BLIND JUSTICE: THE PITFALLS FOR ADMINISTRATIVE DECISION-MAKING

Steven Rares*

In the middle of the 19th Century two seminal decisions of the English Courts applied what were then called the principles of natural justice[1]. In *Dimes v Proprietors of Grand Junction Canal*[2], the House of Lords held that Lord Chelmsford, the Lord Chancellor, could not sit as a judge in a case in which he had a significant financial interest in one of the parties.

The second case, *Cooper v Wandsworth Board of Works*[3], held that it had been unlawful for the Board to have demolished the plaintiff's house under an order which it had made pursuant to a statutory power when it had not given the plaintiff the opportunity to appear before it to contest the making of the order. There Byles J[4] traced the heritage of the rule, referring to observations of Fortescue J in 1723 in *Dr Bentley's Case*[5] where he said[6]:

> … God himself would not condemn Adam for his transgression until he had called him to know what he could say in his defence: Gen: iii.9

Today, these rules have been rechristened, or, to use the advertiser's vernacular, rebranded, as the rules of procedural fairness comprising, the bias rule and the fair hearing rule.

Administrative decision-making which involves the application of these rules is not akin to Groucho Marx' prescription for commercial success. He said 'the key to success in business is honesty and fair dealing – if you can fake those you've got it made.'

Rational for judicial review

This supervisory jurisdiction has been seen by some as providing 'judicial protection against Leviathan'[7]. The rule of man, and its excesses and fallibilities, is supplanted by the rule of law. The intrusion of the executive into the area of reviewing its own conduct was stopped very early when Sir Edward Coke CJ famously told James I that the King is subject not to men, but to God and the law, and so his Majesty could not try cases[8].

Section 75(v) of the Constitution of the Commonwealth creates original jurisdiction in the High Court in all matters in which a writ of mandamus or prohibition, or an injunction is sought against an officer of the Commonwealth. The significance of s 75(v) was explained by Gaudron, McHugh, Gummow, Kirby and Hayne JJ in *Plaintiff S157/2002 v The Commonwealth*[9] as introducing:

> ... into the Constitution of the Commonwealth an entrenched minimum provision of judicial review. There was no precise equivalent to s 75(v) in either of the Constitutions of the United States of America or Canada. The provision of the constitutional writs and the conferral upon this Court of an irremovable jurisdiction to issue them to an officer of the Commonwealth constitutes a textual

* *A judge of the Federal Court of Australia.* *This paper was presented to the Council of Australasian Tribunals NSW Chapter Inc on 26 May 2006. The author was assisted by his associate, Ms Anna Brown. Any errors are his alone.*

reinforcement for what Dixon J said about the significance of the rule of law for the Constitution in *Australian Communist Party v The Commonwealth*[10] . In that case, his Honour stated that the Constitution:

> "is an instrument framed in accordance with many traditional conceptions, to some of which it gives effect, as, for example, in separating the judicial power from other functions of government, others of which are simply assumed. Among these I think that it may fairly be said that the rule of law forms an assumption."[11]

The reservation to this Court by the Constitution of the jurisdiction in all matters in which the named constitutional writs or an injunction are sought against an officer of the Commonwealth is a means of assuring to all people affected that officers of the Commonwealth obey the law and neither exceed nor neglect any jurisdiction which the law confers on them. The centrality, and protective purpose, of the jurisdiction of this Court in that regard places significant barriers in the way of legislative attempts (by privative clauses or otherwise) to impair judicial review of administrative action. Such jurisdiction exists to maintain the federal compact by ensuring that propounded laws are constitutionally valid and ministerial or other official action lawful and within jurisdiction. In any written constitution, where there are disputes over such matters, there must be an authoritative decision-maker. Under the Constitution of the Commonwealth the ultimate decision-maker in all matters where there is a contest, is this Court. The Court must be obedient to its constitutional function. In the end, pursuant to s 75 of the Constitution, this limits the powers of the Parliament or of the Executive to avoid, or confine, judicial review.

Although Parliaments frequently seek to limit the availability or scope of judicial review through the use of privative clauses[12], Gleeson CJ, Gummow, Hayne, Callinan and Crennan JJ emphasised recently that there is[13]:

> … the "basic rule, which applies to privative clauses generally ... that it is presumed that the Parliament [or, it may be interpolated, a State parliament] does not intend to cut down the jurisdiction of the courts save to the extent that the legislation in question expressly so states or necessarily implies"[14]. In addition, it must also be presumed that a State parliament does not intend to cut down the jurisdiction of the Supreme Court of that State over matters of a kind ordinarily dealt with by the State Supreme Courts and which, if dealt with by those Courts, are amenable to the appellate jurisdiction of this Court under s 73 of the Constitution.

It is, of course, well established that it is for the repository of a power confided by statute to determine whether the power ought be exercised or not, on the merits as the repository sees them[15]. The court's responsibility is to review the procedure followed by the repository to ensure that the procedure conformed to what was required to be followed under the express or necessarily intended requirements of the statute and any applicable common law principles. Only if the repository conducted the procedure by which he, or she, or it reached the decision in a manner which did not conform with the conditions which the law mandated, does the power of the court to interfere with the decision arise. That power, previously described as prerogative, and now, in the Commonwealth context as 'constitutional', is to ensure that inferior tribunals and repositories of power do not exceed the jurisdiction which by law has been committed to them by, inter alia, adopting a step, a procedure, or a step in their procedures which was unauthorised.

Acting within power

First, the decision-maker must understand the precise nature, extent and scope of the power which he or she or it is being called upon to decide whether or not to exercise. A failure to understand what the power is can be fatal to a decision. A decision-maker can be forgiven for not understanding some statutory powers because they are couched in language or found in statutes that raise an almost impenetrable fog as to their proper construction. For the correct approach to statutory construction see *Project Blue Sky Inc v Australian Broadcasting Authority*[16].

I will not pause to mention those models of legislative clarity such as the four volumes of the *Income Tax Assessment Act 1936*, or the also ever changing *Migration Act 1958* and

Corporations Act 2001. But the *Atlanta Journal* noted that the Ten Commandments contain 297 words, the United States Constitution's Bill of Rights contained 463, Lincoln's Gettysburg address, 266 words and an American regulation dealing with the price of cabbage apparently contained 26,911 words. So, we are not alone.

Procedural fairness

Secondly, the rules of procedural fairness, or principles of natural justice, usually attend the making of a decision. However, as has now happened under the *Migration Act 1958*, occasionally legislatures modify or eliminate these rules, although not always with the consequences which they intended. Thus, the Parliament[17] refashioned the rules by providing in s 422B that:

> (1) This Division is taken to be an exhaustive statement of the requirements of the natural justice hearing rule in relation to the matters it deals with.

Whether the Parliament achieved its aim will depend on the extent to which the courts find that the procedures codified in statute 'deal' with matters with which the common law would otherwise deal. The very expression of that concept indicates a number of possible outcomes. However, a Full Court of the Federal Court has held that the expression 'in relation to the matters it deals with' is intended to overcome the effect of the High Court's decision in *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah*[18]. A decision-maker need not consider in each case, whether there is an applicable common law rule of natural justice and then examine the relevant sections to see whether it was expressly dealt with[19]. That is fortunate because the courts recognise that a decision-maker is likely to be a person without legal qualifications and Parliament could not have intended that 'the uncertainties of the common law rules were in some unspecified way and to some unspecified extent, to survive'[20].

In *SAAP v Minister for Immigration*[21] it was held that any failure to comply with the statutory regime of procedural fairness resulted in a jurisdictional error being committed for correction of which constitutional writs would issue unless the applicant for relief had been guilty of some personal default such as delay, acquiescence or waiver[22]. The flexibility of the common law discretion to refuse relief on the basis that the procedural defect was not significant was held to have been denied by the legislation.

It will be no comfort to decision-makers to be told that the requirements of the principles of procedural fairness develop over the years, so that what was once an acceptable procedure may become with time legally flawed. So much was held by Mason CJ, Deane and McHugh JJ in *Annetts v McCann*[23] when they said that many interests were protected in 1990 by those principles which less than 30 years before would not have fallen within the protection of the doctrine[24]. The common law process of gradual, principled development of the law to meet the needs of contemporary society has not shown any sign of atrophying in this area of law. This is especially so with the enormous variety of procedural issues with which the High Court and other Ch III courts have had to deal in recent years under the *Migration Act 1958*.

Recently, Gleeson CJ, Gummow, Kirby, Hayne and Heydon JJ said[25], that there was:

> … the fundamental point that principles of natural justice, or procedural fairness, "are not concerned with the merits of a particular exercise of power but with the procedure that must be observed in its exercise". Because principles of procedural fairness focus upon procedures rather than outcomes, it is evident that they are principles that govern what a decision-maker must do in the course of deciding how the particular power given to the decision-maker is to be exercised. They are to be applied to the processes by which a decision will be reached.

The Court held that a decision-maker must determine whether material which he or she has is "credible, relevant and significant", to use the formulation of Brennan J in *Kioa v West*[26], before the final decision is reached. Such information is what cannot be dismissed from further consideration by the decision-maker before making the decision. But as their Honours said, such information is not to be characterised by the decision-maker's later choice when expressing reasons for the decision[27].

By that the Court meant that before deciding the matter, the decision-maker, once he or she had information before him or her which cannot be dismissed from further consideration as not credible, or not relevant or of little or no significance to the decision[28], was bound by the requirements of procedural fairness to draw the applicant's or the parties' attention to that information and invite a response. As that case recognised, issues may also arise as to how the decision-maker conveys such information: that is, it may not be necessary or, indeed in some cases, appropriate to disclose the form in which it has come to the attention of the decision-maker. For example, issues of public interest or confidentiality may require the decision-maker to formulate the substance of the information so as to protect the identity of an informant or a source[29].

Likewise, it is essential to avoid conducting proceedings in a way in which a party is deprived of a fair opportunity to correct an erroneous and factual assumption relevant to his or her credibility lest a jurisdictional error thereby occur[30]. It follows that administrative decision-makers cannot relieve themselves of the obligation to afford procedural fairness by disavowing reliance on such information in the reasons for decision, or by making their decision on other bases unrelated to the information.

Excessive delay in making a decision can also constitute a denial of procedural fairness amounting to a jurisdictional error[31]. Excessive delay *of itself* cannot usually invalidate the decision[32]. However, if there is excessive delay between the assessment of the demeanour of a witness at an initial hearing and the making of demeanour-based findings, then it can be concluded that this delay would affect the decision-maker's ability to fairly analyse the evidence. A delay of four and a half years between an oral hearing and a decision was held to give rise to a jurisdictional error[33]. One test that could be applied in situations of delay is whether the delay caused a 'real and substantial risk' of prejudice to a party to the decision[34].

In *Minister for Immigration v Bhardwaj*[35] the High Court held that a denial of procedural fairness by the decision-maker failing, accidentally, to consider the applicant's request for an adjournment, and deciding the application adversely, resulted in no decision at all. These circumstances constituted a constructive failure to exercise jurisdiction, as the decision-maker failed to afford him a hearing of the kind the legislation required the applicant be given. The decision-maker was thus not *functus officio* and could proceed to hear the matter afresh, as it did.

Another case of constructive failure to exercise jurisdiction is where the decision-maker fails to identify or mischaracterises the applicant's claim or application[36]. As Kirby J said[37]:

> Difficult as it may sometimes be to differentiate jurisdictional and non-jurisdictional error with exactitude, in a case where there has been a fundamental mistake at the threshold in expressing, and therefore considering, the legal claim propounded by an applicant, the error will be classified as an error of jurisdiction.

And, as Brennan CJ, Dawson and Toohey JJ said in *Darling Casino v NSW Casino Control Authority*[38] if a power must be exercised in accordance with the principles of procedural fairness, a failure by a decision-maker to adhere to a procedure which the decision-maker or the body establishing the issue referred for decision had previously declared publicly would

be followed in making the decision, may result in the decision being set aside for failure to accord procedural fairness.

Most administrative decision-makers set out seeking to achieve a fair result in accordance with the proper exercise of their powers. It is rare to find cases in which the courts would actually hold that the decision-maker was in fact biased[39]. But just as courts must ensure not only that justice is done but must be seen to be done, administrative decision-making will usually involve the consequence that departure from transparent and fair processes in accordance with the legislation will affect the validity of the decision reached.

A decision-maker must not only be unbiased but must be seen to be unbiased and unable to be influenced by personal considerations in validly exercising a power to make a decision affecting others under law. This same principle formed the basis of the decision by the House of Lords in the *Pinochet* proceedings[40] in 1999, setting aside its earlier decision because of the appearance of bias of Lord Hoffmann being a director of a charity which was wholly controlled by Amnesty International which had intervened in the proceedings. However, a minor and incidental involvement in the decision-making process by an official who is not the decision-maker and takes no part in the decision will not, ordinarily, affect the validity of the decision[41].

The principles of procedural fairness are reflective of the concern which the courts, as the guardians of the rule of law, have enshrined in principles directed to the protection of the individual from the state. Important common law rights are presumed not to be affected by legislation, or the exercise of administrative power, in the absence of statutory words of plain intendment[42].

Relevant and irrelevant considerations

A third fundamental concept in administrative decision-making is that the decision-maker must have regard to considerations which are relevant to the exercise of a power and must, conversely, ignore considerations which are irrelevant to that. A failure to take into account a consideration can only amount to a jurisdictional error if it be a matter which the decision-maker was bound to take into account in making the decision[43].

Keeping one's eye on the administrative ball in this way ensures that decision-makers do not exceed their authority by deciding matters on bases that are not open to them. The factors which determine whether a matter is one to which the decision-maker is bound to have regard are determined by the proper construction of the legislation, which may refer expressly to matters or necessarily imply that something is relevant. If the discretion to be exercised is unconfined, the decision-maker is authorised to consider any matter unless, having regard to the subject-matter, scope and purpose of the legislation it appears to be irrelevant to the exercise of the power[44]. Consideration of irrelevant material or the failure to consider relevant material in a manner that affects the exercise of power constitutes jurisdictional error[45].

The formulation of reasons

In the Commonwealth context most decision-makers can be required to give reasons[46]. The approach taken to judicial review by Australian Courts reflects an awareness of the boundaries of judicial review[47]. In *Minister for Immigration and Ethnic Affairs v Wu Shan Liang*[48] Brennan CJ, Toohey, McHugh and Gummow JJ said:

> … the reasons of an administrative decision maker are meant to inform and not be scrutinized upon by over-zealous judicial review by seeking to discern whether some inadequacy may be gleaned from the way in which the reasons are expressed.

Various cases provide some guidance as to the content of reasons[49]. It may not be an error for the decision-maker to fail to discuss why contrary evidence was not accepted or to fail to discuss every conflict in the evidence in its reasons[50].

In *Minister for Immigration Multicultural and Indigenous Affairs v Yusuf* [51] it was held that it was sufficient if the decision-maker sets out its findings 'on those questions of fact which it considered to be material to the decision and to the reasons it had for reaching that decision'[52] This process focuses on the subjective thought processes of the decision-maker. It also '…entitles a court to infer that any matter not mentioned … was not considered by the Tribunal to be material'.[53] That may reveal the presence of a jurisdictional error such as taking into account an irrelevant consideration or not taking into account a relevant consideration.

In *Public Service Board of NSW v Osmond*[54] the High Court emphatically held that at common law, an administrative decision-maker has no obligation to give reasons. However, just as in other areas of procedural fairness, this may not be an immutable truth. A strong Privy Council held in *Stefan v General Medical Council*[55] that there had been a trend in the law toward an increased recognition of the duty on decision-makers of many kinds to give reasons. Their Lordships held that the quasi-judicial character of the General Medical Council, and its authority to affect the right of doctors to practice medicine who appeared before it, gave rise to an obligation at common law on the decision-maker to give reasons notwithstanding the absence of any statutory requirement[56].

But in many non-federal contexts there is no statutory requirement to give reasons. However, as Dixon J noted in *Avon Downs Pty Ltd v Federal Commissioner of Taxation*[57] this may not immunise decisions from judicial review:

> But it is for the commissioner, not for me, to be satisfied of the state of the voting power at the end of the year of income. His decision, it is true, is not unexaminable. If he does not address himself to the question which the sub-section formulates, if his conclusion is affected by some mistake of law, if he takes some extraneous reason into consideration or excludes from consideration some factor which should affect his determination, on any of these grounds his conclusion is liable to review. Moreover, the fact that he has not made known the reasons why he was not satisfied will not prevent the review of his decision. The conclusion he has reached may, on a full consideration of the material that was before him, be found to be capable of explanation only on the ground of some such misconception. If the result appears to be unreasonable on the supposition that he addressed himself to the right question, correctly applied the rules of law and took into account all the relevant considerations and no irrelevant considerations, then it may be a proper inference that it is a false supposition. It is not necessary that you should be sure of the precise particular in which he has gone wrong. It is enough that you can see that in some way he must have failed in the discharge of his exact function according to law.

That leads into the question of irrationality as a ground for review. Reasons can sometimes be very revealing in that regard though, as Dixon J showed, the absence of reasons is not fatal to such a conclusion being open on judicial review.

Limiting the scope of judicial review

Nonetheless, the jurisdiction of the courts in the area of judicial review has not developed without challenge by the legislature. The Administrative Law Council, in their report launched only last week, addressed the question of the desirable scope and circumstances in which limitations on judicial review may be justified.

One such area has been seen by the Parliament to be in the area of migration law. The report by the Council explains that an unmeritorious challenge to decision making is most likely to arise when the making of such a challenge provides some collateral advantage.[58] In some migration cases the Council said that this advantage may be twofold: not only does the

applicant benefit from the delay of the enforcement of decision, but often the making of such an application provides a basis for eligibility for a bridging visa. Despite the anecdotal evidence of abuse of these processes by some applicants, the Council was not convinced that such considerations justify a limitation on the right to judicial review, as any such limitation can apply indiscriminately to both applicants with and without merit.[59]

In light of such a conclusion, the Council saw that the appropriate response revolved around the establishment of procedures to minimize the amount of delay involved in the judicial process and to provide, to the extent possible, for a single avenue of redress[60].

Irrationality

Decisions should be and also appear to be rational and reasonable. An absence of rationality can result in finding that the decision is infected with jurisdictional error. An example of this is when a decision maker acts on material that forms an 'inadequate' basis for the findings made. This is because the inadequacy may support an inference that the decision-maker had applied the wrong test or was not 'in reality satisfied of the requisite matters'[61]. The demonstration of a defect in an irrational or unreasonable decision may lie in the evidentiary foundation relied on or available, or the logical process by which conclusions are sought to be drawn from it[62]. Moreover, decision-makers cannot merely engage in speculation, or rely on suspicions or impressions in forming reasons for decisions[63].

When decisions involve serious findings such as perjury, dishonesty, forgery or fraud, decision-makers are under a stronger obligation carefully to examine all the facts and base conclusions on proper foundations[64]. Failure to do so can result in a court holding that the decision-maker demonstrated such a 'closed state of mind' that a finding of ostensible bias could be made[65]. In *Applicant M164/2002 v Minister for Immigration and Multicultural and Indigenous Affairs* [66] Lee J stated:

> Serious findings of forgery, fraud or perjury cannot be based on a superficial examination of relevant events and materials, particularly where the conclusion reflects no more than a suspicion held by the Tribunal, and where the suspicion remains untested by reasonable use of powers available to the Tribunal to have further enquiries made in exercise of the Tribunal's inquisitorial function.

Although more difficult to establish, the doctrine of '*Wednesbury* unreasonableness' can also form a basis for a finding of jurisdictional error. A decision can be set aside if it is established that a decision maker reached a decision so unreasonable 'that is might almost be described as being done in bad faith' or 'so absurd that no sensible person could ever dream that it lay within the powers of [the decision-maker]'[67]. The ground of unreasonableness can overlap with the ground that the decision-maker took into account irrelevant, or failed to take into account a relevant consideration[68].

Conclusion

One peril of administrative decision-making in statutory tribunals is over-enthusiastic counsel. Recently, in the Administrative Appeals Tribunal during some concurrent expert evidence as to the reproductive possibilities of elephants in zoos, senior counsel for the zoos asked an Indian veterinarian about a photograph showing elephants in what might be described, were they humans, as a compromising position. The following exchange occurred[69]:

> **Dr Griffiths:** Could I ask you whether or not, it's not evident from this photograph, but do you have any recollection as to whether or not the cow elephant was chained or tethered when this photo was taken?
>
> **Prof Cheeran:** I don't think so because, the elephant is chained, a cow elephant is chained, hardly they would get a chance because the female genitalia is situated in such a way that it's at the very

bottom of the area, so the cow has to cooperate so much, so that – the penis goes up like a cobra[70] …. locate the extremity genitalia, so the elephant, cow elephant just stand like erect. A practical person cannot take this elephant, unlike in cow or other quadrupeds go forward like that.

Dr Griffiths: I don't think I want to take that topic any further. Perhaps I could change the subject.

Given the often complex and evolving nature of the law in this area, one may be tempted to characterise administrative decision making as a veritable minefield of reviewable errors for decision-makers. But it is better that in making decisions one acts honestly and fairly, with as much attention to all relevant requirements as possible, so that as the vast majority of decision-makers diligently do, one does one's duty according to law.

Endnotes

1 The principles were expressed in Latin as first, *nemo iudex in sua causa*; and secondly, *audi alteram partem*.
2 (1852) 3 HL Cas 759 [10 ER 301]
3 (1863) 14 CBNS 180
4 14 CBNS at 185
5 *The King v The Chancellor & c of Cambridge* (1723) 1 Str 557; 8 Mod 148 at 164; 2 Ld Raym 1334
6 8 Mod at 164
7 Aronson & Dyer, *Judicial Review of Administrative Action*,(3rd ed) Lawbook Co, North Ryde,2004 , at p 2
8 *Prohibitions del Roy* (1608) 12 Co Rep 63
9 (2003) 211 CLR 476 at 513-514 [103]-[104]: see too: Administrative Law Council Report No. 47 *The Scope of Judicial Review* (2006) p 16
10 (1951) 83 CLR 1 at 193; cf *Kartinyeri v The Commonwealth* (1998) 195 CLR 337 at 381 [89], per Gummow and Hayne JJ
11 *Australian Communist Party* (1951) 83 CLR 1 at 193
12 see e.g. s 474 of the *Migration Act 1958* (Cth)
13 *Fish v Solution 6 Holdings Limited* [2006] HCA 22 at [33]
14 *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476 at 505 [72] per Gaudron, McHugh, Gummow, Kirby and Hayne JJ
15 see *Attorney-General (NSW) v Quin* (1990) 170 CLR 1 at 35-36 per Brennan J
16 (1998) 194 CLR 355
17 by enacting the *Migration Legislation Amendment (Procedural Fairness) Act 2002* (Cth); these amendments came into effect on 4 July 2002
18 (2001) 206 CLR 57 see *Minister for Immigration and Multicultural Affairs v Lay Lat* [2006] FCAFC 61 at [64]
19 ibid at [69]
20 [2006] FCAFC 61 at [70]
21 (2005) 215 ALR 162
22 215 ALR at 183-184 [79]-[80] per McHugh J, 203 [174] per Kirby J, 212 [211] per Hayne J
23 (1990) 170 CLR 596 at 599-600
24 See too *Carroll v Sydney City Council* (1989) 15 NSWLR 541 at 549A-G per McHugh JA, Kirby P agreeing at 543E; *Twist v Randwick Municipal Council* (1976) 136 CLR 106 at 115-116 per Mason J
25 *Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 222 ALR 411 at 416 [16]
26 (1985) 159 CLR 550 at 628
27 222 ALR at 416-417 [17]
28 ibid at 417 [20]-[21]
29 222 ALR at 418-420 [23]-[29]
30 *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 84; *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Palme* (2003) 216 CLR 212 at 222 [25]
31 *NAIS v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 223 ALR 171
32 223 ALR 171 per Gleeson CJ at 172 [5]; per Gummow J at 181 [43] and 184 [55]; Kirby J at 196 [102] (that prima facie excessive delay presumptively flaws an administrative decision with jurisdictional error); per Callinan and Heydon JJ at 213 [163] (phrased in the negative, that 'failure to make a quick decision would not of itself constitute jurisdictional error').
33 *NAIS,* supra at fn 31
34 223 ALR 171 per Gleeson CJ at 174 [10] and per Kirby J at 197 [106]
35 (2002) 209 CLR 597
36 *Dranichnikov v Minister for Immigration* (2003) 197 ALR 389
37 197 ALR at 407 [87]
38 (1997) 91 CLR 602 at 609

39 *Sun v Minister for Immigration* (1997) 81 FCR 71 at 134 per Burchett J and per North J (Wilcox J left this issue open at 124).
40 *R v Bow Street Metropolitan Stipendiary Magistrate and others, ex parte Pincohet Ugarte (No 2)* [2000] 1 AC 119; see e.g. at 135E-F per Lord Browne-Wilkinson
41 *Hot Holdings Pty Ltd v Creasy* (2002) 210 CLR 438 at 453 [44], 455-456 [50]-[52]
42 *Wentworth v New South Wales Bar Association* (1992) 176 CLR 242 at 252
43 *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 39 per Mason J
44 ibid at 40 per Mason J
45 *Minister for Immigration v Yusuf* (2001) 206 CLR 323, 350-352 at [80]-[83]
46 see: s 13 of the *Administrative Decisions (Judicial Review) Act 1977* and s 28 of the *Administrative Appeals Tribunal Act 1975*: see too s 25D of the *Acts Interpretation Act 1901* and *Dalton v Federal Commissioner of Taxation* (1986) 160 CLR 246
47 *Minister for Aboriginal Affairs v Peko-Wallsend Ltd,* op cit, 40-41 per Mason J
48 (1996) 185 CLR 186 at 272
49 *Military Rehabilitation and Compensation Commission v SRGGG* (2005) 215 ALR 459. *Comcare v Forbutt* [2000] FCA 837 These decisions have since been cited with approval in the Full Federal Court decision of *McGuire v Military Rehabilitation and Compensation Commission* [2005] FCAFC 52 at [33]
50 215 ALR 459 at 480 [96]. See also *Commonwealth v Angela* (1992) 34 FCR 313
51 (2001) 206 CLR 323 at 346 [68] per McHugh, Gummow and Hayne JJ
52 ibid at 346 [68] per McHugh, Gummow and Hayne JJ
53 (2001) 206 CLR 323 at 346 [69] per McHugh, Gummow and Hayne JJ
54 (1986) 159 CLR 656
55 [1999] 1 WLR 1293 at 1300F-G
56 [1999] 1 WLR at 1303G-1304A
57 (1949) 78 CLR 353 at 360
58 Administrative Review Council, "*The Scope of Judicial Review*", Report No. 47, 2006.
59 ibid at p 43
60 ibid at p 43
61 *Re Minister for Immigration and Multicultulral and Indigenous Affairs; Ex parte Palme* 216 CLR 212 at 223 [39] at 223 [39] applying *R v Australian Stevedoring Industry Board; Ex parte Melbourne Stevedoring Co Pty Ltd* (1953) 88 CLR 100 at 120
62 *Corporation of City of Enfield v Development Assessment Commission* (1999) 199 CLR 135 at 150 [34]; see too per Iacobucci J in *Canada (Direction of Investigation and Research) v Southam Inc* [1997] 1 SCR 748 at 776-777 [56] referred to by Gummow J in *Minister for Immigration v Eshetu* (1999) 197 CLR 611 at 657 [145] and Lee J in *M164/2002 v Minister for Immigration and Multicultulral and Indigenous Affairs* [2006] FCAFC 16 at [81]
63 *Applicant M164/2002 v Minister for Immigration and Multicultulral and Indigenous Affairs,* op cit at [80], [86]-[92] per Lee J
64 ibid at [117] per Tamberlin J
65 ibid at [118] per Tamberlin J
66 [2006] FCAFC 16 at [90]
67 *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 at 229 per Lord Greene MR
68 *Minister for Aboriginal Affairs v Peko-Wallsend* op cit at 40
69 Bar News: Summer 2005/2006
70 The author recollects the description as 'a black hooded cobra'.