) 2 SSR 12a.

24 Justice John von Doussa 'Natural Justice in Federal Administrative Law' paper presented at a seminar by the Australian Institute of Administrative Law, Darwin, 7 July 2000, 3.

25 For example, *Australian Broadcasting Commission Staff Association v Bonner* (l984) 2 FCR 561; *Johnson v Federal Commissioner of Taxation* (1986) 11 FCR 351 per Toohey J at 354. In *Johnson*, the *Income Tax Assessment Act 1936* (Cth) s 185 provided that an objection against a taxation assessment must be lodged within 60 days of the taxpayer receiving notice of the assessment. Regulation 59 made under the Act provided that a notice sent by the Commissioner through the mail was deemed, unless the contrary was proved, to have been received at the time when it would arrive in the ordinary course of posting. The Commissioner refused to accept an objection lodged by Johnson as it was lodged outside the 60 day period. Further, the Commissioner refused to accept the assertion of Johnson's accountant that the assessment had been received by the accountant through the post long after it was posted by the Tax Office. Toohey J said in response to a challenge under the ADJR Act: 'The applicant does not succeed in the present case merely by calling evidence which, if accepted by the court, would show that the assessments were not served until 9 May or thereabouts, with the consequence that the objections were lodged in time. The applicant must persuade the court that the decision-maker erred on one of the grounds in s 5(1)'. On the evidence His Honour was not satisfied that a breach of any of the grounds had been made out.

26 ADJR Act s 5(1)(j)

27 ADJR Act s 5(2)(j).

28 ADJR Act; see also *Administrative Decisions (Judicial Review) Act 1989* (ACT); *Judicial Review Act 1991* (Qld); *Judicial Review Act 2000* (Tas).
29 This development has been firmly rejected in the migration jurisdiction (*Minister for Immigration, Multicultural and Indigenous Affairs v Anthonypillai* (2001) 106 FCR 126 at [59] and [86]) but the Court was at pains to confine its remarks to Part 8 of the *Migration Act 1958* (Cth). However, even in the context of Part 8 the duty to inquire may arise in special or exceptional circumstances (*Minister for Immigration, Multicultural and Indigenous Affairs v Anthonypillai* (2001) 106 FCR 126; *Foroghi v Minister for Immigration and Multicultural Affairs* [2001] FCA 1875 per Marshall J).
30 *Mahon v Air New Zealand Ltd* [1984] AC 808; *Minister for Immigration v Pochi* (1980) 31 ALR 666.
31 For example, *Benjamin v Repatriation Commission* (2001) 64 ALD 411.
32 For example, absence of proportionality; estoppel; breach of statutory duty.
33 *Friends of Hinchinbrook Society Inc v Minister for Environment & Ors* (1997) 142 ALR 632.
34 *Li v Minister for Immigration and Multicultural Affairs (No 2)* [2000] FCA 172; *Foroghi v Minister for Immigration and Multicultural Affairs* [2001] FCA 1875.
35 *Alcoa of Australia Retirement Plan Pty Ltd v Thompson* (2002) 68 ALD 343 at [53]; *Turner v Minister for Immigration* (1981) 55 FLR 180 at 184 per Toohey J; *Howells v Nagrad Nominees Pty Ltd* (1982) 66 FLR 169 at 195 per Fox and Franki JJ; *Kioa v West* (1985) 159 CLR 550 at 604 per Wilson J; *Parramatta City Council v Hale* (1982) LGRA 319 at 331 per Street CJ.
36 *Sellamuthu v Minister for Immigration and Multicultural Affairs* (1999) 90 FCR 287; *Minister for Immigration and Multicultural Affairs v Anthonypillai* (2001) 106 FCR 126 at [78] and [80].
37 *Re Fenton and Commissioner of Police, New South Wales Police Service* [2000] NSW ADT 16 (23 February 2000).
38 *Ibid; Khan v Minister for Immigration and Ethnic Affairs* (1987) 14 ALD 291 (per Wilcox, Madgwick JJ; Hill J, dissenting).
39 *Minister for Immigration and Ethnic Affairs v Pochi* (1980) 31 ALR 666; *Yelds v Nurses Tribunal* (2000) 49 NSWLE 491.
40 *Epeabaka v Minister for Immigration and Multicultural Affairs* (1997) 150 ALR 397. The Full Court of the Federal Court disagreed with this finding (*Minister for Immigration and Multicultural Affairs v Epeabaka* (1999) 84 FCR 411). This ground was not considered relevant by the High Court (*Epeabaka v Minister for Immigration and Multicultural Affairs* [2001] HCA 23 at [9]).
41 *Li v MIMA (No 2)* [2000] FCA 172; *Tickner v Bropho* (1993) 114 ALR 409; *Garcha v Minister for Immigration and Multicultural Affairs* (1997) 145 ALR 55.
42 *Lek v Minister for Immigration and Ethnic Affairs* (1993) 117 ALR 455.
43 *Mahon v Air New Zealand Ltd* [1984] AC 808; *Nand v Minister for Immigration and Ethnic Affairs* (1988) 14 ALD 527; *Luu v Renevier* (1989) 19 ALD 521; *Bunnag v Minister for Immigration and Ethnic Affairs* (1993) 124 ALR 383; *NCSC v News Corp Ltd* (1984) 156 CLR 296; *Commissioner for ACT Revenue v Alphaone Pty Ltd* (1993) 34 ALD 324; *Lek v Minister for Immigration and Ethnic Affairs* (1993) 117 ALR 455.
44 *Prasad v Minister for Immigration and Ethnic Affairs* (1985) 6 FCR 155 at 169-170. See also *Luu v Renevier* (1989) 19 ALD 521; *Videto v Minister for Immigration and Ethnic Affairs* (1985) 8 FCR 167 at 170-171 per Toohey J; *Cheer v Minister for Immigration and Multicultural and Indigenous Affairs* [2002] FMCA 91 (22 May 2002); *Bunnag v Minister for Immigration and Ethnic Affairs* (1993) 124 ALR 383; *Secretary, Department of Social Security v O'Connell & Sevel* (1992) 28 ALD 626.
45 *Cruz v Minister for Immigration and Multicultural Affairs* (Full Court of the Federal Court, unreported) (23 May 1997).
46 Notably in relation to the duty to enquire: see Senior Member Sassella in *Re Hunter and Repatriation Commission* [2002] AATA 485 at [88].
47 [1985] AC 374 at 410-411.
48 Comment made at the ANU's Public Law Weekend, 1 November 2002, Canberra, during her presentation of a paper delivered at that conference, to be published in 2003.
49 *TXU Electricity Ltd v Office of the Regulator-General* [VSC] VSC 153 (unreported, 17 May 2001)).
50 *Re Michael; Ex parte Epic Energy (WA) Nominees Pty Ltd* (2002) 25 WAR 511.
51 The *National Third Party Access Code for Natural Gas Pipeline Systems 1997* (Gas Code).
52 Tariff Order cl 5.10(a).
53 *Collector of Customs v Agfa-Gevaert Ltd* (1996) 186 CLR 389, 397; *Australian Lighting and Hardware Pty Ltd v (Falkner) Brightlight Nominees Pty Ltd* [1994] 1 VR 553; *Marine Power Australia Pty Ltd v Comptroller-General of Customs* (1989) 89 ALR 561 at 572; *General Accident*

Fire & Life Assurance Corporation Ltd v Commissioner of Pay-roll Tax (NSW) [1982] 2 NSWLR 52.

54 *TXU Electricity Ltd v Office of the Regulator-General* [VSC] VSC 153 (unreported, 17 May 2001) per Gillard J at [143].

55 *Re Michael; Ex parte Epic Energy (WA) Nominees Pty Ltd* (2002) 25 WAR 511 at [145].

56 *Id* at [144].

57 Justice John von Doussa 'Natural Justice in Federal Administrative Law', Australian Institute of Administrative Law Seminar, Darwin, 7 July 2000, 3.

58 *Electricity Industry Act 1993* (Vic) s 157 which sets out the objectives of the Office of Regulator-General.

59 Eg *Independent Pricing and Regulatory Tribunal Act 1992* (NSW) s 15(1)(f), (i), (k).

60 Productivity Commission Report No 17, *Report on the National Access Code*, Chapters 4, 12.

61 In 1994 the Council of Australian Governments agreed to general principles for the reform of competition policy in Australia as recommended in a report chaired by Professor Hilmer (FG Hilmer, M Rayner and G Tapperell *Report by the Independent Committee of Inquiry into Competition Policy in Australia* (AGPS, 1993)).

62 *Re Michael; Ex parte Epic Energy (WA) Nominees Pty Ltd* (2002) 25 WAR 511 at [144].

63 *Id* at [145].

64 *Re Dr Ken Michael AM; Ex parte Energy (WA) Nominees Pty Ltd* [2002] WASCA 231 (20 December 2002).

65 At [14] - [16].

66 *Re Michael; Ex parte Epic Energy (WA) Nominees Pty Ltd* (2002) 25 WAR 511 at [31].

67 *Board of Education v Rice* [1911] AC 179, 182.

68 *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 371.

69 *Annetts v McCann* (1990) 170 CLR 586; *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564; *Koppen v Commissioner for Community Relations* (1986) 11 FCR 360; *Johns v Australian Securities Commission* (1993) 178 CLR 408; *Board of Education v Rice* [1911] AC 179; *Consolidated Press Holdings v Federal Commissioner of Taxation* [1999] FCA 1314; cf *Croft v McNamara* [1999] VSC 495; *Wood v Australian Community Pharmacy Authority* [2002] FCA 1592.

70 *Hughes Aircraft Systems International v Airservices Australia* (1997) 146 ALR 1; *NIB Health Funds Ltd v Private Health Insurance Administration Council* [2002] FCA 40 ; cf *Croft v McNamara* [1999] VSC 495.

71 *Croft v McNamara* [1999] VSC 495 at [41].

72 Gleeson CJ 'Legal Oil and Political Vinegar', title of a speech to The Sydney Institute, Sydney, 16 March 1999.

73 Thomas 'Continental Principles in English Public Law' in Harding and Orucu (eds), *Comparative Law in the 21st Century* (2002) 121 at 133, quoted in their joint judgment by McHugh and Gummow JJ in *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* [2003] FCA 6 at [75].

74 *X v Minister for Immigration and Multicultural Affairs* (1999) 92 FCR 524 per North J at [34], [41] and [43]; *Odhiambo v Minister for Immigration and Multicultural Affairs* (2002) 69 ALD 312 per Black CJ, Wilcox and Moore JJ at [90]; *Jaffari v Minister for Immigration and Multicultural Affairs* [2001] FCA 985 (unreported, French J, 26 July 2001).

75 *De prerogativa regis*.

76 *The Laws of Australia* Vol 20 *Health and Guardianship Law*, R Creyke and N Seddon 'Guardianship and Management of Property' title, Part A, [1], [4].

77 *Immigration (Guardianship of Children) Act 1946* (Cth) s 6.

78 *Re Application of K* (1995) 36 NSWLR 477; *Re adoption of S* (1976) 28 FLR 427 at 430; *X v Minister for Immigration and Multicultural Affairs* (1999) 92 FCR 524; *Odhiambo v Minister for Immigration and Multicultural Affairs* (2002) 69 ALD 312.

79 *X v Minister for Immigration and Multicultural Affairs* (1999) 92 FCR 524 per North J at [34]; cited with approval by the Full Court of the Federal Court (Black CJ, Wilcox and Moore JJ) in *Odhiambo v Minister for Immigration and Multicultural Affairs* (2002) 69 ALD 312 at [57] and [88].

80 *Odhiambo v Minister for Immigration and Multicultural Affairs* (2002) 69 ALD 312 at [90] - [92].

81 *X v Minister for Immigration and Multicultural Affairs* (1999) 92 FCR 524 per North J at [34], [41] and [43]; *Odhiambo v Minister for Immigration and Multicultural Affairs* (2002) 69 ALD 312 at [90]; *Jaffari v Minister for Immigration and Multicultural Affairs* [2001] FCA 985 (unreported, French J, 26 July 2001).

82 At [92].

83 At [46].
84 *X v Minister for Immigration and Multicultural Affairs* (1999) 92 FCR 524 per North J at [34], [41] and [43]; *Odhiambo v Minister for Immigration and Multicultural Affairs* (2002) 69 ALD 312 per Black CJ, Wilcox and Moore JJ at [90]; *Jaffari v Minister for Immigration and Multicultural Affairs* [2001] FCA 985 (unreported, French J, 26 July 2001).
85 At [71] and [90].
86 *Ibid*.
87 *X v Minister for Immigration and Multicultural Affairs* (1999) 92 FCR 524; *Jaffari v Minister for Immigration and Multicultural Affairs* [2001] FCA 985 (unreported, French J, 26 July 2001).
88 *O'Reilly v Commissioner of State Bank of Victoria* (1982) 153 CLR 1. An argument against too ready a reliance on the use of an agent is that the *Carltona* principle which underpins the principal/agent relationship emerged in a war-time context and arguably on historical grounds should be available only in extreme circumstances (SH Bailey, BL Jones and AR Mowbray *Cases and Materials on Administrative Law* (2nd ed) ((Sweet & Maxwell, 1992) at 280).
89 Ibid.
90 *Public Service Act 1999* (Cth) s 78(9), (10), (11); *Public Service Regulations 1999* (Cth) reg 9.3(5), (6), (7); *Long Service Leave (Commonwealth Employees) Act 1976* (Cth) s 9; *Parliamentary Service Act 1999* (Cth) s 70.
91 *Johnson v Repatriation Commission* [2002] FCA 1543.
92 At [32].
93 See note 57.
94 R Creyke and J McMillan 'Executive Perceptions of Administrative Law - An Empirical Study (2002) 9 *Aust Jo of Admin Law* 163 at 173, 187.