FINALITY OF ADMINISTRATIVE DECISIONS AND DECISIONS OF THE STATUTORY TRIBUNAL

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The finality of any decision which affects a person's entitlement or interest engages a fundamental precept in the rule of law.

In the setting of the exercise of judicial power, there would hardly be a person in this country, let alone a lawyer, who would not both recognise and accept that a judicial determination is one which "… must stand, and, unless reversed or varied on appeal if there be an appeal, would govern the matter".[1]

But what of the position of the administrative decision and the decision of a statutory tribunal?

That question engages two competing interests[2] in respect of which I contend no clear principles have been, or perhaps are ever able to be developed. On the one hand there is the desirability for the administration to correct decisions when they are attended by error of law or fact. On the other hand, a favourable decision for an individual, if sought to be reconsidered, may and is likely to almost certainly cause a real sense of despair.

It is these two tensions which underlie the entire question of the finality of administrative decision making.

When one moves to the question of the resolution of these tensions, one must grapple with the question of the nature of the statute authorising the decision, the decision itself and the nature of the error.

Is the decision a final decision which bears the hallmarks of finality such that one would not reasonably conclude that such a decision is able to be remade? If it is, then speaking generally, the law would accord the decision finality and irrevocability.

If it bears the character of finality, the decision is only able to be re-made if it is made in jurisdictional error – for the reasons disclosed in *Bhardwaj*[3]. But the error attending the decision must be of that character. Mere error within jurisdiction may be erroneous in the general sense of the word but will not result in capacity to remake, if the decision may be properly characterised as final.

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The Statutes of Interpretation are of assistance in the unlocking of these questions but they are not determinative. The answer always lies in the construction of the statute conferring the power and the subject matter of the decision. Thus it is my contention that the only sure way for the legislature to ensure that there is revocability for a decision of a decision maker or a tribunal, if that is the intention, is to expressly confer it. If that does not happen, the Statutes of Interpretation will not definitely achieve it and nor will the common law.

Further, if the contrary is the case, finality needs to be made very clear from the terms of the statute conferring the power, for otherwise the terms of the Statutes of Interpretation may result in the decision being revocable.

It is into this thicket of uncertainty that one must now descend.

It has long been stated that "an administrative decision remains good in law unless and until it is declared invalid by a court of competent jurisdiction".[4] Indeed it has been said that, save for fraud or clear statutory statements,[5] administrative decisions, once given effect by communication to the affected party, are irrevocable on the basis that the power is spent.[6]

Some note ought be taken of and appropriate recognition needs to be given to the presumption that "the validity of an administrative act or decision and the legality of steps taken pursuant to it are presumed valid until the act or decision is set aside in appropriate proceedings".[7]

It is important to recognise, first, that this said presumption is a presumption only and, secondly, that "it is not a presumption which may be understood as affording all administrative acts and decisions validity and binding effect until they are set aside".[8]

Further, the generality of the proposition of continuing validity must now, of course, be assessed in the light of the High Court's decision in *Bhardwaj,*[9] which makes it clear that the law in this country is that any decision which is made in jurisdictional error is one which may be "seen to have no relevant legal consequences"[10] or one which in law is "no decision at all".[11] It is thus well understood in this country, at least since *Bhardwaj*, that an administrative decision which has been made in jurisdictional error is one which may be re-made by the primary decision maker, for to so then act, the original decision maker, when then acting in the manner without the attendant error vitiating the exercise of power once first exercised, will then be acting in the manner required of him or her by the enabling statute which the decision maker was first "bound to do".[12]

This paper will attempt to do the following things:

1. Address generally the scope of any power to remake a decision made within jurisdiction by reference to:

   (a) the statutes of interpretation; and
   (b) the common law in Australia, the United Kingdom and Canada.

2. Address how one is to apply the dictate of the statutes of interpretation that one must identify contrary intention.

3. Consider briefly the effect of fraud and misrepresentation.

4. Consider the relevance of any agreement to set aside a decision.

5. Look briefly at the position in Local Government.

6. Consider some practical issues that have arisen in the migration setting.

7. Provide some conclusionary comments.

Therefore, what is the position when the decision is not affected by jurisdictional error and it is to this issue which I now must turn.[13]

The decision – unaffected by jurisdictional error

It must be steadily remembered that the starting position for the status of such a decision, as expressed in *Bhardwaj*, is that such a decision is "effective for all purposes"[14] and may be regarded as binding.

When a decision which is made pursuant to a statutory power is made within jurisdiction, then there must be found to be a source of power to make the same decision again.

This is because a statute which confers a power to make a decision will be properly characterisable as one which exists for that purpose – the purpose of making the decision. When that purpose has been fulfilled, the power is "exhausted" or "spent".[15]

It is submitted that it does not matter whether this principle bears the name of the Latin term "functus officio" or whether the principle, as I submit, is to be recognised as a matter of fundamental application of the principle that the determination of matters must have a terminus.

It has been put thus:

> There was an inconvenient common law doctrine of somewhat uncertain extent that a power conferred by statute was exhausted by its first exercise.[16]

Craies also puts it thus:

> If a power is given to the Crown by statute for the purpose of enabling something to be done which is beyond the scope of the royal prerogative, it is said to be an important constitutional principle that such a power, having been once exercised, is exhausted and cannot be exercised again.17

It is important to recognise that the above expressions express the common law position and, therefore, the position against which various interpretation statutes were first enacted so as to ameliorate the consequences of that principle of law. These kinds of statutes were first passed in the United Kingdom in 1889[18] and in the colonies prior to Federation.[19]

The power to re-make a decision may either be conferred expressly by the statute or it may be implied.[20] Plainly, the Parliament may give an administrative decision whatever force it wishes.[21]

In the event that the power to re-make is expressly found in the statute conferring the power, then no difficulty whatsoever will arise.[22] Plainly the decision may be re-made. But such is not usually, if ever, the case nowadays, at least in part because of the terms of the statutes of interpretation, to which I will turn later.

Then the power may perhaps be implied from the statute itself. To discern the implication may on occasions not be an easy task; whatever the difficulty, I suggest that it is a largely unrewarding task. I say unrewarding for, as I will explain later, when the statutes of interpretation create the presumption that a power, once exercised, may be re-exercised, for myself I see little utility in engaging in the process of searching for the existence of a power that already exists subject to the existence of contrary intention. Nevertheless, if the power

to revoke may be readily implied from the statute then, as a matter of reality, that will certainly also evince a clear intention that the decision made is not a final one and, under the statutes of interpretation, may be re-made. Thus one may still engage in the exercise of analysis of the statute in those two ways in order to achieve the same result.

In *Sloane v Minister for Immigration, Local Government and Ethnic Affairs*,[23] French, J addressed the question of the manner of approaching the implication of such a power into the statute:

> The general question whether an implication should be found in the express words of a statute has been said to depend upon whether it is proper, having regard to accepted guides to construction, to find the implication and not on whether the implication is 'necessary' or 'obvious': see F A R Bennion, *Statutory Interpretation* (1984), p 245. While implication can often be justified by necessity, it should not be limited by that condition. The question whether some power, right or duty is to be implied into a statute will depend upon the construction of the provisions under consideration having regard to their purpose and context and other traces of the convenient phantom of legislative intention. Where a statute confers a power there is ample support for the proposition that the donee of the grant will enjoy the rights and powers necessary to the exercise of the primary grant. The so called 'inherent jurisdiction' or 'implied incidental power' of a statutory court derives from that general principle: see *Jackson v Sterling Industries Ltd* (1987) 162 CLR 612 at 623.
>
> While it may be accepted that a power to reconsider a decision made in the exercise of a statutory discretion will have the advantage of convenience, it cannot always claim the virtue of necessity.

It should be noted that in three well-known cases[24] there was consideration of whether there was a power to revoke to be implied from the statute itself. I will turn to these cases later.

The more relevant question, in my opinion, is the scope and operation of the statutes of interpretation on the power authorising the decision.

Interpretation statutes

Section 33 of the *Acts Interpretation Act 1901* (Cth) provides as follows:

> (1) Where an Act confers a power or imposes a duty, then, unless the contrary intention appears, the power may be exercised and the duty shall be performed from time to time as occasion requires.

All States and Territories have an analogue to this provision.[25]

The common theme amongst all such statutory provisions is that a statutory power may be re-exercised "unless the contrary intention appears".

The requirement of "contrary intention" in such statutes either arises in the very provision itself, for example as is contained in s 33(1) of the Commonwealth statute[26] or, alternatively, is found elsewhere in the interpretation statute, and thus such a provision as found in the Act governs the general power.[27]

It should also be noted that by s. 33(3) of the Acts Interpretation Act, the power to make an instrument includes a power to revoke the instrument, unless the contrary intention appears. This power also exists in State legislation.[28] It also may support an act of revocation if it is an instrument which is being considered.[29]

The power in s 33(1) is a power which has significant scope for ameliorating the effect of the *functus officio* rule. It is interesting to note that it has been observed that the power has "been overlooked in the past and [has] been rarely used".[30] Whilst I would not, with respect, necessarily entirely accept that proposition, its terms always repay attention.

One must remain mindful of the cautionary words of Sir William Wade in his famous work that these provisions give "a highly misleading view of the law where the power is a power to decide questions affecting legal rights … the same arguments which require finality for the decisions of courts of law apply to the decisions of statutory tribunals, ministers and other authorities."[31]

There are cases which provide instances of the "contrary intention", hence the caution of Sir William Wade, and it is to that matter which I now must turn.

"Contrary intention"

It is important to recognise, first, that the interpretation statutes put on its head, the common law presumption that the exercise of power, once made, exhausts the power.

Accordingly, the position which now obtains is that a power may be re-exercised unless the contrary intention appears from the statute.

One therefore is always driven back to a construction of the terms of the statute conferring the power to decide.

The question is, does the statute either in terms or by implication mean that the decision is final and may not be re-made?

If the statute conferring the power says so expressly, then little difficulty will arise, for the contrary intention will accordingly be expressly apparent.

The difficulty nearly always exists at the level of whether the decision under the statute is impliedly final. Such an implication usually arises from the subject matter of the statute. It should therefore be remembered that the interpretative obligation is sometimes not necessarily of specific words but may perhaps be of the statute's purpose as a whole – "the convenient phantom" as Justice French puts it.[32]

Finality in any statute may arise from basic principles. In *Minister for Immigration and Multicultural Affairs v Bhardwaj*, Gleeson CJ said –

> The requirements of good administration, and the need for people affected directly or indirectly by decisions to know where they stand, mean that finality is a powerful consideration.[33]

In the High Court's decision to uphold the immunity of advocates for in-court negligence, *D'Orta-Ekenaike v Victoria Legal Ai*d, Gleeson CJ, Gummow, Hayne and Heydon JJ said that the principle that "controversies, once resolved, are not to be reopened except in a few narrowly defined circumstances" was "a central and pervading tenet of the judicial system"[34] and that underpinning the judicial system was "the need for certainty and finality of decision".[35]

Whilst these principles were applied in *D'Orta-Ekenaike* in the sphere of judicial determination, the observation of Gleeson CJ in *Bhardwaj* is submitted to still be apposite as a guiding principle.

The decision of *Kabourakis v The Medical Practitioners Board of Victoria*[36] is the most recent authoritative decision considering these issues.

Kabourakis v The Medical Practitioners Board of Victoria

Dr. Kabourakis treated a patient in May and June 2002 for pain management following an industrial accident in December 1999. He prescribed drugs and the patient died from the inhalation of his own vomit. It was less than clear whether the death was from an overdose, but it clearly was a tragic case.

Pursuant to its powers under the *Medical Practice Act* 1994 (Vic), consequent to a notification to it, the Medical Practitioners Board of Victoria conducted a preliminary investigation and thereafter referred the question of the practitioner's conduct to an informal hearing. A hearing was conducted, the hearing considered the material supplied to it by an investigator employed by the Board and the informal panel hearing found that the Doctor had not engaged in unprofessional conduct.

The notifier was dissatisfied and complained to the Victorian Ombudsman.

The Ombudsman examined the file and recommended that the Board re-open the matter and hold a new informal hearing, because an expert medical report obtained by the Board's investigator opining on the question of the conduct of the Doctor had not been provided to the informal hearing.

The Board convened a new informal hearing and raised the same matters *ipsissima verba*.

Judicial review proceedings commenced to halt the new process. The Board conceded on judicial review, quite properly, that no jurisdictional error had been committed.

The critical statutory provisions were as follows:

> 25.(7) The Board, of its own motion, may determine to conduct (with or without conducting a preliminary investigation)
>
> …
>
> (d) an informal or formal hearing into the professional conduct of a registered medical practitioner.
>
> 38K. Outcome of a preliminary investigation
>
> (1) Upon completing a preliminary investigation into the professional conduct of a registered medical practitioner, the person or sub-committee appointed by the Board to conduct the investigation may make one of the following recommendations –
>
> (a) that the investigation into the matter not proceed further;
>
> (b) that an informal or formal hearing be held into the matter;
>
> (c) that the medical practitioner undergo a medical examination;
>
> (d) that the medical practitioner's performance be assessed by a medical practitioner or reviewed by a performance review panel.
>
> (2) The Board must determine whether or not to act on the recommendations of the person or sub-committee appointed by the Board to conduct the preliminary investigation.

42. *Conduct of an informal hearing*

At an informal hearing –

(a) the panel must bear and determine the matter before it; and

(b) the practitioner who is the subject of the hearing is entitled to be present, to make submissions and to be accompanied by another person but is not entitled to be represented; and

(c) the proceedings of the hearing must not be open to the public.

43. *Findings and determinations of an informal hearing*

(1) After considering all the submissions made to the hearing the panel may find either –

(a) that the practitioner has, whether by act or omission, engaged in unprofessional conduct which is not of a serious nature; or

(b) that the practitioner has not engaged in unprofessional conduct.

(2) If the panel finds that the practitioner has, whether by act or omission, engaged in unprofessional conduct which is not of a serious nature, the panel may make one or more of the following determinations –

(a) that the practitioner undergo counselling;

(ab) that the medical practitioner undertake further education of the kind stated in the determination and to complete it within the period specified in the determination;

(b) that the practitioner be cautioned;

(c) that the practitioner be reprimanded.

The Court of Appeal referred to the following matters in deciding that the Medical Practitioners Board of Victoria had no power to convene a second hearing and the first decision was final:

1. One must construe the statute granting the power;[37]

2. An administrative decision only has such force and effect as is given to it by the law pursuant to which it is made;[38]

3. As a rule a statutory tribunal cannot revisit its own decision simply because it has changed its mind or recognises that it has made an error within jurisdiction.[39]

4. The requirements of good administration and the need for people affected directly or indirectly by decisions to know where they stand mean that finality is the paramount consideration and the statutory scheme, including the conferring and limitation of right of review on appeal, will be seen to evince an intention inconsistent with capacity for self correction of non-jurisdictional error. In the bulk

of cases, logic and common sense so much incline in favour of finality as to permit of no other conclusion.[40]

5. If it was possible for the Board to re-open the findings of an informal hearing, there would be no end to that possibility. If not once, then twice and so forth? There must be a terminus for such a finding.

6. The finding of finality was aided by the fact that the practitioner was able to request a formal hearing under s 45 if dissatisfied but the Board was not. The Board was found to be bound by its election to take the informal hearing route.

7. There was a prospect of inconsistent findings if the Board was able to convene a second hearing and Parliament would have intended to create that state of affairs. The fact that the practitioner was found to have been cleared was irrelevant to that matter. It was expressly rejected as "facile" that a favourable finding is without legal effect.

8. Upon the construction of the Act, a notifier has a sufficient interest to review the decision of an informal panel which leads to a conclusion of finality.[41]

9. As appeal rights are given to the Board in respect of other decisions made under the Act, and as none are conferred in the case of an informal hearing, this implied that the Board does not have an overriding power to act under its own motion power under s 25(7) to commence another investigation.[42]

10. Where an apparently exhaustive group of provisions deal with a matter in a fashion which is repugnant to another provision or provisions having operation, then the latter provision yields to the former provision.[43] So in this case the own motion power of the Board under s 25(7) to re-refer the matter yielded to the effect of a finding under s 43.

11. The effect of s 40 of the *Interpretation of Legislation Act* does not enable a further exercise of power which would "annihilate the effects of a finding made by a panel in the determination of a hearing undertaken pursuant to a previous exercise of power".[44]

There are other cases that have decided that an exercise of power is final and thus exclude the operation of s 33(1) and its analogues, some of which were referred to and approved in *Kabourakis*.

Other authorities on contrary intention

In Re Denton Road, Twickenham[45] is one. There the *War Damage Act 1943* created the War Damage Commission and empowered it to pay compensation to property owners who had suffered loss from enemy bombing raids on London in 1940. The legislation provided for a regime of claims, assessments and awards. There was an analogue to s 33 at that time and Vaisey, J at 56-57 held –

> that where Parliament confers upon a body such as the War Damage Commission the duty of deciding or determining any question, the deciding or determining of which affects the rights of the subject, such decision or determination made and communicated in terms which are not expressly preliminary or provisional is final and conclusive, and cannot in the absence of express statutory power or the consent of the person or persons affect be altered or withdrawn by that body.
>
> …

I think that the contrary view would introduce a lamentable measure of uncertainty, and so much disturbance in the minds of those unfortunate persons who have suffered war damage that the Act cannot have contemplated the possibility of such vacillations as are claimed to be permissible in such a case as the present.

In *Walter Construction Group Limited v Fair Trading Administration Corporation*,[46] Grove J rejected an attempt to rely upon the equivalent of s 33 in relation to a decision on a claim under a statutory building insurance scheme, saying –

I do not construe that provision as vesting a power to make and unmake decisions infinitely. If power does not stretch to infinity, there must be in the circumstances of a particular case and 'as occasion requires' a terminus. In this case it was reached with the communication of decision by the letter of 24 October 2002.[47]

Leave to appeal from the judgment of Grove J was refused by the Court of Appeal.[48] Santow JA, with whom Sheller JA and Tobias JA agreed, made specific reference, with apparent approval, to the above passage.[49]

In *Export Development Grants Board v EMI (Australia) Ltd*,[50] the Full Court of the Federal Court considered the *Export Expansion Grants Act 1978* (Cth); s 11 –

11.(1) The Board shall consider every claim duly made and determine whether the claimant has an incentive grant entitlement and, if so, the amount of that incentive grant entitlement.

(2) Where the Board determines that a claimant has an incentive grant entitlement, there is payable to the claimant a grant equal to the amount of the incentive grant entitlement so determined.

This was held to mean that once the Board had performed the task required of it by s 11, it could not reassess the decision as it was *functus officio*:

[W]hen the Board has determined the entitlement and the grant, its original task in relation to that claim is ended.[51]

The terms of the Act left no room for the application of s 33(1) of the Acts Interpretation Act.

In *Firearm Distributors v Carson*,[52] Chesterman J considered the nature of a power conferred on the Commissioner of Police by regulation 71(3) of the *Weapons Regulations 1996* (Qld) in respect of surrendered weapons. The regulation there provided –

The Commissioner (of Police) is to decide the amount of compensation payable to the person under this section.

The Commissioner determined the amount of $971,160 on 21 April 1998, and subsequently varied to the reduced amount of $306,160 on 7 May 1999. His Honour found:[53]

(a) that the decision possessed the requisite degree of finality and was not amenable to reconsideration or reversal; and

(b) that the statutory equivalent of s 33 in Queensland was not available because the contrary intention appeared.

In *Ping v Medical Board of Queensland*,[54] Moynihan J considered s 164(1) of the *Health Practitioners (Professional Standards) Act* 1999, which provided as follows:

(1) As soon as practicable after completing a hearing of a disciplinary matter relating to a registrant under subdivision 2, or within 14 days after the end of the period for making a submission stated in the notice given to a registrant under section 153, the board of disciplinary committee must decide whether a ground for disciplinary action against the registrant is established.

The Medical Board of Queensland determined to conduct a disciplinary proceeding by way of correspondence and so advised the parties, but it later purported to rescind that resolution and to direct that the matter proceed by way of hearing. Having referred to *Bhardwaj*[55] and *Firearms Distributors v Carson*,[56] the Court held that the Board's election to pursue the course of determining the matter by correspondence rather than by hearing could not be abandoned and that the equivalent of s 33 had no application.[57] His Honour accepted that a purpose of the legislation was to uphold the confidence of the public in the profession, but said:

> Those general considerations have to yield to the specific provisions of the legislation.[58]

In *VQAR v The Minister for Immigration and Multicultural and Indigenous Affairs*,[59] the question was whether the Minister, having made a decision under s 501A(2) of the *Migration Act 1958* (Cth) to refuse to grant a visa on character grounds, may subsequently revisit, reconsider and set aside that decision.

In this case, the applicant overstayed his visitor entry permit and , 5 or 6 years later, was located and placed into immigration detention. Seven days later he applied for a spouse visa and about 12 months later that application was refused. The applicant sought review in the AAT and 3 years thereafter the AAT set aside the delegate's decision and ordered re-consideration. Four months thereafter the Minister himself made a decision and pursuant to s 501A(2) of the Migration Act, set aside the AAT's decision.

Section 501A(2) provided:

> The Minister may set aside the original decision and;
>
> (a) refuse to grant a visa to the person; or
>
> (b) cancel a visa that has been granted to the person;
>
> if
>
> (c) the Minister reasonably suspects that the person does not pass the character test (as defined by section 501); and
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> (d) the person does not satisfy the Minister that the person passes the character test; and
>
> (e) the Minister is satisfied that the refusal or cancellation is in the national interest.

An "original decision" includes a decision of the AAT.

Following protracted litigation to the High Court challenging this decision, an application was made to the Minister to reconsider his original decision.

The question was whether s 33(1) afforded the basis for doing so.

Justice Heerey took the view that the power in s 501A(2) is not a power which may be re-made.

His Honour held that:

(a) the Act provided for a complex scheme for dealing with visa applications, with review rights, and once they are exhausted the person is to be removed from Australia;

(b) it would be inconsistent with parliamentary policy for the Minister to have a "floating inchoate power like Banquo's ghost" extending indefinitely;

(c) the fact that it/the power is a personal Ministerial power leads to finality;

(d) that there existed a power under s 501A(3) to set aside an original decision like the power under s. 501A(2) but followed by a power in s 501C(4) that the revocation power under s 501A(3) is revocable – but that power did not extend to the power under s 501A(2).

These matters led to the conclusion of a contrary intention.

Sloane v The Minister for Immigration, Local Government and Ethnic Affairs[60] was decided in 1992 under older provisions of the Migration Act.

Mr. Sloane overstayed his temporary entry permit which expired in January 1982 by ten years. He was arrested on 12 June 1991. He applied to a delegate of the Minister for an extended eligibility temporary entry permit, as he was then permitted to do.

That application was refused on 2 August 1991.

He then applied to the Immigration Review Tribunal for a review of the refusal. That application was determined to be incompetent because the applicant had been arrested on 12 June 1991 and the Migration (Review) Regulations precluded the Immigration Review Tribunal from entertaining such an application by such a person.

Accordingly, the applicant sought to have the original decision of the Ministerial delegate reviewed upon the production of further evidence.

The initial power of the delegate was exercisable under s 82(1) of the Migration Act, upon the question of whether a deportation order ought to be made. The applicant initially applied, in June 1991, for an extended eligibility temporary entry permit on the remaining relative ground and compassionate grounds, which grounds were available under regulation 131A of the then *Migration Regulations 1989* (Cth).

French, J took the view[61] that such a power, when exercised once is not re-exercisable because –

- there were no clear words in the statute so authorising;
- the presence of full judicial review rights and Regulations going to reviewability points against that conclusion;[62]
- thus there was no basis for implying in the statute that the decision may be re-exercised.

I have taken some time in dealing with *Sloane* for, whilst there are some well known and (with respect) most elegantly expressed statements by French, J in this case concerning the amenability of administrative decisions and their finality, its analysis did not give consideration to s. 33. His Honour looked to whether he could imply the power of re-consideration from the Migration Act itself.

Jayasinghe v Minister for Immigration and Ethnic Affairs[63] is another such case.

In *Jayasinghe* the question for consideration was whether the Refugee Review Tribunal was able to re-open or re-consider its substantive decision on its review of an RRT - reviewable decision – after it had published its decision.

Goldberg, J commenced his analysis of the position with an exposition of the *functus officio* doctrine, a doctrine which he held is not limited to the exercise of judicial power, by saying:

> …it is a description or consequence of the performance of a function having regard to the statutory power or obligation to perform that function. The effect of the application of the doctrine is that once the statutory function is performed there is no further function or act for the person authorised under the statute to perform.[64]

The jurisdiction of the RRT at that time was to review an "RRT-reviewable decision".[65] The definition "RRT-reviewable decision" did not include a decision of the RRT itself.[66]

What enabled His Honour to conclude that a decision of the RRT is not able to be re-considered or re-opened was that there were provisions elsewhere in the Act which enabled a person to make a further review of an RRT-reviewable decision to the Tribunal[67] or to make further application to the Minister for a protection visa,[68] and the Minister is not bound by the decision of the RRT.

His Honour stated that these two provisions recognised the fact that there may be further relevant facts which emerge after the initial Tribunal decision, which may be brought before the Tribunal on a further application. All these matters pointed to a conclusion of finality of the first decision, such that there was no clear intention on a construction of the Migration Act "to imply a power in the Tribunal to reconsider or re-open a decision".

His Honour did not rely upon s 33 in his analysis but, as is clear from his reasons, it is submitted, with respect, that he would probably have also concluded that the "contrary intention" was present had he also so reasoned.

Leung and Anor v Minister for Immigration and Multicultural Affairs[69] is an important case for the following reasons:

1. It considers the approach to be taken in the light of the statutes of interpretation;

2. It considers various cases and expresses views concerning the finality of administrative decision making.

3. It gives further light as to how *Kawasaki Motors* is to be dealt with, a matter and a case I will turn to later.

It should be remembered that *Leung* pre-dates *Bhardwaj* and, interestingly, its conclusion on the treatment of a decision made in jurisdictional error was later found in *Bhardwaj* to be correct.

In *Leung,* the applicants had obtained a certificate of Australian Citizenship Order pursuant to s 13(1) of the *Australian Citizenship Act* 1948 (Cth). This section conferred no revocation power. Nevertheless the holding of the court was that the decision to grant citizenship was obtained by misrepresentation and not "in the true exercise of the power conferred by s 13(1) and could then be treated as having no effect"[70] – classic *Bhardwaj*.

Accordingly, the observations of the court on the question of the revocation of a validly made decision are obiter.[71] In this exercise, Finkelstein, J briefly refers to a variety of cases, some of which I have referred to or will refer to in this paper. What is worth noting is that His Honour states:[72]

> When one turns to consider the circumstances in which a power of reconsideration will be implied an examination of the cases shows that no coherent set of principles has as yet been developed. The courts have been required to choose between two competing interests – on the one hand there is the desirability for the administration to be able to correct decisions arrived at as a result of an error of law or an error of fact. In some cases it may also be desirable that an administrative decision be altered when there has been a change in policy. On the other hand, if a decision is favourable to an individual its reconsideration may cause a real sense of grievance.

I make some further general propositions. Until a Tribunal actually hands down its decision, or otherwise communicates it, it may not be regarded as *functus officio*.[73] Accordingly, a person may seek to approach the decision maker until that time.

The fact that a right of appeal or a right of review may exist does not alter the finality of any decision.[74] It may not be concluded that such rights take away the finality of a decision. Indeed to the contrary, they may point to the opposite conclusion.

Contrary intention – a summary

1. A decision which affects the rights of a person in some way is likely to point more to a decision presumed to be final.

2. The principal of finality is a powerful consideration and courts are well-prepared to so find when their individual personal rights are affected or even third party rights are affected.

3. When no appeal rights are conferred finality is a powerful conclusion. The presence of an appeal right does not necessarily negate the conclusion.[75] Indeed, interestingly, the existence of an appeal right may also support a conclusion of finality.

4. If the statute provides a body with an own motion power, then that power will not necessarily override the principle of finality if the statute provided for a mechanism for the determination of an issue.

5. If the tribunal is exercising judicial power under common law concepts, then the conclusion of finality may be more readily accepted. This is important in the State sphere first because State tribunals may exercise judicial power,[76]unlike Commonwealth Tribunals by reason of Chapter III of the Constitution. Common law notions of judicial power in the State setting are broader than in the Commonwealth setting.[77]

6. Accordingly, one may look to the nature of the power being exercised by a tribunal and ascertain whether the power may be characterised as judicial.[78]

7. Thus, the power needs to be examined in order to ascertain, speaking generally and not exhaustively,[79] whether:

   - there is an ascertainment of facts that fulfil conditions prescribed by law;

   - there is a decision setting for the future, perhaps between persons, but may also be of status (judgment *in rem*), a question as to the existence of a right or obligation;

- an inquiry as to the law as it is and the facts as they are followed by the application of the law as determined to the facts as determined;

- there is an imposition of liability affecting rights by a determination of itself, not by the fact determined;

- if the adjudicating body cannot exercise its power of its own motion, this points towards the judicial concept.[80]

8. There is no necessity for an *inter partes* dispute for a decision affecting a person in the way of their status may be a judgment *in rem*.[81]

9. The question of whether a body exercises judicial power is, or may be, not without its difficulty. I point to this issue so as to enable one to consider that question in the context of the statutory setting of the powers of decision maker.

10. If the decision sought to be revoked has the potential to create the result that there are two conflicting legally made decisions, particularly as to status or liability, then that conclusion tells in favour of finality of and non-revocability of the former decision.[82]

11. Should there be provisions in an Act which confer time limits for the decision making process, prescribe mechanisms for the decision making process and limited forms of judicial review, as was the case in the Migration Act, when considered in *Bhardwaj*, then such matters pointed towards a conclusion of finality.[83] It is recognised that the conclusion of the majority of the High Court in *Bhardwaj* of the consequences of a decision made in jurisdictional error meant that the s 33 question did not arise; nevertheless, the observations referred to are matters which may still be validly used to assist in another interpretative approach.[84]

12. If the statute confers an opportunity to re-apply and make a further application, then this situation tells in favour of finality of the primary decision.[85]

Common law position on the re-making of decisions

There is considerable scope for confusion on this question and certain cases which do or seem to set out a basis at common law for the re-making of a decision need to be analysed very carefully, to discern whether such cases are really speaking about a decision which is made in jurisdictional error as is now recognised. If they are, the law, as is now clear from *Bhardwaj,* may be the proper basis for understanding why such a decision is able to be made.

The observations of Justice Beaumont in *Comptroller-General of Customs and Anor v Kawasaki Motors Pty Ltd*[86] ("*Kawasaki*") are the most well-known.

In *Kawasaki* on 2 August 1984 the Comptroller-General of Customs made a Commercial Tariff Concession Order. On 4 October 1989 he purportedly revoked it. That revocation was challenged and consent orders were made on 20 July 1990 by Davies, J that the decision to revoke (made 6 July 1990) the revocation order of 4 October 1989 be set aside. Litigation followed, being the decision in *Kawasaki* which considered whether the purported revocation of the revocation order was valid.

The power to revoke the concession order existed under s 269 P (1) of the *Customs Act 1901* (Cth).

The question was whether there existed a power to revoke the exercise of the express statutory power to revoke. This question is against the setting that the original revocation order was said to be of doubtful validity on "grounds which appear to be substantial".[87]

This is critical for the 4 October 1989 revocation order was challenged in the first proceedings on the following bases; namely that:

- it was made in breach of the rules of natural justice;
- procedures required by law had not been observed;
- the decision was not authorised by the enactment in pursuance of which it was purportedly made;
- it was an improper exercise of power;
- there was an error of law;
- there was no evidence to justify the decision.[88]

Indeed an officer of Customs deposed that "it was accepted by the decision maker that the said decision was invalid".[89] For those reasons, Davies, J made the express order in earlier legal proceedings that the decision to revoke made on 4 October 1989 be set aside.

Accordingly, the status of the first revocation must be either that it was made in jurisdictional error and may be ignored or, alternatively, the order was of no effect by reason of the pronouncement of the order by Davies, J that it be set aside and was void ab initio.[90]

In either event it is my contention that the following words of Beaumont, J, which have oft been cited to support the proposition that revocation is permissible, need to be considered in that light. They are: [91]

> Some administrative decisions, once communicated, may be irrevocable. But where it appears that his or her decision has proceeded upon a wrong factual basis or has acted in excess of power, it is appropriate, proper and necessary that the decision maker withdraw his or her decision.

There are a number of matters to note about this statement:

1. It recognises that at least there is a class of irrevocability.
2. It is made without any reference to or consideration of s 33 of the *Interpretation Act*
3. It is obviously made pre-*Bhardwaj*.
4. It is a statement of law that now accords with *Bhardwaj* when it refers to "acting in excess of power".
5. Proceeding on "a wrong factual basis" may well amount to a jurisdictional error and, if so, again accords with *Bhardwaj;* for example, if there is a failure to take account of a relevant consideration. Further, the phrase "proceeded upon a wrong factual basis" is somewhat uncertain as to meaning. It may have the meaning of "an error of the kind described as 'error in fact' in the context of proceedings by writ of error: the non-fulfilment or non-performance of a condition precedent to regularity of adjudication such as would ordinarily induce a tribunal to 'stay its hand if it had knowledge, or to re-open its judgment had it the

power'."[92] Hence either this discloses a tenable reference to jurisdictional error or begs the question as to the capacity to re-open on that purported basis.

6. Beaumont, J himself[93] in *Leung* agreed with the reasons of Finkelstein, J in *Leung* and Finkelstein, J stated in relation to this statement of Beaumont, J in *Kawasaki*:

> I do not consider that His Honour was seeking to lay down a principle of general application to all administrative decision-makers but was confining himself to the exercise of the power there under consideration namely the grant of a tariff concession order under Pt XVA of the *Customs Act 1901* (Cth).

7. Interestingly, Finkelstein, J then goes on to say:

> However, if it is to be taken as a statement of general principle, it has much to commend it in my opinion. There is a good deal to be said for the view that an administrative decision which is plainly erroneous should not stand.

8. Indeed, Hill and Heerey, JJ in *Kawasaki* expressed the following view:[94]

> But the question whether an administrative order can effectively be treated as void by the decision-maker without the need for any order of a court has to be considered as a matter of principle independently from the particular circumstances of the case.
>
> It would in our opinion be strange if an administrative order remained valid until set aside by an order of a court even though the decision-maker did not seek to uphold the order. Courts have long recognised the rule of policy that there is a public interest in the avoidance of litigation and the termination of litigation by agreement when it has commenced. The argument that disputed orders could not be treated, by agreement of all concerned, as void would directly conflict with that rule. Parties would be forced into pointless and wasteful litigation.

9. It may be contended that these statements of Hill and Heerey, JJ in *Kawasaki* and the comments of Finkelstein, J in *Leung*, with the agreement of Beaumont, J, place a severe restriction on the scope of the use to which *Kawasaki* may be put as an authority for the proposition that an *intra vires* decision may be re-made. It may be contended that given the facts of *Kawasaki,* possibly the treatment of the entire court (and certainly Hill and Heerey, JJ) of the legal status of the decision in question and the treatment of the words of Beaumont, J in *Kawasaki*, by himself and Finkelstein, J in *Leung* make it tolerably clear that this statement may be confined to cases where there is a jurisdictional error. As *Bhardwaj* has now clarified how such decisions may be treated, indeed in a manner consistent with the sentiment, in conclusion, of all the judges in *Kawasaki* and Beaumont and Finkelstein, JJ in *Leung*, its application to *ultra vires* decisions has been clarified by *Bhardwaj,* and its application to *intra vires* decisions, because of its facts, is highly doubtful.

10. Furthermore, it is to be noted that *Kawasaki* paid no reference to the use that was able to be made if any of s. 33 of the *Acts* Interpretation Act. On the analysis given by all Judges in *Kawasaki* that is with respect entirely logical, for as was also observed to be the case in *Bhardwaj*,[95] there is no occasion for the consideration of s. 33 when the purported exercise of the power on the first occasion has not been performed in accordance with the statutory mandate. Hence, the setting for and the decision in *Kawasaki* is consistent with an approach to the consideration of the first act of revocation in *Kawasaki* being an instance of the capacity to remake a decision made in jurisdictional error and little more.

11. It is possible that the statement of Beaumont, J may be applicable to an intra vires error but such a statement would seem to ignore the preponderance of

view concerning the finality of administrative decisions and it principally relies upon *Rootkin*, a decision which I will deal with later, which would appear to have limited scope for such an expression of view.

The United Kingdom

There are cases in the United Kingdom which have been relied upon to support the revocability at common law of an administrative decision and these cases have been similarly referred to in Australia.[96] It is now necessary to refer to them so as to ascertain their application in this country.

In *Ridge v Baldwin* Lord Reid considers the consequence of a failure to follow the rules of natural justice and says:

> I do not doubt that if an officer or body realises that it had acted hastily and reconsiders the whole matter afresh, after affording to the person a proper opportunity to present his case, then its later decision is valid.[97]

Beaumont and Carr, JJ in *Minister for Immigration v Bhardwaj*[98] use this quote to support the entitlement of the Tribunal in *Bhardwaj* to act again having failed once to accord procedural fairness on the ground that it "accords with the approach taken at common law, and with the principles of good administration".[99]

Accordingly, the statement of Lord Reid, it is submitted, is really to be now seen as a statement of the consequences of the first decision being made outside jurisdiction.[100] The statement in *Ridge v Baldwin* relied upon the decision of the Privy Council in *De Vertuil v Knaggs*.[101] In *De Vertuil* an order was made in the first instance without the person affected having been heard, but that right was later granted and the primary decision affirmed. Again, *De Vertuil* may be now regarded as a jurisdictional error case.

Rootkin v Kent County Council[102] has been relied upon by Beaumont, J in *Kawasaki* and referred to by Finkelstein, J in *Leung* as affording a basis for concluding that an administrative decision may be re-made.

In *Rootkin v Kent County Council* the Kent County Council was permitted to pay the reasonable travelling expenses of a child that lived more than three (3) miles from school. The enabling power for the payment of such sums was in the following terms:

> A local education authority may pay the whole or any part, as the authority think fit, of the reasonable travelling expenses of any pupil in attendance at any school or county college or at any such course or class as aforesaid for whose transport no arrangements are made under this section.[103]

A child aged 12 was given a season ticket. It was thought she lived more than three miles from school. She did not. She was 175 yards short. The season ticket was withdrawn. It was initially granted under a mistake of fact.

The Court of Appeal, per Lawton, J, found the following:[104]

> It is the law that if a citizen is entitled to payment in certain circumstances and a local authority is given the duty of deciding whether the circumstances exist and if they do exist making the payment, then there is a determination which the local authority cannot rescind. That was established in *Livingstone v Westminster Corporation* [1904] 2 K.B. 109. But that line of authority does not apply in my judgment to a case where a citizen has no right to a determination on certain facts being established, but only to the benefit of the exercise of a discretion by the said authority. The wording of section 55(2) is far removed from the kind of statutory working which was considered in *In re 56 Denton Road, Twickenham* and *Livingstone v Westminster Corporation*.

Accordingly, the court held that at best the applicant held an entitlement to the favourable exercise of discretion but that when it is established that the discretion miscarried on the basis of a false fact, the Council may revoke its decision.

Lord Justice Eveleigh put it thus:[105]

> [The] principle of irrevocability may well be applicable when there is a power or a duty to decide questions affecting existing legal rights. In *Livingstone v Westminster Corporation* itself the Council were concerned to assess compensation for loss of office to which compensation the plaintiff had a right under the *Local Government Act* 1899. Generally speaking, however, a discretionary power may be exercised from time to time unless a contrary intention appears. I can see nothing in the *Education Act* 1944 to prevent the education authority from reviewing its decisions from time to time.

It would seem that this reasoning pivotally influenced Beaumont, J in *Kawasaki* .[106] It is also noteworthy to see the presence of the "contrary intention" principle appear.

The error of fact here as made did not go to jurisdiction. The authority's jurisdiction extended to making the payment if it saw fit. The question thus remained as to whether the valid decision could be revoked. *Rootkin* is authority for the proposition that, if a valid decision is one which confers a discretionary benefit and not one which determines a right, then such a decision, if made on the basis of incorrect facts, may be revoked.

There is a contrary argument. The 3 mile limit rule was a rule which informed the exercise of the discretion under s 55(2). This rule arose from the fact that legislation gave a parent a defence to criminal charge for not ensuring a school age child regularly attends school, if the child lives more than three (3) miles from the school and no arrangements have been made by the local education authority for transport to and from school.[107] Accordingly, it had become accepted that a local education authority had a duty to pay reasonable travelling expenses.[108] The court in *Rootkin* stated that the council accepted in the appeal that, where the child lives more than three (3) miles from a school they must pay reasonable travelling expenses.[109]

Was this case, in reality, the application of a broad discretion? The Council appears to have accepted that a relevant consideration to the exercise of the power was the distance of the child from school. The Council submitted "as a matter of *policy*, that as long as the child is physically capable of walking up to three miles and there are no special circumstances, such as a hazardous route, in getting to school, then the child should walk". Was this case one of failure to take into account a relevant consideration? Perhaps. Then again, this consideration was not one which the Council was "bound" to take into account, in the *Peko Wallsend* sense,[110] when one construes s 55(2) so as to raise it to the level of a relevant consideration for the purpose of the exercise of that power. It is thus debatable whether the exercise of power in this matter in this country would have been made in jurisdictional error for failure to have taken a relevant matter into consideration. Further, the Council did take that relevant matter of the child's distance from school into account but got it wrong on the facts. Perhaps, thus, there is no jurisdictional error.

Whatever analysis may be given to the facts of the case, the Court of Appeal did not consider that the original decision was one made in excess of jurisdiction. Assuming, without deciding, that the same conclusion is open on that or any other situation in this country, then if the power exercised is a discretionary one and is not a power which mandates a result upon the satisfaction of certain criteria, then *Rootkin* is certainly authority for the permissibility of the re-exercise of that power.

A limited power on the part of a Tribunal to re-open a matter was recognised in *Regina v Kensington and Chelsea Rent Tribunal*, *ex parte MacFarlane*.[111] In this case Mr. MacFarlane rented premises and was faced with an application by his landlord for determination of his

tenancy. He was given notice of the hearing but his case was that he did not receive it. His hearing was determined in his absence. Lord Widgery CJ gave the judgment of the court and held that Mr. MacFarlane was able to "go back to the Tribunal, explain why he did not attend, and the Tribunal will then have jurisdiction if it thinks fit to re-open the matter and to re-consider its decision in the light of the representations made by the absent party". His Lordship went on to say that:

> if the Tribunal, having considered [all the arguments of the absent party], is of that opinion that it would be proper to re-open the matter, it has power in my judgment to re-open it.[112]

An explanation for the basis the power is not given in this judgment.

The parallels with *Bhardwaj* are obvious. Whether this case is authority for a free-standing power to re-open in the absence of jurisdictional error is, it is submitted, highly doubtful.

Accordingly, there is slender authority[113] for the proposition that the exercise of intra vires power may be revoked at common law but, when one examines the circumstances when that has been found to be permissible, it may be that the occasions spoken of would really now be seen in this country as occasions of jurisdictional error or, at least, arguably so.

It is my contention that there is no clear authority as relied upon in *Kawasaki* or able to be derived from *Kawasaki* for the position that at common law an intra vires administrative decision may be revoked.

Canada

The position in Canada to some extent concerning the re-making of valid administrative decisions has been noted in this country in *Leung*[114] and *Bhardwaj*.[115]

The fundamental position in Canada, as observed in *Bhardwaj*,[116] is that as expressed in *Chandler v Alberta Association of Architects*:[117]

> As a general rule, once [an administrative] tribunal has reached a final decision in respect to the matter that is before it in accordance with its enabling statute, that decision cannot be revisited because the tribunal has changed its mind, made an error within jurisdiction or because there has been a change of circumstances. It can only do so if authorised by statute or if there has been a slip or error within the exceptions enunciated in *Paper Machinery Ltd v J O Ross Engineering Corp* [1934] SCR 186.
>
> To this extent, the principle of functus officio applies. It is based, however, on the policy ground which favours finality of proceedings rather than the rule which was developed with respect to formal judgments of a court whose decision was subject to a full appeal. For this reason I am of the opinion that its application must be more flexible and less formalistic in respect to the decisions of administrative tribunals which are subject to appeal only on a point of law. Justice may require the reopening of administrative proceedings in order to provide relief which would otherwise be available on appeal.
>
> Accordingly, the principle should not be strictly applied where there are indications in the enabling statute that a decision can be reopened in order to enable the tribunal to discharge the function committed to it by enabling legislation. This was the situation in *Grillas*.

The rule in *Paper Machinery* concerned judicial proceedings and covered: (1) the slip rule; and (2) where there was an error in expressing the manifest intention of the Court.

Leung[118] refers to *Grillas v Canada (Minister of Manpower and Immigration)*[119] as a case where a re-consideration may be made on new evidence. This case is really one where the power to re-open was expressly conferred.[120] The application of *Grillas* ought to be considered to be limited to appeals that are made on humanitarian grounds within the confines of the authorising statute. The orthodox position in Canada is that which is

expressed in *Chandler.* It is also to be noted that a decision made by the Refugee Division of the Immigration and Refugee Board of Canada, like the Immigration Appeal Board in that country, is that such tribunals have no jurisdiction to re-open an application for re-determination solely on the basis of new facts.[121] *Longia* distinguished *Grillas*, confining it to a case of an appeal on humanitarian grounds and not a refugee determination.

In *Re Lornex Mining Corporation and Bukwa*[122] the Human Rights Commission of Canada re-opened a determination of a complaint of discrimination that had been dismissed, so as to hear new evidence. Whilst acknowledging the usual rule as to finality,[123] the Court held that a re-opening of the matter for the purpose of new evidence was permitted[124] and followed the decision in *Grillas* in order to do so. There was no express authority to re-open granted by the statute in *Re Lornex*, in *Grillas* there was. *Grillas* did not purport to lay down any general ground for re-opening. It was based upon specific statutory authority. Therefore *Re Lornex* must be of doubtful authority in this country and, in my opinion, is unlikely to be followed, indeed it has been argued that it is wrong.[125]

The power in *Grillas* to re-open was said by the Court to be "equitable".[126] This term seemed to be used to describe the character of the enabling statute[127] and not any other right of such nature, whatever that right might be. Nevertheless there has developed a line of authority, seemingly emanating from *Grillas,* which continues to describe a tribunal's right to reconsider a matter in that country as equitable.[128] In *Zutter*, notwithstanding the holding in *Chandler* and express reference to it,[129] the Court construed a specific provision[130] in the *Human Rights Act* which precluded the taking of "further proceedings" under the *Human Rights Act* in relation to the subject matter of proceedings that had been discontinued or dismissed, as a provision which did not say that such decisions as made "shall be regarded as final",[131] and confined the scope of the prohibition to fresh proceedings and not the re-consideration of the same proceedings.[132] It made reference to this "equitable" jurisdiction. It would seem that the Court was greatly influenced by the fact that it was dealing with Human Rights legislation[133] and was prepared to find that the words in *Chandler* that "Justice may require the reopening of administrative proceedings in order to provide relief…."[134] to have significant effect in such case when the British Columbia Council of Human Rights (the decision-making body itself) or the Minister consider that it is in the interests of justice and fairness to re-open the original proceedings.

Accordingly, there does seem to exist some authority in Canada in such cases as decisions of tribunals dealing with Human Rights matters to permit of their re-opening. It remains to be seen whether cases of this kind are sui generis.

It is difficult therefore to discern the precise limits of the power to re-open in Canada, given that certain cases have carved out exceptions from the stated general position in *Chandler* that tribunal decisions are final.

Fraud and misrepresentation – effect on the decision

It may be accepted that if a decision is induced by fraud or misrepresentation, then the decision may be re-made on the *Bhardwaj* principle.[135] In this country, such a decision will be regarded in law as one which is no decision at all because the jurisdiction remains constructively unexercised.[136]

The following most famous words have application (although written in a different context) –

> No judgment of a court, no order of a Minister, can be allowed to stand if it has been obtained by fraud. Fraud unravels everything. The court is careful not to find fraud unless it is distinctly pleaded and proved; but once it is proved, it vitiates judgments, contracts and all transactions whatsoever...[137]

Leung is an example of the setting aside of a decision for misrepresentation. *Jones v Commissioner of Police and Anor*[138] recognises that a decision induced by fraud or actual deception enables revocation of the first decision and also relies upon a line of U.K. authorities in the migration setting for that conclusion.[139]

Of course, cases of this kind are rare in the field of public law and may not rise to the level of what the High Court terms "red blooded" fraud as is recognised in the common law.[140] The meaning of fraud, its connection with bad faith in the public law arena and other such notions are outside the scope of this paper.

Relevance of any agreement that a decision be set aside

There have been occasions, expressed in some authorities, that where all parties – being the person affected and the decision maker - do not seek to uphold the decision, then that would seem to be relevant to the status of the decision made.[141] Even in *Re 56 Denton Road* "the consent of the person or persons affected"[142] is mentioned as a requirement for revocation in the absence of express statutory power.

What is the relevance of a person's consent? To my mind, other than it being an occasion for advancing the question for consideration, none.

If a decision is made in jurisdictional error – consent is irrelevant.

If a decision possesses any of the elements of a lack of finality, then the statutes of interpretation apply or, perhaps, even the implication of revocability in the statute, may be open.

I contend that consent of the party is not legally relevant in any legal respect[143] save for one important practical matter. It is necessary for the decision maker or tribunal to acknowledge the jurisdictional error or the power to re-make in order to obtain the further course urged by the person affected. In the event that such acknowledgment is not forthcoming, it is then that the person affected would be obliged to proceed to Court for declarations.

Local government

Some case law concerning the revocability of decisions made by a local Council point towards irrevocability. If one is faced with such a decision, plainly, analysis of the conferral of power and the subject matter in the light of the principles I have referred to earlier is paramount. Some case law in New South Wales and South Australia shows a marked tendency to treat decisions of a Council as final and not revocable.[144] These authorities relate to the position concerning the grant of building approval or land subdivision approval. Circumstances of that kind point to a decision made by a Council which a person may then act upon, when made. They fit into the category of case identified in *In Re Denton Road Twickenham*.

Other cases show a capacity of a Council to rescind resolutions.[145] Such cases turn on the precise terms of the by-law or statute in question.

Some practical issues

Of course it is of vital importance to the person affected by an administrative decision, depending upon their interest, to know whether a particular decision can or cannot be re-made. That is the essence of all the cases that have been referred to.

It is also of importance in the question of good governance and, in the very actions of government, for public officials or, indeed, tribunals to know whether a decision is able to be re-made.

A recent report, in June 2007, of the Commonwealth and Immigration Ombudsman,[146] Professor John McMillan makes this apparent.

This report arose from a referral of 247 cases in 2005 and 2006 of people who had each been detained by the Department of Immigration and Citizenship (DIAC) and later released.

I refer to this report because it provides an excellent basis for looking at the difficulties that arise from the issues discussed in this paper.

Professor McMillan stated in his report that "in the absence of an express power [to revoke], DIAC historically relied upon a principle that derived from a decision of the Federal Court in *Kawasaki* to review and remake problematic decisions".[147]

Apparently a view was taken in the Department, after the insertion of the privative clause in s 474 of the Migration Act, that the *Kawasaki* principle was no longer available.[148]

The effect of the High Court's decision in *Bhardwaj* was observed.[149]

The Ombudsman also noted that there had arisen conflicting instructions concerning DIAC's ability to re-visit decisions. In some cases it was said that, as no express power to revoke existed, officers should invoke the *Kawasaki* principle and, in other cases, instructions are given which take no account of *Plaintiff S157* or *Bhardwaj*.[150]

In one case the correct view as to the DIAC's ability to re-make a decision in the light of *Plaintiff S157* was not taken until three years after that case.[151]

In six other decisions a decision was taken to set aside by applying the *Kawasaki* principle.[152]

Importantly, the Ombudsman observed an inconsistent set of practices. Officers sometimes relied on *Kawasaki*. In other cases "officers have gone down the path of greater complexity to see if there is a jurisdictional error that will facilitate a decision being set aside.[153] Professor McMillan then found that "if no such error can be found, the view taken is that there is no legal capacity to set the decision aside, notwithstanding apparent error, or unintended or harsh consequence arising from the decision".[154]

The Report demonstrates that no consideration has been given by DIAC in the cases analysed to the effect, if any, of s. 33 of the Acts Interpretation Act in the particular cases. Of course, it may be that s. 33 does not empower the re-making of the decision, depending upon the particular section of the Migration Act which is engaged. That is another matter.

These matters drive Professor McMillan to the conclusion that "this could all be avoided if there was an express power in the Migration Act that permitted any decision made under the Act to be set aside and varied. If necessary, the power could be qualified to reduce the scope of the discretion and limit the prospect of judicial review of a refusal to invoke the power. For example, the power could be limited to setting aside a decision based upon a factual or legal error".[155]

There has been no such amendment of the Migration Act to date nor, according to my researches, has one been suggested by Government.

The matters canvassed in Professor Macmillan's paper throw up real life issues of real complexity which, in many cases, are and have been hard to resolve. They graphically demonstrate the difficulty that arises in this area. They disclose the real difficulty in applying the law in this context. It is even alarming to note that, after more than a century has elapsed since statutes have been passed to ameliorate the effect of the *functus officio* rule, the Ombudsman of this country has reported on a series of troubling events arising from the difficulty of applying the law, which causes him to conclude that a power of revocation, if it is to be meaningful in the Migration context and is to exist, has to be statute specific.

Conclusion

These matters highlight the real difficulties which arise. Is it reasonable to expect an administrator to be able to discern whether a contrary intention exists when, for example, the Court of Appeal in Victoria in *Kabourakis* differed from the judge at first instance on that very question? Is it reasonable to expect an administrator to determine whether his or her decision is made in jurisdictional error? Presumably a Tribunal may be able to do it, but it may depend upon which Tribunal is being asked that question.

There is much to be said for the fact that the statutes of interpretation result in an overarching position for the exercise of all statutory power. But is this enough to ensure real justice? There are many occasions where the Courts have observed that it is in the interests of justice that certain administrative decisions ought to be able to be re-made if they are attended by error; but one is left to wonder whether that aspirational notion is able to be met, in the current state of the law. That aspirational statement has to be understood in the context of the nature of the error, the nature of the decision and the nature of the statute. Some decisions are final and ought to be, even if they are erroneous, when made within jurisdiction. Some decisions are erroneous, and the error leads to jurisdictional error, resulting in the capacity to re-make. Many decisions, even if made in some error, will still be final and irrevocable for, if within jurisdiction, they will be unable to be re-made, despite the statutes of interpretation.

The only sure way in which the revocability of a decision can be ensured, if that is the intention, is for Parliament to express it in the statute conferring the power. If that does not happen the situation may become complicated as I may have demonstrated, but it becomes a situation which is, hopefully (I say aspirationally), not insoluble.

Endnotes

1 *The Waterside Workers' Federation of Australia v Gilchrist, Watt and Sanderson Ltd* (1924) 34 CLR 482 at 528. *Punton v Ministry of Pension and National Insurance (No. 2)* [1964] 1 WLR 226 at 237-238.
2 I adopt and rely upon the same analysis in this regard of Justice Finkelstein as to the identification of the competing interests in *Leung and Anor v Minister for Immigration and Multicultural Affairs* (1997) 79 FCR 400 at 410.
3 *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597.
4 *Sloane v The Minister for Immigration, Local Government and Ethnic Affairs* (1992) 37 FCR 429 at 444. See also *Smith v East Elloe Rural District Council* [1956] AC 736 at 769-770; *Durayappah v Fernando* [1967] 2 AC 337; *Calvin v Carr* [1980] AC 574 at 589-590; *R v Balfour; ex parte Parkes Rural Distributions Pty Ltd* (1987) 17 FCR 26 at 33 (Wilcox, J).
5 *Re Petroulias* [2005] 1 Qd R 643 at [50] per McMurdo, JA.
6 See *Minister for Immigration Local Government and Ethnic Affairs v Kurtovic* (1990) 21 FCR 193 at 211 per Gummow, J.
7 *Ousley v The Queen* (1997) 192 CLR 69 at 130 per Gummow, J. See also *Hoffman-La Roche v Trade Secretary* [1975] AC 295 at 365.
8 *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597 at 646.
9 *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597.
10 Ibid at 647[153] per Hayne, J.
11 Ibid at 616[53] per Gaudron and Gummow JJ; per Gleeson CJ at 605[15]; per Hayne at 647[154]-[155]; per Callinan, J at p. 649[163].
12 Ibid, see for example, Gleeson CJ at 605-606; Hayne J at 647[155].

13 Any analysis of this question would not be complete without at least reference to the following articles: E Campbell, "*Revocation and Variation of Administrative Decisions*" (1996) 22(1) Mon LR 30; E Campbell "*Effect of Administrative Decisions Procured by Fraud or Misrepresentation*" (1998) 5 AJ Admin L 240; R Beech-Jones "*Reopening Tribunal Decisions: Recent Developments*" (2001) 29 *AIAL Forum* 19; M Allars "*Perfected Judgments and Inherently Angelical Administrative Decisions: The Powers of Courts and Administrators to Re-open or Reconsider Their Decisions*" (2001) 30 *AIAL Forum* 1; R Orr and R Briese "*Don't Think Twice; Can Administrative Decision Makers Change Their Minds?*" (2002) 35 *AIAL Forum* 11.

14 Ibid at 614[50] per Gaudron and Gummow, JJ. See also at p. 645 at [149] per Hayne, J. 603[8] per Gleeson CJ and 647[159] per Callinan, J.

15 *Leung and Anor v Minister for Immigration and Multicultural Affairs* (1997) 78 FCR 400 at 410 per Finkelstein, J; *Minister for Immigration and Ethnic Affairs v Kurtovic* (1990) 21 FCR 193 at 211 per Gummow, J.

16 *Halsbury's Laws of England*, 1st ed, Vol. 27, p. 131, footnote (f). See also *Minister for Immigration and Ethnic Affairs v Kurtovic* (1990) 21 FCR 193 at 211 per Gummow, J.

17 *Craies on Statute Law* (1963), 6th ed at 283-284. This observation was first made in 1907 in the 1st ed of that work (at 251) and appeared thereafter.

18 *Interpretation Act*, 1889, s. 32.

19 For example *Acts Interpretation Act* 1889 (Vic), s. 17.

20 *Leung and Anor v Minister for Immigration and Multicultural Affairs* (1997) 78 FCR 400 at 410. *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597 at 605-606[8] per Gleeson, CJ.

21 *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597 at 605-606[8]; *Kabourakis v The Medical Practitioners Board of Victoria* [2006] VSCA 301 at [48] per Nettle, JA.

22 For an example of an express power to re-hear – see s.42A(10) *Administrative Appeals Tribunal Act* 1975 (Cth) where there may be re-instatement of an application if the application has been dismissed in error. The meaning of error is not to be limited to "administrative" error and thus may be broad – see *Goldie v Minister for Immigration and Multicultural and Indigenous Affairs* (2002) 121 FCR 383 per Wilcox and Downes, JJ. The High Court had decided *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597 prior to the judgment in *Goldie* and the Court in *Goldie* was referred to it – at 394. Thus s.42 A(10) would seem to have direct application to error within jurisdiction.

23 (1992) 37 FCR 429 at 443-444.

24 *Jayasinghe v Minister for Immigration and Ethnic Affairs* (1997) 145 ALR 532 at 541; *Sloane v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 37 FCR 429; *Leung v Minister for Immigration and Multicultural Affairs* (1997) 79 FCR 400 at 404-405 (Heerey, J).

25 *Legislation Act* 2001 (ACT), s 197; *Interpretation Act* 1987 (NSW), s 48(1); *Interpretation Act* 1978 (NT), s 41(1); *Acts Interpretation Act* 1954 (Qld), s 23(1); *Acts Interpretation Act* 1915 (SA), s 37; *Acts Interpretation Act* 1931 (Tas), s 20(a); *Interpretation of Legislation Act* 1984 (Vic), s 40(a); *Interpretation Act* 1984 (WA), s 48.

26 See also *Acts Interpretation Act* 1915 (SA), s 37; *Interpretation of Legislation Act* 1984 (Vic), s 40.

27 *Legislation Act* 2001 (ACT), s 6; *Interpretation Act* 1987 (NSW), s 5; *Interpretation Act* 1978 (NT), s 3; *Acts Interpretation Act* 1954 (Qld), s 4; *Acts Interpretation Act* 1931 (Tas), s 4; *Interpretation Act* 1984 (WA), s 3. Whilst the construction is plain from the reading of the sections, an example of the interpretation that the contrary intention is required in the general provisions found in the ACT, NSW, NT, Qld, Tasmania and WA is *Shine Fisheries Pty Ltd v The Minister for Fisheries* [2002] WASCA 11 at [62], Full Court.

28 For example sec. 41A *Interpretation of Legislation Act 1984* (Vic).

29 It is to be noted that the scope of the meaning of "instrument" is now quite wide and may embrace many forms of administrative action and not be confined to legislative instruments – see *Collector of Customs (NSW) v Brian Lawlor Automotive Pty Ltd* (1979) 24 ALR 307 at 313, 322, 344; *R v Ng* [2002] 5 VR 257 at 282.

30 *Kabourakis v The Medical Practitioners Board of Victoria* [2005] VSC 493, at first instance, at [44], speaking of s 40 of the *Interpretation of Legislation Act* 1984 (Vic).

31 HWR Wade and CF Forsyth, *Administrative Law*, (7th ed) 261.

32 Sloane, op cit, at 443.

33 (2002) 209 CLR 597 at 603[8].

34 (2005) 223 CLR 1 at 17[34].

35 (2005) 223 CLR 1 at 30-31[84]. See also 17-18[34]-[36]; 20-21[45] and 66-67[201].

36 [2006] VSCA 301 per Warren CJ, Chernov and Nettle, JJA.

37 at [47].

38 at [48].

39 at [48]. Citing *Chandler v Alberta Association of Architects* [1989] 2 SCR 848 at 862 per Sopinka, J as referred to with approval in *Bhardwaj* by Gleeson CJ at 603[7] and by Gaudron and Gummow JJ at 615[52].

40 at [48].

41 at [75]. It is to be noted that the availability of merits review has also been found to point to finality – see *Sloane v The Minister for Immigration, Local Government and Ethnic Affairs* (1992) 37 FCR 429 at 444. See also R. Orr and R. Briese, "Don't think Twice? Can Administrative Decision makers Change their Mind? *AIAL Forum* No. 35 at 34.

42 at [76] and [79].

43 at [80] and relying on *Minister for Immigration and Multicultural Affairs v Nystrom* [2006] HCA 50 at [2].

44 at [86].
45 [1953] 1 Ch 51.
46 [2005] NSWCA 65.
47 [2004] NSWSC 158 (11 March 2004) at [40].
48 *Walter Construction Group Limited v Fair Trading Administration Corporation* [2005] NSWCA 65.
49 [2005] NSWCA 65 at [53] and [108]. See also the more general observations of Santow JA at [108] and, further the concurring judgment of Sheller JA at [9] and [10].
50 (1985) 9 FCR 169.
51 at 276.
52 (2001) 2 Qd R 26.
53 At 30[36] and 32[41].
54 (2004) 1 Qd R 282.
55 Supra.
56 Supra.
57 At 284.
58 Ibid.
59 [2003] FCA 900.
60 (1992) 37 FCR 429.
61 at 444.
62 at 444.
63 (1997) 76 FCR 301.
64 at 311.
65 See s 414(2) of the *Migration Act* 1958.
66 See s 411(1) and (2).
67 See s 416.
68 Section 50.
69 (1997) 79 FCR 400.
70 at 416.
71 at 409-411.
72 at 410.
73 See *Singh v Minister for Immigration and Multicultural Affairs* (2001) 109 FCR 18 at 28-29; *Semunigus v Minister for Immigration and Multicultural Affairs* (2000) 96 FCR 533.
74 *Kuligowski v Metrobus* (2004) 220 CLR 363 at 374-375[25].
75 Ibid.
76 *City of Collingwood v State of Victoria and Anor (No. 2)* [1994] 1 VR 652 at 663.
77 *Kable v The Director of Public Prosecutions for the State of New South Wales* (1996) 189 CLR 51 at 137 per Gummow, J. See also *The Commonwealth of Australia v The State of Queensland and Anor* (1975) 134 CLR 298 at 325; *Gould v Brown* (1998) 193 CLR 346 at 421[118] and 440[178]; *Re Wakim, ex parte McNally* (1999) 198 CLR 511 at 542[10], 544[17].
78 In this exercise see for example *Huddart Parker and Co Proprietary Limited v Moorehead* (1908) 8 CLR 330 at 357; *The Queen v Trade Practices Tribunal; ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361 at 374; *Fencott v Muller* (1983) 152 CLR 570 at 608; *The Queen v Local Government Board* (1902) 2 I.R. 349 at 373, as cited in *The Queen v Davison* (1954) 90 CLR 353 at 367; *Albarran v Members of the Companies and Auditors and Liquidators Disciplinary Board and Anor* (2007) 234 ALR 618 at [16]-[35].
79 This paper does not purport to canvass all those matters which may go to the question of whether judicial power exists.
80 *R v Joske, ex parte Australian Building Construction Employees and Builders' Labourers' Federation* (1974) 130 CLR 87 at 93-94.
81 *The Doctrine of Res Judicata*, Spencer Bower, Turner and Handley (3rd ed) at [234].
82 *Bhardwaj* at 603[7] per Gleeson CJ; at 615[52] and [53] per Gaudron and Gummow JJ. At common law, even inconsistent jury findings may be overturned – *Osland v The Queen* [1998] HCA 75 at [14]; [116]-[117]; *King v The Queen* (1980) 151 CLR 423 at 434.
83 See *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2000) 99 FCR 251 at 265 per Lehane, J; *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597 at [113]-[119] per Kirby, J.
84 See also R Orr and R Briese "Don't think Twice? Can Administrative Decision Makers change their mind?", *AIAL Forum* No. 35 at 34 who also express the same conclusion.
85 *Jayasinghe v Minister for Immigration and Ethnic Affairs and Anor* (1997) 76 FCR 301 at 316-317. See also R Orr and R Briese, "Don't think Twice?", op cit at 34.
86 (1991) 103 ALR 661 at 667-668.
87 per Beaumont, J at 666.
88 See 668 at lines 36-46.
89 at 669.
90 per Hill and Heerey, JJ at 672.
91 at 667.
92 per Gleeson CJ in *Bhardwaj* at 605.
93 at 402.
94 at 671.

95 at 647[156] per Hayne, J.
96 See *Kawasaki* at 667-668; *MIMA v Bhardwaj* (2000) 99 FCR 251 at 260; *Leung* at 410.
97 *Ridge v Baldwin* [1964] AC 40 at 79.
98 (2000) 99 FCR 251 at 259.
99 at 259.
100 This same conclusion was also expressed in *Chandler v Alberta Association of Architects* [1989] 2 SCR at 863 per Sopinka, J.
101 [1918] AC 557.
102 [1981] 1 WLR 1186.
103 Section 55(2) *Education Act*, 1944.
104 at 1195.
105 at 1197.
106 See 667.
107 See 1193; s 39(a) *Education Act*, 1944.
108 p 1194.
109 p. 1194.
110 *Minister for Aboriginal Affairs and Anor v Peko-Wallsend Limited and Ors* (1986) 162 CLR 24.
111 [1974] 1 WLR 1486.
112 At 1493.
113 I contend that *Livingstone v Westminster Corporation* [1904] KB 109 ought to be confined to the proposition that the Council was not entitled, nor should it be, to revoke a speciality debt. See also M. Akehurst, “Revocation of Administrative Decisions” [1982] Pub Law 613.
114 (1997) 79 FCR 400 at 411.
115 at [7] per Gleeson, CJ; at [52] per Gaudron and Gummow, JJ; at [94] per Kirby, J.
116 at [7] per Gleeson, CJ; at [52] per Gaudron and Gummow, JJ; at [94] per Kirby, J.
117 [1989] 2 SCR 848 at 861-862.
118 Op cit at 411.
119 [1972] SCR 577.
120 See s 15 of the *Immigration Appeal Board Act*, 1966-67 (Can). This section expressly enabled the Immigration Appeal Board to dismiss an appeal against deportation but, if it does so, it may still stay or quash the deportation order on compassionate or humanitarian grounds. This case was controlled by the terms of the statute there under consideration. See also *Chandler v Alberta Association of Architects (op cit)* at 870-871 per L’Heureux-Dubé, J.
121 See *Longia v Canada (Minister of Employment and Immigration)* [1990] 3 F.C. 288.
122 (1976) 69 DLR (3d) 705. Also referred to in *Leung* at 411.
123 at 708.
124 at 710.
125 See E. Campbell: Revocation and Variation of Administrative Decisions, (1996) 22(1) Mon LR 30 at 51.
126 op cit at 589 per Martland, J.
127 See *Re Scivitarro and Ministry of Human Resources et al* (1982) 134 D.L.R. 521 at 526 per Andrews, J.
128 See *Re Zutter and British Columbia Council of Human Rights et al* (1995) 122 DLR 665 at 675 (British Columbia Court of Appeal – the Court per Lambert, Wood and Prowse, JJA) citing *Re Lornex Mining Corp Ltd and Bukwa* (1976) 69 DLR (3d) 705; in *Re Ombudsman of Ontario and The Queen in Right of Ontario* (1979) 103 DLR (3d) 117, affirmed 117 DLR (3d) 613 and *Canada (Attorney-General) v Grove* (1994) 80 FTR 256, 48 ACWS (3d) 1412.
129 at 674.
130 Section 15 *Human Rights Act*, 1984.
131 op cit at 673.
132 op cit at 674.
133 at 673.
134 *Chandler* op cit at 862.
135 *SZFDE and Ors v Minister for Immigration and Citizenship and Anor* (2007) 237 ALR 64 at [51]-[52] as to fraud.
136 Ibid at [52].
137 *Lazarus Estates Ltd v Beasley* [1956] 1 QB 702 at 712.
138 (1990) 20 ALD 532.
139 See *R v Home Secretary; ex parte Hussain* [1978] 2 All ER 423; *R v Home Secretary; ex parte Khawaja* [1984] 1 AC 74.
140 *SZFDE and Ors v Minister for Immigration and Citizenship and Anor* (2007) 237 ALR 64 at [11]-[14].
141 See *Comptroller-General of Customs and Anor v Kawasaki Motors Pty Ltd* (1991) 103 ALR 661 at 671 per Hill, Heerey, JJ.
142 op cit at 56-57.
143 *Leung and Anor v Minister for Immigration and Multicultural Affairs* (1997) 79 FCR 400 at 414.
144 In N.S.W. see *Shanahan and Anor v Strathfield Municipal Council* [1973] 2 NSWLR 740 at 742-744 per Street CJ, relying also upon *Ex parte Renouf* (1924) 24 S.R. (N.S.W.) 463, *Ex parte Wright; Re Concord Municipal Council* (1925) 7 L.G.R. (N.S.W.) 79; *Ex parte Forsberg; Re Warringah Shire Council* (1927) 27 S.R. (N.S.W.) 200; *Little v Fairfield Municipal Council* (1962) 8 L.G.R.A. 64; *Mosman Municipal Council v*

Bosnich (1969) 17 L.G.R.A. 74. In South Australia – see *The Queen v District Council of Berri; ex parte H.L. Clark (Berri) Pty. Ltd. and Ors* (1984) 36 SASR 404 at 417 per Cox, J with whom King CJ and Legoe J agreed.

145 See *The Queen v Corporation of the City of Mitcham; ex parte G.J. Coles and Co. Ltd.* (1980) 26 SASR 74.

146 *Report into Referred Immigration Cases: Other Legal Issues* Report No. 10/2007. Found at http://www.ombudsman.gov.au/commonwealth/publish.nsf/AttachmentsByTitle/reports_2007_10/$FILE/report_2007_10.pdf

147 Paragraph 3.3.

148 Paragraph 3.4.

149 Paragraph 3.6.

150 Paragraph 3.7.

151 Paragraph 3.12.

152 Paragraph 3.13.

153 Paragraph 3.15.

154 Ibid.

155 Ibid at 3.16.