THE CONCEPT OF 'DEFERENCE' IN JUDICIAL REVIEW OF ADMINISTRATIVE DECISIONS IN AUSTRALIA – PART 1

*Alan Freckelton**

Since the year 2000, the Australian High Court has twice considered – once in detail and once briefly – whether a North American concept of 'deference' to administrative decision-makers should be introduced into Australian law. In *Corporation of the City of Enfield v Development Assessment Commission*[1] the High Court roundly rejected any endorsement of a common law principle of deference, claiming that such an approach involves an abdication of the court's responsibility, a theme later taken up by commentators.[2] The *Enfield* judgment, criticising any notion of deference to administrative decision-makers, was a direct response to the arguments raised by counsel. However, in *Minister for Immigration and Citizenship v SZMDS*[3], the issue was raised again, this time seemingly on the volition of Gummow ACJ and Kiefel J. Although the deference approach was rejected again, the concept this time was not dismissed out of hand.

Canadian administrative law has included a doctrine of deference to administrative decision-makers on judicial review of administrative decisions at least since the 1979 decision of *Canadian Union of Public Employees, Local 963 v New Brunswick Liquor Corp*[4] (hence *CUPE*), although the approach may actually have a much longer lineage.[5] The deference approach has been restated and updated in the seminal case of *Dunsmuir v New Brunswick*, where the term was defined as follows:[6]

> Deference is both an attitude of the court and a requirement of the law of judicial review. It does not mean that courts are subservient to the determinations of decision makers, or that courts must show blind reverence to their interpretations, or that they may be content to pay lip service to the concept of reasonableness review while in fact imposing their own view. Rather, deference imports respect for the decision-making process of adjudicative bodies with regard to both the facts and the law. The notion of deference 'is rooted in part in a respect for governmental decisions to create administrative bodies with delegated powers'[7] ... Deference in the context of the reasonableness standard therefore implies that courts will give due consideration to the determinations of decision makers.

Deference is an approach to judicial review taken by the courts, and effectively acts as a form of reconciliation between the rule of law and Parliamentary supremacy. That is, deference to administrative decision-makers balances the courts' constitutional requirement to review the decisions of administrative decision-makers to ensure that they are both constitutionally valid and within the decision-maker's power to make, and the power of the Parliament to allocate certain decision-making powers to persons authorised by or bodies created by statute.

Australian courts claim that they do not engage in merits review. Canadian courts do not make this argument and instead simply focus on whether an administrative decision is 'reasonable' or 'correct', depending on the applicable standard of review. Australian courts would regard this as a form of merits review. However, I will argue that Australian courts

* *Alan Freckelton LLM, University of British Columbia is an online teacher with the ANU's Graduate Certificate in Migration Law program.* *He wishes to acknowledge the assistance of Dr Mary Liston of the UBC law school in the preparation of this article.*

already engage in review of the merits of a decision, regardless of their protestations to the contrary, especially when one considers that *Wednesbury* unreasonableness[8] *is* accepted as a ground of judicial review in Australia. I will argue that the only difference between review of the merits of a decision and *Wednesbury* unreasonableness is the degree of deference afforded to the decision-maker – a difference of degree and not substance.

This article is in two parts. The first part will consider the rejection of the deference approach in *Enfield*, and a consideration of some of the reasons for this rejection, including an examination of the concept of the 'judicial power of the Commonwealth'. The second part will examine the judicial treatment of privative clauses in Australia, and examine academic arguments for and against a concept of deference in Australian administrative law. I will argue that Australia should move to a Canadian and UK type of substantive review of administrative decisions, rather than relying on an artificial and unsustainable distinction between errors of law and errors of fact, or, even worse, 'jurisdictional' and 'non-jurisdictional' errors of law.

Judicial review in Australia

Australia is somewhat of an 'outlier' in matters of judicial review of administrative decisions in contemporary common law jurisdictions. Michael Taggart has described the Australian approach to judicial review as follows[9]:

> There is a sharp distinction between questions of law – meaning the correct interpretation of statutory text and common law rules – and exercise of discretionary power. As regards the former ... the Australian courts insist on having the last word on 'correctness' (there is no deference: *Marbury v Madison*[10] and all that). As regards discretion, the courts could not defer more, in theory at least. Within the four corners of the power the decision-maker is free to decide as he or she likes. Once the decision-maker has applied the right legal test, the application of that test and the weight given to the relevant factors are a matter solely for the decision-maker ... The court would not second-guess (or judge) under the guise of judicial review questions of fact, policy, weight or otherwise intrude into the merits.

The *Enfield* decision

Prelude – Chevron

Before examining the *Enfield* decision, it is necessary to briefly examine the decision of the US Supreme Court in *Chevron USA Inc v Natural Resources Defense Council Inc*.[11] When an attempt was made to create an express deference approach for Australian judicial review in 2000, this was the case referred to, rather than extant Canadian authority such as *CUPE*.

The facts in *Chevron* were fairly complex, but can be summarised as follows. Amendments made to the federal *Clean Air Act* in 1977[12] required certain states to establish a program whereby polluting industries were required to purchase permits for 'new or modified major stationary sources' of air pollution. However, regulations issued by the Environmental Protection Authority (EPA) allowed a polluter to make certain modifications to its plant without applying for a permit, if the overall pollution level was not increased as a result. The issue before the court was whether a corporate group could be regarded as a 'stationary source' of air pollution – Chevron had argued that although it had increased pollution at one site, it had reduced it by a comparable amount at another site in the same state, and therefore did not require a permit.

Stevens J, writing for the court, commented that '[w]e have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer, and the principle of deference to administrative interpretations',[13] clearly demonstrating the use of the *word* 'deference'.[14]

Stevens J then found that the EPA had been given a broad discretion in deciding how the 1977 amendments should be implemented.[15] The key passage of the judgment is as follows:[16]

> First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

Stevens J remarked further that 'a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency'.[17] That is, an administrative decision should not be disturbed if the enabling statute is 'silent or ambiguous' with respect to a particular issue, and the administrative decision-maker's finding is based on a 'permissible' or 'reasonable' construction of the statute. Stevens J ultimately found that the EPA's interpretation of the *Clean Air Act*, permitting Chevron to take the action it did, was reasonable, and upheld its decision.[18]

Enfield – the facts[19]

In *Enfield*, a waste management company applied to the Development Assessment Commission (DAC) in South Australia for approval to alter a waste treatment plant in the local government area of Enfield Council. In the absence of approval by the DAC the development was prohibited. Before assessing the development against the relevant development plan, the DAC was required by subregulation 16(1) of the *Development Regulations* (SA) to 'determine the nature of the development'. A development for 'special industry', defined in part as one causing fumes or producing conditions which may become offensive, would be a 'non-complying' development for the purposes of the *Development Act 1993* (SA). If the proposed waste plant was a non-complying development, s 35(3)(a) of that Act prohibited the DAC from granting provisional development plan consent unless the Minister and relevant council consented.

Enfield Council claimed that the application was properly classified as a 'non-complying' development, attracting the requirement specified under s 35(3)(a) of the Act that the consent of the Minister and the Council be obtained. However, the DAC decided that the application was for general industry rather than special industry and therefore was not a non-complying development, meaning that the consent of the Enfield Council would not be required. The DAC granted the waste management company provisional consent.

Enfield Council sought a declaration that the provisional consent was *ultra vires* and an injunction to restrain action was taken upon it. At first instance, the Supreme Court of South Australia granted the relief sought.[20] The primary judge (Debelle J) held that the development fell within the definition of 'special industry' because the industry involved would produce conditions which could be 'offensive'. The Full Court of the Supreme Court of South Australia reversed the decision,[21] holding that it was inappropriate for the Court to admit evidence as to whether the development was properly classified as 'special industry' and that the Court should defer 'in grey areas of uncertainty to the practical judgment of the planning authority'.[22] The Court should only interfere if the DAC had made an obvious and clear departure from the requirements of the planning legislation.[23] The primary judge should not have 'descend[ed] into the planning merits'[24] since 'without such an obvious and clear departure, the court on judicial review will defer to the judgment of the planning authority on planning issues'.[25]

High Court decision

Majority judgment

The majority of the High Court consisted of Gleeson CJ and Gummow, Kirby and Hayne JJ. After reviewing the legislation and the decisions of the lower courts, their Honours turned their attention to the concept of 'deference'. Their Honours introduced the concept as follows:[26]

> In the written submissions, reference was made to the applicability to a case such as the present of the doctrine of 'deference' which has developed in the United States. However, this *Chevron* doctrine, even on its own terms, is not addressed to the situation such as that which was before Debelle J. *Chevron* is concerned with competing interpretations of a statutory provision not, as here, jurisdictional fact-finding at the administrative and judicial levels.

The majority here drew a distinction between cases such as *Chevron* (and *CUPE*), where the issue was the interpretation of legislation by an administrative decision-maker with the delegated responsibility to make decisions under that legislation, and findings of 'jurisdictional facts'. In the next paragraph, the majority elaborates on this, saying that '*Chevron* applies in the United States where the statute administered by a federal agency or regulatory authority is susceptible of several constructions, each of which may be seen to be (as it is put) a reasonable representation of Congressional intent'.[27] The High Court here seems to be saying that it will have the final say on any matter going to a tribunal's jurisdiction, but what if the legislation conferring the decision-maker's jurisdiction is itself capable of a number of reasonable interpretations? Will any credence be given to the decision-maker's finding on its own jurisdiction, in interpreting legislation with which it is no doubt familiar?

The majority then turned to a theme that is common in Australian discussion of deference – the idea that giving any deference to an administrative decision-maker is somehow an abdication of judicial responsibility. At paragraph 41, the majority cited an extrajudicial article by Breyer J of the US Court of Appeal for the First Circuit, in which his Honour stated that the deference doctrine amounts to 'a greater abdication of judicial responsibility to interpret the law than seems wise, from either a jurisprudential or an administrative perspective'.[28] At paragraph 42, their Honours cited Professor Keith Werhan as stating that:[29]

> Before *Chevron*, the traditional approach viewed the interpretation of ambiguous laws to be a 'question of law'; after *Chevron*, this task became simply a 'policy choice'.[30] Having transformed the legal into the political, the Justices ceded interpretative authority to the agencies.

Again, I contend that if an agency makes a completely unreasonable interpretation of even its own enabling statute, no-one would argue that the courts should not intervene, to ensure that the agency acts within the power given to it by Parliament. Is it really 'ceding' authority, however, to give a reasonable degree of 'weight' to an agency's interpretation of its 'home' statute?

The High Court made the following observation at paragraph 42:

> An undesirable consequence of the *Chevron* doctrine may be its encouragement to decision-makers to adopt one of several competing reasonable interpretations of the statute in question, so as to fit the facts to the desired result. In a situation such as the present, the undesirable consequence would be that the decision-maker might be tempted to mould the facts and to express findings about them so as to establish jurisdiction and thus to insulate that finding of jurisdiction from judicial examination.

One would have thought that administrative decision-makers have an incentive of this kind with or without any concept of deference. The situation could actually be made worse in a situation where an administrative decision-maker believes that a court will only accept one

interpretation of a decision-making power. As one example, in the Full Federal Court decision in *Guo v Minister for Immigration and Ethnic Affairs*, amongst many other things, the Court found that a decision-maker should not come to an adverse view of an applicant's credibility unless he or she was in a 'positive state of disbelief'[31] about his or her claims, as opposed to being merely doubtful about them. Between 26 February 1996, when this decision was handed down, and 13 June 1997, when the High Court overturned the Federal Court in a rare 7-0 judgment,[32] the phrase 'positive state of disbelief' occurred in no less than 315 reported decisions of the Refugee Review Tribunal (RRT), of a total of 5,705 reported in that period. In the 16 years since the High Court's decision, the phrase has occurred less than 200 times in published decisions.[33] This appears to me to be an attempt by members of the RRT to 'mould the facts and to express findings about them' and so 'avoid judicial examination'.

The High Court then turned to the scope of judicial review in Australia, and in particular the prohibition on merits review.[34] The majority referred to ss 75(iii), 75(v) and 76(i) of the Australian *Constitution* as the sources of power for the High Court and other Federal Courts to review administrative decisions and the constitutionality of legislation and administrative action, and distinguished the prohibition on review of the merits from any kind of 'deference' principle. Refusal to engage in merits review is not a form of deference, it simply represents the limit, as the High Court sees it, of judicial power in Australia.[35]

Oddly, the High Court went on to state that 'in a proceeding in the original jurisdiction of a court on 'appeal' from that tribunal, the 'court should attach great weight to the opinion of the [tribunal]',[36] and that 'the weight to be given to the opinion of the tribunal in a particular case will depend upon the circumstances'.[37] The majority stated that these circumstances 'will include such matters as the field in which the tribunal operates, the criteria for appointment of its members, the materials upon which it acts in exercising its functions and the extent to which its decisions are supported by disclosed processes of reasoning'.[38] These considerations appear to inform, at paragraph 46, a 'deference to expertise' argument. The majority cited the following passage from *Eclipse Sleep Products Inc v Registrar of Trade Marks*[39] in support:

> By reason of his familiarity with trade usages in this country, a familiarity which stems not only from an examination of marks applied for and of the many trade journals which he sees, but from the perusal and consideration of trade declarations and the hearing of applications or oppositions, the *Registrar* is peculiarly well fitted to assess the standards by which the trade and public must be expected to estimate the uniqueness of particular indications of trade origin.

This line of reasoning would not look out of place in Canadian decisions! Margaret Allars also sees the development of a principle of deference to expertise in the High Court in this and preceding cases, even though the judges themselves reject the use of such a term.[40]

Ultimately, the majority set aside the decision of the Court of Appeal, thereby restoring the decision of Debelle J. Their Honours stated at paragraph 50 as follows:

> However, it was the task of Debelle J to determine the question of the jurisdiction of the Commission upon the evidence as to 'special industry' before him, as opposed to the probative material which had been before the Commission, and upon his construction of the relevant provision. His Honour did so … If, at the end of the day, Debelle J had been in doubt upon a particular factual matter, it would have been open to his Honour to resolve that doubt by giving weight to any determination upon it by the Commission.

Gaudron J

Gaudron J wrote a concurring judgment, focusing on the 'jurisdictional fact' concept. In her Honour's view, 'once it is appreciated that it is the rule of law that requires the courts to grant whatever remedies are available and appropriate to ensure that those possessed of

executive and administrative powers exercise them only in accordance with the laws which govern their exercise, it follows that there is very limited scope for the notion of "judicial deference" with respect to findings by an administrative body of jurisdictional facts'.[41] That is, in the opinion of Gaudron J, if a statute requires certain facts to exist before an administrative body has jurisdiction, it is up to the courts alone to determine whether those facts exist and whether the decision-maker may lawfully embark on the inquiry.[42] However, Gaudron J also discusses the 'weight' to be given to the opinion of the decision-maker:[43]

> Where, as here, the legality of an executive or administrative decision or of action taken pursuant to a decision of that kind depends on the existence of a particular fact or factual situation, it is the function of a court, when its jurisdiction is invoked, to determine, for itself, whether the fact or the factual situation does or does not exist. To do less is to abdicate judicial responsibility. However, there may be situations where the evidence before the court is the same or substantially the same as that before the primary decision-maker and minds might reasonably differ as to the finding properly to be made on that evidence. In that situation a court may, but need not, decline to make a different finding from that made by the primary decision-maker, particularly if the latter possesses expertise in the area concerned. Even so, in that situation, the question is not so much one of 'judicial deference' as whether different weight should be given to the evidence from that given by the primary decision-maker.

Is there really any difference between 'weight' and 'deference' in this context? Surely according more or less weight to the opinion of a decision-maker, particularly one with a particular expertise, is precisely the same thing as allowing a greater or lesser degree of deference? It looks more and more as if the Australian courts are tying themselves up in semantic knots trying to avoid use of the word 'deference'.

Academic comment

Margaret Allars specifies three reasons why the High Court rejected the *Chevron* approach for Australia. Firstly, *Chevron*, even on its own terms, was not applicable to the situation. *Chevron* was concerned with competing interpretations of a statute, while *Enfield* was concerned with 'the existence of a jurisdictional fact which was a precondition to the jurisdiction of the agency'.[44] Secondly, an application of *Chevron* may have the result that 'an agency decision maker may be encouraged to adopt the competing interpretation which the facts will satisfy so as to produce the desired result, rather than determine the interpretation on the basis of proper principles of statutory interpretation'.[45] Finally, the *Chevron* approach would be antithetical to fundamental Australian principles of judicial review. Australia, following *Marbury v Madison*,[46] has taken the view that it is the role of court to declare and enforce the law: 'This determines the limits of the function of courts in judicial review, requiring that they do not intrude upon the merits of administrative decisions.'[47]

Merits review in Australian courts

The judicial power of the Commonwealth

A striking feature of Chapter III of the Australian *Constitution* is that the term 'judicial power' is nowhere defined. It must, therefore, have been intended to be left to the High Court itself to determine what is 'judicial power'. There is, however, a marked lack of authority on this point. Stephen Gageler SC, now Gageler J of the High Court, has commented that '[t]he largest and most emphatic words in the *Constitution* – take 'judicial power' and 'absolutely free' as well-worn examples – have no fixed or intrinsic meaning and it would be vain to attempt to search for one'.[48] Tony Blackshield and George Williams QC[49] state that the 'classic' definition of judicial power is still that given by Griffith CJ in *Huddart, Parker and Co Ltd v Moorehead*, in which his Honour found as follows:[50]

> I am of the opinion that the words 'judicial power' as used in sec 71 of the *Constitution* mean the power which every sovereign authority must of necessity have to decide controversies between its subjects, or between itself and its subjects, whether the rights relate to life, liberty or property. The exercise of this power does not begin until some tribunal which has power to give a binding and authoritative decision (whether subject to appeal or not) is called upon to take action.

That is, unless there is a final determination of existing rights to be made, there is no exercise of 'judicial power'. The High Court has also made clear a number of propositions in relation to what is or is not judicial review. For example, unlike in Canada, the High Court has found that giving an advisory opinion is not an exercise of judicial power,[51] but the making of control orders applied to terrorism suspects[52] and persons convicted of sexual offences after their release from prison[53] is the exercise of judicial power.

Australian courts have also made it clear that judicial power may not be exercised by a body other than a Chapter III court, and a judicial body may not exercise executive power. This principle has been enunciated many times by the High Court, most notably in *R v Kirby: Ex parte Boilermakers' Society of Australia*.[54] which found that the Court of Conciliation and Arbitration could not exercise both the power to impose an award on the parties to an industrial dispute, and provide a final and binding legal interpretation of that award. The *Boilermakers'* decision also makes clear that Chapter III is an *exhaustive* statement of the judicial power of the Commonwealth. The majority judges, Dixon CJ and McTiernan, Fullagar and Kitto JJ stated that Chapter III is 'an exhaustive statement of the manner in which the judicial power of the Commonwealth is or may be vested ... No part of the judicial power can be conferred in virtue of any other authority or otherwise than in accordance with the provisions of Chap III'.[55]

An interesting illustration of this principle can be seen in *Lim v Minister for Immigration. Local Government and Ethnic Affairs*.[56] In that case, the applicant argued that a number of provisions of the *Migration Act 1958* which provided for the mandatory detention of 'designated persons' (persons who arrived in Australia by boat without a visa or entry permit and were given a 'designation' by the Department) were unconstitutional on a number of grounds, including the ground that orders for detention were inherently punitive in nature and therefore amounted to an exercise of the judicial power of the Commonwealth. The High Court found that s 54L, which provided that a designated person must not be released from detention unless granted a visa or removed from Australia, and s 54N, which required an 'officer' to detain a person reasonably suspected of being a designated person, without a warrant, were valid, as they were powers exercised incidentally to s 51(xix) of the *Constitution*, and were not an exercise of judicial power. They could therefore be exercised by administrative decision-makers.

'Judicial power' and merits review

There have been many cases in which courts have stated that they are not to interfere in the merits of a decision, but the reasons *why* this is the case are obscure. A frequently cited statement of the rule against merits review can be found in *Attorney-General (NSW) v Quin*, in which Brennan J (as he then was) stated as follows:[57]

> The duty and jurisdiction of the court to review administrative action do not go beyond the declaration and enforcing of the law which determines the limits and governs the exercise of the repository's power. If, in so doing, the court avoids administrative injustice or error, so be it; but the court has no jurisdiction simply to cure administrative injustice or error. The merits of administrative action, to the extent that they can be distinguished from legality, are for the repository of the relevant power and, subject to political control, for the repository alone.

The key phrase is, of course, 'to the extent that they [the merits] can be distinguished from legality'. Margaret Allars makes the following points on that issue:[58]

> Three principles of judicial review qualify the operation of the legality/merits distinction. First, review for abuse of power where a decision is *Wednesbury* unreasonable is in practical terms review of the factual basis of the decision. The *Wednesbury* test of abuse of power permits the court to strike down a decision which is so unreasonable that no reasonable decision-maker could have reached it. This ground effectively sanctions as review for legality what is review of the merits in extreme cases of disproportionate decisions. Second, according to the 'no evidence' principle, an agency makes an error of law in the course of making a finding of fact if there is a complete absence of evidence to support the factual inference. The third qualification to the legality/merits distinction is the jurisdictional fact doctrine.

Allars cites in support of her proposition that the *Wednesbury* test allows for review of 'extreme cases of disproportionate decisions' the following passage from the judgment of Mason J (as he then was) in *Minister for Aboriginal Affairs v Peko-Wallsend Ltd*:[59]

> The limited role of a court reviewing the exercise of an administrative discretion must constantly be borne in mind. It is not the function of the court to substitute its own decision for that of the administrator by exercising a discretion which the legislature has vested in the administrator. Its role is to set limits on the exercise of that discretion, and a decision made within those boundaries cannot be impugned … It follows that, in the absence of any statutory indication of the weight to be given to various considerations, it is generally for the decision-maker and not the court to determine the appropriate weight to be given to the matters which are required to be taken into account in exercising the statutory power … I say 'generally' because both principle and authority indicate that in some circumstances a court may set aside an administrative decision which has failed to give adequate weight to a relevant factor of great importance, or has given excessive weight to a relevant factor of no great importance. The preferred ground on which this is done, however, is not the failure to take into account relevant considerations or the taking into account of irrelevant considerations, but that the decision is 'manifestly unreasonable'.

Mason J starts with an orthodox statement that a court must not simply substitute its own opinion for that of an administrative decision-maker, but his Honour then admits that a court may set aside a decision on the basis that a decision-maker has given too little 'weight' to a 'relevant factor of great importance'. This is a clear admission that Australian courts do engage in review of the merits of a decision, even if only in limited circumstances. In fact, it could be argued that, given the prohibition on 'reweighing' factors in the decision-making process in *Suresh v Canada (Minister of Citizenship and Immigration)*.[60] that Australian courts actually permit a greater intrusion into the merits of a case than Canada, in this area at least.

In my opinion, the only difference distinguishing *Wednesbury* unreasonableness, 'variegated unreasonableness',[61] proportionality[62] and full review of the merits is the degree of deference provided to the decision-maker. That is, in Australia *Wednesbury* unreasonableness equates to the old 'patent unreasonableness' standard of review in Canada, while a correctness standard is applied to questions of law, for example. The judicial analysis is identical in each case, and the only difference is the *degree* of unreasonableness that must be demonstrated before the decision will be quashed. Australian courts simply provide a high degree of deference on findings of fact and matters of policy.

David Bennett QC, having defended the orthodox line early in his article, then makes a similar admission:[63]

> The main problem arising in the application of the ground of unreasonableness is the subjectivity involved in drawing the line at which the merits of a decision end and the legality of the decision begins. The courts have made it clear that the ground of unreasonableness is extremely confined and requires something overwhelming, so that it should only be in exceptional circumstances that a court should interfere with the exercise of discretion by the decision-maker.

Stating that administrative discretion should only be interfered with in 'exceptional circumstances' is the same thing as saying that a high degree of deference should be provided when reviewing the exercise of discretion. It is a review of the merits of the decision.

Merits review and 'review of the merits' distinguished

In my opinion, much of the difficulty in this area can be resolved by carefully distinguishing the terms 'merits review' and 'review of the merits'. David Bennett has defined the terms 'merits review' and 'judicial review' as follows:[64]

> A merits review body will 'stand in the shoes' of the primary decision-maker, and will make a fresh decision based upon all the evidence available to it. The object of merits review is to ensure that the 'correct or preferable'[65] decision is made on the material before the review body. The object of judicial review, on the other hand, is to ensure that the decision made by the primary decision-maker was properly made within the legal limits of the relevant power.

That is, it is the role of a primary decision-maker, or review tribunal, to make a new decision on the evidence before it. This is the same principle that the House of Lords enunciated in *Huang v Secretary of State for the Home Department*,[66] in which it found that in reviewing a primary decision the administrative adjudicator had not fulfilled his/her role and had focused on whether there was an error in the primary decision. It was the adjudicator's role to make a new decision on the basis of all the evidence before him/her, including evidence that may not have been available to the Home Department. It does not, however, follow that there is therefore no role in examining the merits of a case for a court. The court's role is one of judicial *review* – it is not the role of a court to simply reopen a case and make any order it sees fit. If the court refrains from substantive decision-making and limits itself to a review of the decision and, if the decision is to be set aside, remits it to the appropriate decision-maker for reconsideration, this is an exercise of judicial and not executive power, even if the 'substance' or the 'merits' of the decision are in question. It does not offend the *Boilermakers'* principle.

<u>*Sun v MIEA*</u>

A consideration of two Australian cases illustrates this point. In *Sun v Minister for Immigration and Ethnic Affairs*[67] the full court of the Federal Court, in my view, correctly exercised judicial power and not merits review. The applicant in *Sun* had been before the Refugee Review Tribunal (RRT) three times. The first decision, made by Member Fordham, accepted the truth of most of the applicant's claims, but found that he was not a refugee. As the Department prepared to remove Mr Sun from Australia, the Chinese consulate refused to issue him with a passport, claiming they could not identify him. Mr Sun took this as further evidence of persecution, and applied again for refugee status.[68] This second application was also refused by the Department, and then by a different member of the RRT, Ms Ransome. Ms Ransome's decision was ultimately set aside by consent, on the fairly technical basis that she had referred to an incorrect provision of the *Migration Act 1958* in her decision.

The matter then went back for a third time to the RRT, this time before Member Smidt. Ms Smidt, unlike Mr Fordham, found that Mr Sun had fabricated most of his claims and again refused his application for review. The Full Federal Court, however, set Ms Smidt's decision aside on procedural fairness grounds. The question that remained was what to do with Mr Sun. There was uncontradicted evidence before the court (and Ms Smidt) that Mr Sun was suffering from post-traumatic stress disorder,[69] and the court was clearly concerned about putting him through another RRT hearing. The leading judgment was given by Wilcox and Burchett JJ, but North J, who concurred in the result, added as follows on the disposal of the case in the final paragraph of the judgment:[70]

> Finally, I wish to refer to the observation by Wilcox J that the Minister should consider exercising his power under s 417[71] in favour of the appellant. As the comprehensive analysis made by Wilcox J in his judgment reveals, the Court has had the opportunity to examine the entire history of the appellant's involvement in the review system. The circumstances of this case are exceptional and call for a quick and humane conclusion in favour of the appellant ... A number of errors make it oppressive to require the appellant to have to face another hearing.

North J seemed sorely tempted to make some kind of declaration that Mr Sun was a refugee, but declined to do so. Making an order to this effect would go beyond judicial review of an administrative decision, and would be an exercise of executive power.

The *Guo* litigation

Sun should be compared to the *Guo* cases in the full Federal Court and then the High Court. In the Full Federal Court, Einfeld J, having first ruled that an asylum-seeker should be found to be a refugee unless the contrary could be proved beyond reasonable doubt,[72] then made orders to the effect that Mr Guo and his wife Ms Pan were refugees and 'entitled to the appropriate entry visas'.[73] Foster J agreed with the orders proposed by Einfeld J.[74]

In a rare 7-0 judgment, the High Court[75] overturned both the 'beyond reasonable doubt' approach to refugee decision-making proposed by Einfeld J, and the orders his Honour proposed. The majority judges (Brennan CJ and Dawson, Toohey, Gaudron, McHugh and Gummow JJ) found on the first point that '[i]ngenious as his Honour's approach may be, it is not supported by the terms of the Convention or the proper approach to administrative decision making in this context'.[76] On the power to make orders, the majority stated as follows:[77]

> The orders of the Full Court included a declaration 'that both appellants are refugees and are entitled to the appropriate entry visas'. A declaration in these terms lacked utility because it did not specify with reference to the legislation the 'appropriate entry visas' nor did it indicate any ready means of identification thereof. A declaration so loosely framed is objectionable in form.
>
> Moreover, a declaration, even if drawn in specific terms, should not have been made. The Tribunal was empowered by s 166BC(1) of the Act to exercise all the powers and discretions conferred upon the primary decision-maker. The Act provided (s 22AA) for determination by the Minister that a person was a refugee, but this power was exercisable upon the Minister being satisfied that a person had that status or character. The rights of the appellants to the issue of visas, which the Full Court purported to declare with present effect, would only arise upon satisfaction of statutory conditions including the determination by the Minister under s 22AA or by the Tribunal under s 166BC. In those circumstances, the appropriate course would have been for the Full Court to set aside the orders of Sackville J and to return the matter to the Tribunal for determination in accordance with law.

Kirby J concurred as follows:[78]

> [I]t is sufficient in my view to say that it was not appropriate for the Federal Court to adopt the course which the majority did. The proper course, legal error having been found, was to return the matter to the Tribunal. In that way, each of the relevant organs of government performs the functions proper to it. The Judicial Branch authoritatively clarifies and declares the law as it applies to the facts found. The Executive Branch, by power vested in it by the Legislature, performs its functions according to the law as so clarified and declared. Neither branch usurps or intrudes upon the functions proper to the other.

It is no part of the judicial function to make a decision of an administrative nature such as the grant of a visa. This is indeed a breach of the principle of separation of powers. This does not mean, however, that a court has no place in *reviewing* the merits of a decision, and leaving the substantive decision to the duly designated administrative decision-maker. This kind of reasoning complies with the admonition of Mason J in *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* that '[i]t is not the function of the court to substitute its own decision for that of the administrator by exercising a discretion which the legislature has vested in the administrator'[79] while still ensuring that the courts can truly *review* the merits of the decision.

Kirby J also noted in *Guo* as follows:[80]

> [C]are must be exercised in applying decisions about the available and appropriate remedy apt to an appeal when the process before the Court is that of judicial review. Whereas on appeal a court will often enjoy the power and responsibility of substituting its decision for that under appeal, judicial review is designed, fundamentally, to uphold the lawfulness, fairness and reasonableness (rationality)

> of the process under review. It is thus ordinarily an adjunct to, and not a substitution for, the decision of the relevant administrator.

The appeal to 'fairness' and 'rationality' in his Honour's judgment is a reference to 'review of the merits', as opposed to 'merits review'. The point that the court is an 'adjunct' to administrative decision-making is an important one – the court is not to simply substitute its view for that of the decision-maker, a sentiment similar to that expressed in the UK in *A v Secretary of State for the Home Department*[81]and in Canada in *CUPE*[82], amongst other cases. Stating that a court should not simply substitute its opinion for that of the decision-maker is simply another way of stating that deference should be afforded.

Deference and standards of review in Australia

Jurisdictional facts – definition

One particular kind of interpretation of law on which the High Court has firmly imposed a standard of correctness is the interpretation by an administrative body of 'jurisdictional facts'. The term 'jurisdictional fact' was defined in *Enfield* as a 'criterion, satisfaction of which enlivens the power of the decision-maker to exercise a discretion'.[83] More recently, in *M70/2011 and M106/2011 v Minister for Immigration and Citizenship*, the High Court described the term as follows:[84]

> The term 'jurisdictional fact' applied to the exercise of a statutory power is often used to designate a factual criterion, satisfaction of which is necessary to enliven the power of a decision-maker to exercise a discretion. The criterion may be 'a complex of elements'.[85] When a criterion conditioning the exercise of statutory power involves assessment and value judgments on the part of the decision-maker, it is difficult to characterise the criterion as a jurisdictional fact, the existence or non-existence of which may be reviewed by a court.[86] The decision-maker's assessment or evaluation may be an element of the criterion or it may be the criterion itself. Where a power is expressly conditioned upon the formation of a state of mind by the decision-maker, be it an opinion, belief, state of satisfaction or suspicion, the existence of the state of mind itself will constitute a jurisdictional fact. If by necessary implication the power is conditioned upon the formation of an opinion or belief on the part of the decision-maker then the existence of that opinion or belief can also be viewed as a jurisdictional fact.

M70 was concerned with s 198A of the *Migration Act 1958*, and in particular with the government's so-called 'Malaysia solution', which involved processing of asylum-seekers who arrived illegally in Australia in Malaysia, in return for Australia accepting persons from Malaysia who had been determined by the United Nations High Commission for Refugees (UNHCR) as having refugee status. Subsection 198A(1) provided that 'an officer may take an offshore entry person[87] from Australia to a country in respect of which a declaration is in force under subsection (3)'. Subsection 198A(3) then provided as follows:

> The Minister may:
>
> (a) declare in writing that a specified country:
>
> (i) provides access, for persons seeking asylum, to effective procedures for assessing their need for protection; and
> (ii) provides protection for persons seeking asylum, pending determination of their refugee status; and
> (iii) provides protection to persons who are given refugee status, pending their voluntary repatriation to their country of origin or resettlement in another country; and
> (iv) meets relevant human rights standards in providing that protection; and
>
> (b) in writing, revoke a declaration made under paragraph (a).

The Minister made a declaration on 25 July 2011 providing that Malaysia was a 'declared country'. The applicants sought a declaration that the declaration was invalid on the basis that ss 198A(3)(a)(i) – (iv) were each jurisdictional facts that did not exist, or alternatively that

the Minister had misconstrued the meaning of the provisions. The Minister argued that as long as he made a declaration in good faith, that was sufficient – in other words, ss 198A(3)(a)(i) – (iv) were simply relevant considerations for the Minister, not jurisdictional facts.

The majority, consisting of Gummow, Hayne, Crennan and Bell JJ, found that ss 198A(3)(a)(i) – (iv) were jurisdictional facts. At paragraph 109 their Honours noted as follows:

> It may readily be accepted that requirements to exercise the power in good faith and within the scope and for the purposes of the Act constrain the exercise of the Minister's power. But the submissions on behalf of the Minister and the Commonwealth that sub-pars (i) to (iv) of s 198A(3)(a) are not jurisdictional facts should not be accepted. To read s 198A(3)(a) in that way would read it as validly engaged whenever the Minister bona fide thought or believed that the relevant criteria were met. So to read the provision would pay insufficient regard to its text, context and evident purpose. Text, context and purpose point to the need to identify the relevant criteria with particularity.

At paragraph 118 their Honours stated that a country could only meet the requirements of s 198A(3) if that country was a signatory to the Convention Relating to the Status of Refugees, which Malaysia was (and is) not. Since the jurisdictional facts that allowed the Minister to make a declaration under s 198A(3) did not exist, the declaration could not be lawfully made and was invalid.

French CJ and Kiefel J gave separate concurring judgments. Kiefel J found that ss 198A(3)(a)(i) – (iv) were jurisdictional facts[88], but that even if they were not, the Minister had misconceived his power under s 198A(3) by relying on an undertaking by the Malaysian government to comply with certain human rights requirements, stating that 'the enquiry under s 198A(3)(a) is as to the state of the laws of the country proposed to be the subject of a declaration and it is to be undertaken at the date of such declaration'.[89]

French CJ found that ss 198A(3)(a)(i) – (iv) were not jurisdictional facts, but took a similar view to the alternative approach of Kiefel J, finding that 'the declaration must be a declaration about continuing circumstances in the specified country ... [i]t cannot therefore be a declaration based upon, and therefore a declaration of, a hope or belief or expectation that the specified country will meet the criteria at some time in the future even if that time be imminent'.[90] As Malaysia was not a signatory to the Convention, it could not meet the requirements of s 198A(3)(a) at the time the declaration was made.[91] Heydon J dissented.

This is a clear example of a correctness standard of review being applied to an executive decision. Whether or not the Minister's interpretation of s 198A was reasonable or not was not even discussed. In the view of five of the seven judges, the 'jurisdictional facts' simply did not exist and that was the end of the matter. No deference was given. The obvious result is that Australian courts, despite stressing the difference between judicial and merits review, have now adopted a quite intrusive standard of judicial review. Michael Tolley explains the situation as follows:[92]

> In Australia, the High Court explicitly rejected the *Chevron* doctrine and has adopted an approach that favours wider judicial control of administrative action. The approach, based on the doctrine of 'jurisdictional fact,' allows courts to review administrative action authorised by statute. Parliament can, and often does, stipulate that any action that it authorizes depends on the existence of various preconditions. Where the power depends on the existence of objective facts, the court on review is given the final say as to whether the required facts exist. This doctrine of jurisdictional fact has been used (manipulated some critics would say) by courts to justify a wide range of review of administrative interpretation of statutes.

While Tolley's article was published well before the decision in *M70*, I think that the current Australian government would certainly count as one of his 'critics' after this judgment.

Jurisdictional facts – 'The Minister is satisfied that ...'

Another possibility is that legislation will provide that a decision-maker may not undertake a certain action unless he or she is 'satisfied' that certain circumstances exist. In that case, the 'satisfaction' can be construed as a jurisdictional fact. The obvious question that follows is whether that 'satisfaction' has to be reasonable in some sense.

The most recent pronouncement on this subject came in *Minister for Immigration and Citizenship v SZMDS*.[93] The case involved a Pakistani applicant for a Protection Visa,[94] who claimed a well-founded fear of persecution on the basis of his membership of a particular social group, namely homosexuals. The RRT rejected his claim, refusing to accept that he was even homosexual. Section 65 of the *Migration Act 1958* provided (and still provides) that if the Minister is 'satisfied' that the applicant meets all criteria for the grant of a visa then he or she must grant it, and if not, the application must be refused.

The RRT decision was set aside by the Federal Court, which found that the 'Tribunal's conclusion that the applicant was not a homosexual was based squarely on an illogical process of reasoning'.[95] On appeal to the High Court, the Minister argued that the RRT's findings were not illogical, and that even if they were, this did not amount to a 'jurisdictional error'.

The leading judgment was given by Crennan and Bell JJ, with whom Heydon J agreed. Gummow ACJ and Kiefel J gave separate reasons, concurring on this point. Crennan and Bell JJ started by referring to *Minister for Immigration and Multicultural Affairs v SGLB*,[96] which had found that the Minister's satisfaction, referred to in s 65, was a jurisdictional fact. The key passage in the judgment relating to jurisdictional facts is as follows:

> 119. Whilst the first respondent accepted that not every instance of illogicality or irrationality in reasoning could give rise to jurisdictional error, it was contended that if illogicality or irrationality occurs at the point of satisfaction (for the purposes of s 65 of the Act) then this is a jurisdictional fact and a jurisdictional error is established. This submission should be accepted ...
>
> 120. An erroneously determined jurisdictional fact may give rise to jurisdictional error. The decision maker might, for example, have asked the wrong question or may have mistaken or exceeded the statutory specification or prescription in relation to the relevant jurisdictional fact. Equally, entertaining a matter in the absence of a jurisdictional fact will constitute jurisdictional error.

While Australian courts will generally give deference to findings of fact by administrative decision-makers, this is not the case with findings of *jurisdictional* facts. Therefore, illogicality or irrationality in finding of jurisdictional facts is a jurisdictional error and will result in the decision under review being set aside. However, Crennan and Bell JJ found that the RRT's findings were open to it on the evidence before it, and that 'a decision will not be illogical or irrational if there is room for a logical or rational person to reach the same decision on the material before the decision maker'.[97] The Federal Court decision was therefore set aside and the RRT decision restored.

Expertise

Despite the considerations mentioned above, there is a judicial trend in Australia to defer, at least on matters of fact and discretion, to expert decision-makers. This reasoning seems to have been clearly expressed for the first time in *Collector of Customs v Agfa-Gevaert Ltd*,[98] in which the High Court was concerned with the assessment by the Collector that certain goods imported by Agfa were subject to duty. The case turned on the interpretation of a Commercial Tariff Concession Order (CTCO), which was an instrument made under s 269C of the *Custom Tariff Act 1987* (Cth). The effect of a CTCO was that goods that would otherwise be subject to import duty were exempted.

Agfa sought exemption from duty of products it called 'types 8 and 9 photographic paper'. A CTCO exempted such products if they used a 'silver dye bleach reversal process' and operated by 'having the image dyes incorporated in the emulsion layers'. The High Court, in a unanimous judgment, found that the individual words in these terms should be defined in terms of their 'trade meaning', and stated as follows:[99]

> [C]ontrary to Agfa's submission, using the trade meaning of individual words in a composite phrase having no special meaning as a whole does not involve a failure to construe the phrase 'as a whole'. It simply does not follow, as a matter of logic or common-sense, that the division of a composite expression into parts which are interpreted by reference to their trade meaning, ordinary meaning or a combination thereof necessarily means that a court or tribunal has failed to construe an expression by reference to its meaning as a whole … It remains to determine whether the finding of the Tribunal was permissible as a matter of law. We think that it was.

Even though the words 'deference' and 'expertise' do not appear in the judgment, this decision reads very much as if the High Court reasoned that it should accept the interpretation given to the CTCO by the Controller of Customs, as that officer had expertise in the interpretation of technical terms such as 'silver dye bleach reversal process' that the court did not.

Australian courts tend to refer to the 'weight' to be given to certain findings of an administrative decision-maker, rather than 'deference to expertise'. However, the two formulations lead to much the same result. In *Minister for Immigration and Ethnic Affairs v Wu Shan Liang*, Kirby J, who wrote a separate judgment from the majority but concurred in the result, commented as follows:[100]

> [T]here are additional reasons for restraint and resistance to any temptation to turn a case of judicial review into, effectively, a reconsideration of the merits. Often, the decision-maker will have more experience in the consistent application of applicable administrative rules to achieve fairness to a wider range of people than typically come before the courts … In reviewing reasons and decisions of the delegates of the Minister, such as are in contest in this appeal, it is appropriate to take into account the fact that they were not untrained laymen. They had obvious expertise for the performance of their functions. By the evidence, they also had legal advice available to them.

Kirby J links the requirement not to engage in 'merits review' with respect for the expertise of decision-makers. Similarly, Gummow J stated as follows in *Minister for Immigration and Ethnic Affairs v Eshetu*:[101]

> [W]hilst it is for this Court to determine independently for itself whether in a particular case a specialist tribunal has or lacks jurisdiction, weight is to be given, on questions of fact and usage, to the tribunal's decision, the weight to vary with the circumstances. The circumstances will include such matters as the field in which the tribunal operates, the criteria for appointment of its members, the materials upon which it acts in the exercise of its functions and the extent to which its decisions are supported by disclosed processes of reasoning.

It is interesting that Gummow J would not automatically *assume* an administrative decision-maker or tribunal to be expert in its field, and would instead look for 'corroborative' evidence. The focus on the means by which a tribunal's members are appointed is particularly interesting, and may go some way towards addressing David Mullan's concern about 'political hacks' being appointed to tribunals.[102] In *Enfield* itself, the majority stated as follows:[103]

> Questions may arise, within the jurisdiction of an administrative tribunal and upon a settled construction of the applicable legislation, as to the side of the line on which a case falls. The question may be one to be decided on the particular primary facts which are largely undisputed and where little can be gained from a detailed examination of previous decisions. In such instances, this Court has said that, in a proceeding in the original jurisdiction of a court on 'appeal' from that tribunal, the 'court should attach great weight to the opinion of the [tribunal]'.[104]

At paragraph 47 the majority made comments very similar[105] to those of Gummow J in *Eshetu*:

> The weight to be given to the opinion of the tribunal in a particular case will depend upon the circumstances. These will include such matters as the field in which the tribunal operates, the criteria for appointment of its members, the materials upon which it acts in exercising its functions and the extent to which its decisions are supported by disclosed processes of reasoning. A similar view appears to be taken by the Supreme Court of Canada.

Gaudron J noted that 'there may be situations where the evidence before the court is the same or substantially the same as that before the primary decision-maker and minds might reasonably differ as to the finding properly to be made on that evidence'.[106] Her Honour added that '[i]n that situation a court may, but need not, decline to make a different finding from that made by the primary decision-maker, particularly if the latter possesses expertise in the area concerned'.[107]

Finally, *Osland v Secretary to the Department of Justice*[108] involved an application under the *Freedom of Information Act 1982* (Vic) for access to documents relating to a decision to refuse the applicant's request for an executive pardon. Heather Osland had been convicted of the murder of her violent and abusive husband, in a case that resulted in an (unsuccessful) appeal to the High Court.[109] The Victorian Department of Justice had refused her FOI application on the basis that the documents she sought were protected by Legal Professional Privilege and this decision was upheld by the Victorian Civil and Administrative Tribunal (VCAT). At paragraph 12 of the judgment, the majority (Gleeson CJ and Gummow, Heydon and Kiefel JJ) noted that the response to Mrs Osland's petition was informed by its legal professionals, 'their legal expertise being relevant to the weight to be attached to their opinions'. However, in this case the High Court found that the Victorian Court of Appeal should have examined the relevant documents itself to determine if privilege applied, and remitted the matter to the court for reconsideration.[110]

In summary, *Enfield* saw the majority of the High Court adopt a form of deference to expertise, at least in relation to findings of fact and exercise of discretion. The High Court has specifically referred to (pre-*Dunsmuir*) Canadian jurisprudence to support this line of reasoning, and the refusal to formally move to a Canadian approach of substantive review in *SZMDS*[111] does not appear to have altered this reasoning.

Discretion and fact-finding generally

On the other hand, lower courts have been regularly warned by the High Court to defer to the written reasons of administrative decision-makers, on matters of fact and discretion, as far as possible. The best-known instance of the High Court making such a pronouncement was in *Minister for Immigration and Ethnic Affairs v Wu Shan Liang*,[112] a case involving a failed asylum-seeker. The Full Federal Court[113] had found, despite the fact that the decision-maker had clearly stated that he found that the applicants did not have a 'well-founded fear of persecution', that the decision-maker had in fact decided the matter on a balance of probabilities standard, and not on the 'real chance' test propounded by *Chan v Minister for Immigration and Ethnic Affairs*.[114]

On appeal, the majority of the High Court (Brennan CJ and Toohey, McHugh and Gummow JJ) stated that 'the reasons of an administrative decision-maker are meant to inform and not to be scrutinised upon over-zealous judicial review by seeking to discern whether some inadequacy may be gleaned from the way in which the reasons are expressed',[115] and found that the Full Federal Court had erred in reading the reasons of the decision-maker in the way it had. Kirby J concurred, noting that '[i]t is erroneous to adopt a narrow approach, combing through the words of the decision-maker with a fine appellate tooth-comb, against the prospect that a verbal slip will be found warranting the inference of an error of law',[116] and

that '[t]his admonition has particular application to the review of decisions which, by law, are committed to lay decision-makers, ie tribunals, administrators and others'.[117] This form of reasoning is quite apparent in the Supreme Court of Canada decision in *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, where Abella J, writing for the court, emphasised that the purpose of reasons is to enable a court to follow the reasoning of the decision-maker, and to determine whether the decision reached falls within the *Dunsmuir* 'possible, acceptable outcomes'.[118] Reasons are not required to be perfect.[119]

Wu is the best example of a long line of judicial reasoning on this point. For example, in *Collector of Customs v Pozzolanic Enterprises Pty Ltd* the Full Federal Court stated that '[t]he Court will not be concerned with looseness in the language of the Tribunal nor with unhappy phrasing of the Tribunal's thoughts ... [t]he reasons for the decision under review are not to be construed minutely and finely with an eye keenly attuned to the perception of error'.[120] Finally, in a passage that appears frequently in Department of Immigration and Citizenship training materials, the Federal Court stated in *Obejas v Minister for Immigration and Ethnic Affairs* that '[t]he reasons of the Tribunal are not a Statute ... [t]hey are not to be parsed and analysed as if they were'.[121]

Kirby J has also noted that there is a distinct similarity between the North American approach to deference and the *Wu Shan Liang* principle. In *Minister for Immigration and Multicultural Affairs v Singh*[122] the Minister had argued that a reviewing court should show deference to the expertise of the Administrative Appeals Tribunal (AAT) in making a finding that an applicant for a Protection Visa was excluded from refugee status under Article 1F(b) of the Convention. Kirby J observed as follows:[123]

> Where a repository of statutory power has been designated by the Parliament as the decision-maker, required to determine whether critical facts do or do not exist, courts, without clear authority to go further, should restrict their intervention to cases that fall within the categories that have been identified as evidencing legal error. In the United States, such restraint upon appellate intervention is often described in terms of the 'deference' owed by courts of law to administrators entrusted with primary decision-making in that country. This principle is especially applicable in the context of immigration decisions. In this Court there are suggestions of a similar approach in the repeated expressions of caution against over-zealous scrutiny of administrative reasons, nominally for error of law, that finds such error in infelicitously expressed or otherwise imperfect reasons.[124]

Kirby J, however, found that the AAT member had misconstrued the meaning of Article 1F(b) and had therefore made an error of law. His Honour noted that 'where the decision-maker has given reasons that indicate that the finding was arrived at by a misunderstanding of the applicable legal test, or where the finding resulted from a failure to apply correctly the language of that phrase to the facts as found, a court reviewing for error of law is entitled to intervene'.[125] The Minister's appeal was therefore dismissed.

Endnotes

1 (2000) 199 CLR 135.
2 See in particular Justice Kenneth Hayne, 'Deference: an Australian Perspective', [2011] *Public Law* 75.
3 [2010] HCA 16.
4 [1979] 2 SCR 227.
5 David Mullan, 'Supreme Court of Canada and Tribunals – Deference to the Administrative Process: a Recent Phenomenon or a Return to Basics?', (2001) 80 *Canadian Bar Review* 399.
6 [2008] 1 SCR 190 at paragraph 47.
7 Referring to *Canada (Attorney General) v Mossop* [1993] 1 SCR 554 at 596.
8 *Associated Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223.
9 Michael Taggart, 'Australian Exceptionalism in Judicial Review', (2008) 36 *Federal Law Review* 1 at 13.
10 (1803) 5 US (1 Cranch) 137.
11 (1984) 467 US 837.

12 Pub. L 95-95, 91 Stat 685.
13 Supra n11 at 844.
14 It is also notable that later US cases have even used the phrase '*Chevron* deference' – *US v Mead Corporation* (2001) 533 US 218 at 226.
15 Supra n11 at 862.
16 Ibid at 842-3.
17 Ibid at 844.
18 Ibid at 866.
19 Much of this section is paraphrased from Margaret Allars, '*Chevron* in Australia: A Duplicitous Rejection?', (2002) 54 *Administrative Law Review* 569 at 581-2.
20 *Enfield City v Development Assessment Commission* (1996) 91 LGERA 277.
21 *Enfield City Corporation v Development Assessment Commission* (1997) 69 SASR 99.
22 Ibid at 119.
23 Ibid at 115.
24 Ibid at 121.
25 Ibid.
26 Supra n1 at paragraph 40.
27 Ibid at paragraph 41.
28 Justice Stephen Breyer, 'Judicial Review of Questions of Law and Policy', (1986) 38 *Administrative Law Review* 363 at 381.
29 Keith Werhan, 'Delegalizing Administrative Law', (1996) *University of Illinois Law Review* 423 at 457.
30 *Chevron*, supra n11 at 844-5.
31 (1996) 135 ALR 421 at paragraph 20 of the judgment of Foster J.
32 *Minister for Immigration and Ethnic Affairs v Guo* (1997) 191 CLR 559.
33 These figures are taken from the RRT decisions database at http://www.austlii.edu.au/au/cases/cth/RRTA/.
34 *Enfield*, supra n1 at paragraph 43.
35 The majority cites in support of this proposition *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 and *Attorney-General (New South Wales) v Quin* (1990) 170 CLR 1.
36 *Enfield*, supra n1 at paragraph 45, citing *Registrar of Trade Marks v Muller* (1980) 144 CLR 37 at 41.
37 Ibid at paragraph 47.
38 Citing Gummow J in *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611 at 655.
39 (1957) 99 CLR 300 at 321-322.
40 Allars, supra n19 at 585-7.
41 Supra n1 at paragraph 59.
42 This approach closely resembles the Canadian pre-*CUPE* 'preliminary question' doctrine.
43 Supra n1 at paragraph 60.
44 Allars, supra n19 at 584.
45 Ibid.
46 Supra n10.
47 Allars, supra n19 at 585.
48 Stephen Gageler SC, 'Beyond the Text: A Vision for the Structure and Function of the *Constitution*', (2009) 32 *Australian Bar Review* 138 at 141.
49 Tony Blackshield and George Williams QC, *Australian Constitutional Law and Theory: Cases and Materials*, Federation Press, 2006 at 662.
50 (1909) 8 CLR 330 at 357.
51 *Re Judiciary Act 1903-1920 and In re Navigation Act 1912-1920* (1921) 29 CLR 257 (the Advisory Opinions Case').
52 *Thomas v Mowbray* [2007] HCA 33.
53 *Fardon v Attorney-General (Queensland)* (2004) 223 CLR 575.
54 (1956) 94 CLR 254.
55 Ibid at 270, cited with approval by *Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at paragraph 21.
56 Supra n55.
57 Supra n35 at 36.
58 Allars, supra n19 at 583-4.
59 Supra n35 at 42.
60 [2002] 1 SCR 3. Note the apparent reconsideration of this position, at least in relation to Charter rights, in *Doré v Barreau du Québec* [2012] SCC 12.
61 This is a commonly-used term in UK decisions, especially prior to the passage of the *Human Rights Act 1998*, and originated in *Budgaycay v Secretary of State for the Home Department* [1987] AC 514.
62 This is the term used in relation to consideration of s 1 of the Charter of Rights and Freedoms in Canada (*R v Oakes* [1986] 1 SCR 103), and in relation to decisions under the UK *Human Rights Act 1998* (*R v Secretary of State for the Home Department, ex parte Daly* [2001] 2 AC 532).
63 David Bennett QC, 'Balancing Judicial Review and Merits Review', (2000) 53 *Administrative Review* 3 at 11.
64 Ibid at 7.
65 *Drake v Minister for Immigration and Ethnic Affairs* (1979) 2 ALD 60 at 68.
66 [2007] 2 AC 167.

67 (1997) 81 FCR 71.
68 This course of action would now be prohibited by s 48A of the *Migration Act 1958*, which, broadly speaking, prohibits repeat claims for refugee status onshore. Section 48A did not exist at the time of Mr Sun's second application.
69 Supra n67 at 81-3.
70 Ibid at 137.
71 Section 417 of the *Migration Act 1958* gives the Minister a non-compellable power to grant a visa to a person who is refused refugee status by the RRT, on humanitarian grounds.
72 *Guo* (Full Federal Court), supra n31, paragraph 25 of the judgment of Einfeld J.
73 Ibid at paragraphs 63 and 68. Incidentally, there is not and never has been such a thing as an 'entry visa' – Einfeld J apparently conflated the terms 'visa' and 'entry permit'. The latter kind of document was abolished with the passage of the *Migration Reform Act 1992*, which came into effect on 1 September 1994, and the visa has been the sole authority for entry to Australia by a non-citizen since that date.
74 Ibid at paragraph 54 of the judgment of Foster J.
75 *Guo* (High Court), supra n32.
76 Ibid at 574.
77 Ibid at 579.
78 Ibid at 600.
79 Supra n35 at 42.
80 Supra n32 at 600.
81 *A v Secretary of State for the Home Department* [2004] UKHL 56.
82 Supra n4.
83 Supra n1 at paragraph 28.
84 [2011] HCA 32 at paragraph 57.
85 *Enfield*, supra n1 at paragraph 28.
86 *Australian Heritage Commission v Mount Isa Mines Ltd* (1997) 187 CLR 297 at 303-304.
87 An 'offshore entry person' is a non-citizen who arrived without a visa at an 'excised offshore place' – these terms are defined in s 5 of the *Migration Act 1958*. Both plaintiffs had arrived without a visa at Christmas Island, which is an excised offshore place under paragraph (a) of the definition of 'excised offshore place' in s 5(1).
88 Supra n84 at paragraph 155.
89 Ibid at paragraph 156.
90 Ibid at paragraph 62.
91 Ibid at paragraphs 66-7.
92 Michael Tolley, 'Judicial Review of Agency Interpretation of Statutes: Deference Doctrines in Comparative Perspective', (2003) 31 *Policy Studies Journal* 421 at 427.
93 Supra n3.
94 Under s 36 of the *Migration Act 1958*, the key criterion for the grant of a Protection Visa is that the applicant has been found to be a refugee as defined by the *Convention Relating to the Status of Refugees*.
95 *SZMDS v Minister for Immigration and Citizenship* [2009] FCA 210 at paragraph 29.
96 (2004) 207 ALR 12.
97 Supra n3 at paragraph 135.
98 (1996) 186 CLR 389.
99 Ibid at 409-10.
100 (1996) 185 CLR 259 at paragraph 25 of the judgment of Kirby J.
101 Supra n38 at 655.
102 David Mullan, 'Deference: is it Useful Outside Canada?', (2006) *Acta Juridica* 42 at 52.
103 *Enfield*, supra n1 at paragraph 45.
104 Referring to *Muller*, supra n37 at 41.
105 Margaret Allars views the two tests as identical – see Allars, supra n19 at 587.
106 *Enfield*, supra n1 at paragraph 60.
107 Ibid.
108 [2008] HCA 37.
109 *Osland v The Queen* (1998) 197 CLR 316.
110 Supra n108 at paragraph 58.
111 Supra n3 at paragraph 28.
112 Supra n100.
113 *Wu Shan Liang v Minister for Immigration and Ethnic Affairs* (1995) 130 ALR 367.
114 (1989) 169 CLR 379.
115 Supra n100 at paragraph 31 of the majority judgment.
116 Ibid at paragraph 24 of the judgment of Kirby J.
117 Ibid.
118 [2011] SCC 62 at paragraph 16.
119 Ibid at paragraph 18.
120 (1993) 43 FCR 280 at 287.
121 [1995] FCA 1458 at paragraph 21.
122 (2002) 209 CLR 533.

123 Ibid at paragraphs 131 and 132.
124 Referring to *Wu Shan Liang*, supra n100 at 271-272, 291.
125 Supra n122 at paragraph 134.