Perhaps too, this need not be seen as a violation of the separation of powers or the overthrow of the doctrine of *ultra vires*.

Perram J's paper usefully reminds us that that more than a century and half ago in *Royal British Bank v Turquand*[35] the Chancery Courts put a stop to companies being allowed to avail of the *ultra vires* doctrine to deny the constitutional authority of their officers notwithstanding that the ultimate source of a company's power to act under its memorandum and articles of association was entirely statutory in origin. It may not be fanciful to imagine that this kind of issue could arise in the Australian constitutional setting given the outcome in *Williams v Commonwealth of Australia* [2012] HCA 23 were the Commonwealth ever to deny its own constitutional authority. It seems unthinkable that such a defence would be permitted. It is but a short step from that premise to the wider public law notion of administrative estoppel.

The jurisprudential difficulties standing in the way of Australian courts reaching a similar functional conclusion as their civilian counterparts are, of course, formidable. They may ultimately be shown to forever preclude that course being taken but I am sceptical of the more pessimistic view that that possibility has already been ruled out.[36] As Justice Frankfurter of the Supreme Court of the United States of America observed, in a remark equally apposite to all highest courts obliged to respond to the challenges of the growth and increasing complexity of government systems: 'in administrative law we are dealing pre-eminently with law in the making; with fluid tendencies and tentative traditions'.[37]

Endnotes

1 'General Principles of Law in Civilian Legal Systems: What Lessons for Australian Administrative Law?', AGS Administrative Law Symposium, Excellence in Government Decision–Making, Canberra, 21-22 June 2013, available at http://www.fedcourt.gov.au/publications/judges-speeches/justice-perram/perram-j-201.

2 Keynote address, 11th AIJA Tribunals Conference, Surfers Paradise, Australia, 5-6 June 2008, available at http://www.aat.gov.au/Publications/SpeechesAndPapers /Frydman/AdministrativeJusticeInFrance2008.htm

3 It seems plausible to suggest that, in the aftermath of *Minister for Immigration v SZMDS* (2010) 240 CLR 61, and despite considerable differences in underpinning jurisprudence, Australian law may be currently in the process of edging closer to adopting review standards which may functionally be not greatly different from the standard in many other countries which apply the notion of proportionality. As in Canada (see *Baker v Canada* [1999] 2 SCR 817; 174 DLR (4th) 193—where similar jurisprudence, albeit influenced by notions of rights and deference foreign to Australian law, has been considerably developed) that outcome would be arrived at not by the overthrow of prior doctrine but through the mundane and orthodox route of statutory interpretation in the light of presumptions of legality. In *Minister for Immigration and Citizenship v Li* [2013] HCA 18 the plurality, Hayne, Keifel and Bell JJ stated at [63] 'The legislature is taken to intend that a discretionary power, statutorily conferred, will be exercised reasonably'. This appears to be conceptually more flexible than *Wednesbury* unreasonableness and allow a bridge to permit review if a court cannot be satisfied that the decision was properly open, see at [68] 'The legal standard of unreasonableness should not be considered as limited to what is in effect an irrational, if not bizarre, decision − which is to say one that is so unreasonable that no reasonable person could have arrived at it – nor should Lord Greene MR be taken to have limited unreasonableness in this way in his judgment in *Wednesbury*. This aspect of his Lordship's judgment may more sensibly be taken to recognise that an inference of unreasonableness may in some cases be objectively drawn even where a particular error in reasoning cannot be identified'. Such a standard opens the prospect of Australian courts achieving substantially the same end as the English courts have achieved by applying a doctrine of proportionality. See also Gageler J at [88]-[92] under the heading 'Reasonableness as a statutory implication' and, similarly, but perhaps more cautiously and limited to reasonableness in its *Wednesbury* form, French CJ at [23]-[24].

4 International Association of Supreme Administrative Jurisdictions, *The Review of the Administrative Decision by Administrative Courts and Tribunals*: Association International des Hautes Jurisdictions Administratives, *Le controle des decisions administratives par les cours et les tribunaux administratifs* (La documentation Francais 2013).

5 *Fardon v Attorney-General (Queensland)* (2004) 223 CLR 575, 600.

6 (1996) 189 CLR 51.

7 (2010) 239 CLR 531.

8 The Commonwealth Administrative Review Committee, chaired by Sir John Kerr, and the Committee of Review of Prerogative Writ Procedures, chaired by RJ Ellicott QC.
9 *Judicial Review Act 1991* (Qld); *Judicial Review Act 2000* (Tas); *Administrative Decisions (Judicial Review) Act 1989* (ACT). The now little-used *Administrative Law Act 1978* (Vic) differs substantially from the *Administrative Decisions (Judicial Review) Act*. Those states in which judicial review remains governed wholly or partly by the common law have simplified their procedures: see, eg Order 56 of the *Supreme Court (General Civil Procedure) Rules 2005* (Vic); and in New South Wales, Practice Note No. SC CL 3, Supreme Court Common Law Division – Administrative Law List, 16 July 2007.
10 (1995) 183 CLR 245.
11 Although the Queensland Civil and Administrative Tribunal primarily exercises administrative power it has been held to be a 'court of a State' for the purposes of the *Constitution*: *Owen v Menzies* [2012] QCA 170; (2012) 265 FLR 392, 396-400 (de Jersey CJ), 405-409 (McMurdo P). The Tribunal's orders can be enforced by filing them with an affidavit in an appropriate court: *Queensland Civil and Administrative Tribunal Act 2009 (Qld)* ss 131 and 132. Its status as a 'court of a State' also permits it, subject to inconsistency with federal law, conveniently to exercise jurisdiction in matters in which the Commonwealth is a party. Otherwise the limits whereby the Commonwealth is subject to State administrative decisions, have proved prone to give rise to disputes—notwithstanding what was said by the High Court in *Re Residential Tenancies Tribunal (NSW); Ex parte the Defence Housing Authority* (1997) 190 CLR 410 *('Henderson's Case')*—which affirmed in that particular instance that the Commonwealth was bound.
12 Report No 39 (1995).
13 (2003) 211 CLR 476.
14 A similar issue might arise where an employee's condition has been contributed to by injuries arising out of employment with the same employer, but occurring at different times, initially when the employer was bound by State or Territory legislation and later when the employer was licenced under the *SRC Act*. For the full terms of the submission see AAT *Submission to the Review of the Safety, Rehabilitation and Compensation Act 1988* [2.4].
15 See for example ss 631 and 632 of the *Fair Work Act 2009* and ss 37 and 38 of the *Fair Work Act 1994* (SA).
16 Justice Perram, 'General Principles of Law in Civilian Legal Systems' p 12.
17 Even conceding that in practice the distinction between correcting legal error and examining the merits of a decision may sometimes be blurred 'there is in Australian legal theory a bright line between judicial review and merits review,' see Stephen Gageler, 'The Legitimate Scope of Judicial Review' (2001) 21 *Australian Bar Review* 279, 279.
18 (1990) 170 CLR 1, at 35-36.
19 Justice Perram, 'General Principles of Law in Civilian Legal Systems' p 8.
20 Ibid; *R v North and East Devon Health Authority; Ex parte Coughlan* [2001] QB 213.
21 [2012] HCA 31 at [61].
22 Matthew Groves, 'Substantive Legitimate Expectations in Australian Administrative Law' (2008) 32 *Melbourne University Law Review* 470, 490.
23 See Enid Campbell and Matthew Groves, 'Polycentricity in Administrative Decision-Making', in Matthew Groves (ed), *Law and Government in Australia* (2005) 213.
24 Justice Perram, 'General Principles of Law in Civilian Legal Systems' p 15.
25 Nicholas Seddon, citing *Commonwealth v Newcrest Mining (WA) Ltd* (1995) 58 FCR 167, suggests there may be a basis to distinguish particular from general reliance: 'It is generally not sensible or reasonable to make large investment decisions or other commitments on the basis of a government announcement or other policy statements. On the other hand, an operational statement or assurance (that is, one about day-to-day matters as opposed to policy) may generate a legitimate claim, either through a negligence claim, through estoppel or by invoking an Ombudsman's ability to make a recommendation for an ex gratia or act-of-grace payment'. Nicholas Seddon, *Government Contracts: Federal, State and Local* (5th ed, 2013) 287.
26 Paul Finn and Kathryn Jane Smith, 'The Citizen, the Government and Reasonable Expectations' (1992) 66 *Australian Law Journal* 139, 146.
27 [1977] Q.B. 643 at p 707.
28 *Attorney-General (NSW) v Quin* (1990) 170 CLR 1, 18.
29 Sir Anthony Mason, 'The Place of Estoppel in Public Law' in Matthew Groves (ed), *Law and Government in Australia* (Federation Press, 2005) 160, 175.
30 RS French, 'The Equitable Geist in the Machinery of Administrative Justice' (2003) 39 *AIAL Forum* 1, 11; see also Alexandra O'Mara, 'Estoppel against Public Authorities: is Australian Public Law Ready to Stand upon its own Two Feet?' 42 *AIAL Forum* 1.
31 Justice Perram, 'General Principles of Law in Civilian Legal Systems', 16.
32 Greg Weeks, 'Estoppel and Public Authorities: Examining the Case for an Equitable Remedy' (2010) 4 *Journal of Equity* 247, 254.
33 Justice Perram, 'General Principles of Law in Civilian Legal Systems', 18.
34 See for example *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 per Gaudron, McHugh, Gummow, Kirby and Hayne JJ [82].
35 (1856) 6 E & B 327.
36 Australia is not the only nation with a common-law inheritance and constitutional structure that have led to hesitancy twinned with a reluctance to rule out the prospect of change. In the United States, the Supreme

Court 'has come close to saying that the government can never be equitably estopped based on a false or misleading statement of one of its agents no matter how much an individual has relied on that statement to her detriment or how reasonable her reliance. Each time it seems tempted to take this step, however, the Court stops just short of saying "never."' see Pierce, *Administrative Law Treatise* (Aspen, 4th ed, 2002) quoted in *Lam* (2003) 214 CLR 1, 22 (McHugh and Gummow JJ).

37 Felix Frankfurter, 'The Task of Administrative Law (1926) 75 *University of Pennsylvania Law Review* 614, 619, quoted in Dame Sian Elias, 'Administrative Law for "Living People"' (2009) 68 *Cambridge Law Journal* 47, 47.

THE CONCEPT OF 'DEFERENCE' IN JUDICIAL REVIEW OF ADMINISTRATIVE DECISIONS IN AUSTRALIA – PART 2

Alan Freckelton*

This article is in two parts. The first part[1] considered the rejection of the deference approach in *Corporation of the City of Enfield v Development Assessment Commission*[2], 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.

Privative clauses in the High Court

Deference on questions of law generally

While Canadian courts may give deference to an administrative decision-maker in at least some matters of law, most particularly when interpreting a 'home statute', Australian courts do not. Sackville J, writing extrajudicially, has stated:[3]

> But … two principles have been accepted, generally without challenge, as fundamental in determining the proper scope of judicial review. The first is that courts exercising powers of judicial review must not intrude into the 'merits' of administrative decision-making or of executive policy making. The second is that it is for the courts and not the executive to interpret and apply the law, including the statutes governing the power of the executive. These can be regarded as the twin pillars of judicial review of administrative action in Australia.

Even more bluntly, Hayne J, also writing extrajudicially, stated that '[t]he whole system of Government in Australia is constructed upon the recognition that the ultimate responsibility for the final definition, maintenance and enforcement of the boundaries within which governmental power may be exercised rests upon the judicature'.[4] In *Enfield* Gaudron J stated that 'that there is very limited scope for the notion of "judicial deference" with respect to findings by an administrative body of jurisdictional facts',[5] which is a question of law, not fact-finding.

There is, of course, real difficulty in determining the difference between an error of law and an error of fact in the first place. Sir Anthony Mason, the former Chief Justice of the High Court, has written extrajudicially as follows:[6]

> The difficulty of distinguishing between questions of law, on the one hand, and questions of fact, not to mention questions of policy, is notorious. This difficulty unquestionably creates complications for a system of administrative law such as ours which requires questions of law and questions of fact to be treated differently. In the United States and Canada, the assumption that there is a distinction has

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> been challenged. So far that is not the position in Australia, where the High Court has noted that the distinction 'is a vital distinction in many fields of law', while acknowledging that 'no satisfactory test of universal application has yet been formulated'.[7]

The situation changes, however, when a privative clause is inserted into the relevant legislation. The clash between the insertion of a privative clause into legislation and the constitutional guarantee of judicial review in s 75 of the *Constitution* has been considered on several occasions by the High Court.

Privative clause cases from Federation to Hickman

Until 1945, the High Court's approach was to find that privative clauses were unconstitutional because they offended s 75 of the *Constitution*. In *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Whybrow*[8] the Court simply noted that s 31 of the *Conciliation and Arbitration Act 1904 (Cth)* which provided that '[n]o award of the Court shall be challenged, appealed against, reviewed, quashed or called into question in any other Court on any account whatsoever', did not mention prohibition or mandamus, and made an order of prohibition against the Court of Conciliation and Arbitration. However, in *R v Commonwealth Court of Conciliation and Arbitration* (the *Tramways Case*)[9], in the face of a better drafted privative clause, the court made itself unambiguously clear, with a unanimous finding that such clauses conflicted with s 75 of the *Constitution* and were invalid. Powers J stated that '[t]he power directly conferred on the High Court by the Court as original jurisdiction cannot be taken away by the Commonwealth Parliament'.[10] The *Tramways Case* was upheld as late as 1942, in *Australian Coal and Shale Employees Federation v Aberfield Coal Mining Co Ltd.*[11]

However, from 1945 the court attempted to reconcile privative clauses and s 75 by finding that a privative clause could not oust judicial review, but it expanded the situations in which an administrative decision would be found to be valid by a court. This line of authority, known as the *Hickman* approach for the leading case, *R v Hickman; Ex parte Fox and Clinton,*[12] was basically the approach taken by the High Court from 1945 to 2003. The key part of the *Hickman* judgment can be found in the judgment of Dixon CJ as follows:[13]

> [U]nder Commonwealth law … the interpretation of provisions of the general nature of reg 17 is well established. They are not interpreted as meaning to set at large the courts or other judicial bodies to whose decision they relate. Such a clause is interpreted as meaning that no decision which is in fact given by the body concerned shall be invalidated on the ground that it has not conformed to the requirements governing its proceedings or the exercise of its authority or has not confined its acts within the limits laid down by the instrument giving it authority, provided always that its decision is a bona fide attempt to exercise its power, that it relates to the subject matter of the legislation, and that it is reasonably capable of reference to the power given to the body.

Later cases added that the administrative decision in question must also conform to mandatory (or 'inviolable') requirements within the Act itself.[14] For example, if the Act itself required that certain procedural rights be given to an applicant, failure to follow those procedures would have the result that the privative clause would not protect the decision. However, the principles basically remained unchanged until 2003.

The jurisdictional error qualification: the evisceration of Hickman in S157

Plaintiff S157/2002 v Commonwealth of Australia[15] involved a constitutional challenge to the validity of s 474 of the *Migration Act 1958* and administrative challenges to a number of decisions that were defended on the basis of this section. At the time of the judgment, subsections 474(1) and (2) relevantly provided as follows:

(1) A privative clause decision:

(a) is final and conclusive; and

(b) must not be challenged, appealed against, reviewed, quashed or called in question in any court; and

(c) is not subject to prohibition, mandamus, injunction, declaration or certiorari in any court on any account.

(2) In this section, ***privative clause decision*** means a decision of an administrative character made, proposed to be made, or required to be made, as the case may be, under this Act or under a regulation or other instrument made under this Act (whether in the exercise of a discretion or not) …

Subsection 474(3) made it clear that a decision to grant or refuse a visa was a 'privative clause decision'.

The applicants argued that s 474 conflicted with s 75 of the *Constitution* and was therefore invalid, or alternatively that s 474 did not protect 'jurisdictional errors', a term that will be explained shortly. The High Court rejected the first argument but accepted the second, which left s 474 'on the books', but rendered it of almost no effect. The leading judgment was given by Gaudron, McHugh, Gummow, Kirby and Hayne JJ. At paragraph 73, their Honours stated that:

> A privative clause cannot operate so as to oust the jurisdiction which other paragraphs of s 75 confer on this Court, including that conferred by s 75(iii) in matters 'in which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party'. Further, a privative clause cannot operate so as to allow a non-judicial tribunal or other non-judicial decision-making authority to exercise the judicial power of the Commonwealth[16]. Thus, it cannot confer on a non-judicial body the power to determine conclusively the limits of its own jurisdiction.

Their Honours stated at paragraph 76 that an administrative decision affected by jurisdictional error is a legal nullity, referring to *Minister for Immigration and Multicultural Affairs v Bhardwaj.*[17] Therefore, a 'decision' affected by a privative clause is only a putative decision and cannot be a 'privative clause decision' for the purposes of s 474. When read in this way, there was no conflict between s 474 and s 75 of the *Constitution*, and the provision was therefore constitutionally valid. Indeed, s 75(v) was reaffirmed to amount to 'an entrenched minimum provision of judicial review',[18] 'assuring to all people affected that officers of the Commonwealth obey the law and neither exceed nor neglect any jurisdiction which the law confers on them',[19] in a passage remarkably similar to the Canadian case of *Crevier.*[20]

The remaining issue was the definition of 'jurisdictional error'. Curiously, none of the judgments referred to the High Court's decision of just two years previously, *Minister for Immigration and Multicultural Affairs v Yusuf.*[21] In that case, McHugh, Gummow and Hayne JJ defined the term as follows at paragraph 82:

> It is necessary, however, to understand what is meant by 'jurisdictional error' under the general law and the consequences that follow from a decision-maker making such an error. As was said in *Craig v South Australia,*[22] if an administrative tribunal (like the Tribunal):
>
> 'falls into an error of law which causes it to identify a wrong issue, to ask itself a wrong question, to ignore relevant material, to rely on irrelevant material or, at least in some circumstances, to make an erroneous finding or to reach a mistaken conclusion, and the tribunal's exercise or purported exercise of power is thereby affected, it exceeds its authority or powers. Such an error of law is jurisdictional error which will invalidate any order or decision of the tribunal which reflects it.'

> 'Jurisdictional error' can thus be seen to embrace a number of different kinds of error, the list of which, in the passage cited from *Craig*, is not exhaustive[23] … if an error of those types is made, the decision-maker did not have authority to make the decision that was made; he or she did not have jurisdiction to make it.

The kinds of 'jurisdictional error' identified by *Craig* and *Yusuf* are very wide, and endorse the *Anisminic*[24] approach as far as possible without expressly abolishing the distinction between jurisdictional and non-jurisdictional errors.

The judgment of Gleeson CJ is of interest primarily for his Honour's attempt to distinguish between jurisdictional and non-jurisdictional errors:[25]

> The concept of 'manifest' defect in jurisdiction, or 'manifest' fraud, has entered into the taxonomy of error in this field of discourse. The idea that there are degrees of error, or that obviousness should make a difference between one kind of fraud and another, is not always easy to grasp. But it plays a significant part in other forms of judicial review. For example, the principles according to which a court of appeal may interfere with a primary judge's findings of fact, or exercise of discretion, are expressed in terms such as 'palpably misused [an] advantage', 'glaringly improbable', 'inconsistent with facts incontrovertibly established', and 'plainly unjust'. Unless adjectives such as 'palpable', 'incontrovertible', 'plain', or 'manifest' are used only for rhetorical effect, then in the context of review of decision-making, whether judicial or administrative, they convey an idea that there are degrees of strictness of scrutiny to which decisions may be subjected.

The majority judges in *S157* came to the conclusion that a failure of procedural fairness was a 'jurisdictional error' and therefore s 474 did not protect the Tribunal decision from such a claim.[26] The *Hickman* principle has therefore been overturned. The result is that when a decision is protected by a privative clause, deference will be shown to the decision-maker on a point of law to the extent that no jurisdictional error is involved. Otherwise, the decision will be set aside.

No privative clauses have been enacted in Commonwealth legislation since *S157* was decided. This may be an admission by governments that such clauses are simply not worthwhile. All in all, it now appears that *Hickman* was a post-WWII aberration in Australian law.

Why the change?

It is almost impossible to overstate the hostility towards privative clauses by Australian academics. Duncan Kerr, the former Commonwealth Minister for Justice, is the author of an article entitled 'Privative Clauses and the Courts: Why and How Australian Courts have Resisted Attempts to Remove the Citizen's Right to Judicial Review of Unlawful Executive Action';[27] two chapters in that article are entitled 'Attempts to Thwart Judicial Review of Executive Action' and 'A Detour to Deference: The *Hickman* Myth'. The latter clearly elucidates the abhorrence of 'deference' of Australian commentators.

In one sense, it could be argued that the High Court decision in *S157* simply returns the High Court to a pre-*Hickman* position. This is not entirely accurate, however – the *Tramways* approach was to strike down the privative clause altogether as constitutionally invalid. The High Court's approach in *S157* was to 'gut' s 474 of the *Migration Act* rather than to invalidate it; the Court effectively found that non-jurisdictional errors will be protected while jurisdictional errors will not, which gives the courts the power to determine what a jurisdictional error is and what it is not. This gives the courts extraordinary control over the executive, giving them the ability to pick and choose which decisions to strike down. Since *S157* was decided, the High Court has found in *Minister for Immigration and Citizenship v SZJSS*[28] that apprehended bias also amounts to jurisdictional error, although no such bias was found to exist in that case. More controversially, the High Court and Full Federal Court

have found that even a refusal to permit an adjournment can amount to a jurisdictional error in certain circumstances.[29] It appears that Australia is headed for a much more interventionist approach from its courts than has been the case for some time and, unlike Canada, its academics are likely to applaud this approach.

A variable standard of reasonableness review in Australia?

As noted earlier, Australian courts are quite prepared to review an administrative decision on the ground of *Wednesbury* unreasonableness, despite the fact that this is clearly a review of the merits of the decision. Is there any move in Australia to create a variable standard of reasonableness review, such as expressly exists in the UK and appears to exist (despite denials from the Supreme Court) in Canada?

The view that there may be a variable standard of proof appears to predate *Wednesbury* in Australia. In *Briginshaw v Briginshaw*, Dixon J (as he then was) noted as follows in the context of a petition for divorce:[30]

> [A]t common law no third standard of persuasion was definitely developed. Except upon criminal issues to be proved by the prosecution, it is enough that the affirmative of an allegation is made out to the reasonable satisfaction of the tribunal. But reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or facts to be proved. The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal.

The *Briginshaw* principle has been restated many times, but by itself has never developed into a principle of 'variegated reasonableness review'. Instead, it has been used, for example, to emphasise that an allegation of actual bias against a decision-maker will only be upheld if 'accusations are distinctly made and clearly proved',[31] and that a decision-maker will only have 'serious reasons to consider'[32] that an applicant has committed acts which exclude him or her from protection under the *Convention Relating to the Status of Refugees* if there is clear evidence before him or her to that effect.[33] That is, the *Briginshaw* principle has been applied more as a requirement of procedural fairness than going to the substance of a decision.

More recently in Australia, there has been a move towards review on the grounds of irrationality. This ground was most clearly considered by the High Court in *Minister for Immigration and Citizenship v SZMDS,*[34] in which the High Court split three ways. Crennan and Bell JJ allowed the Minister's appeal, finding that irrationality or illogicality is a ground of judicial review in Australian law, but that the RRT's decision was not irrational or illogical. Gummow ACJ and Kiefel J also found that irrationality is a ground of review, and found that the decision in question *was* illogical. Heydon J found that the decision was not irrational, but declined to make a ruling on whether irrationality or illogicality is a separate ground of review. This means that four of five judges accepted the existence of irrationality as a ground of review.

Crennan and Bell JJ seemed to take quite a narrow interpretation of irrationality. Their Honours noted that mere disagreement, even 'emphatic disagreement',[35] is not sufficient to find a decision to be 'irrational'. The key passage of the judgment can be found at paragraph 131:

> What was involved here was an issue of jurisdictional fact upon which different minds might reach different conclusions. The complaint of illogicality or irrationality was said to lie in the process of reasoning. But, the test for illogicality or irrationality must be to ask whether logical or rational or reasonable minds might adopt different reasoning or might differ in any decision or finding to be made

> on evidence upon which the decision is based. If probative evidence can give rise to different processes of reasoning and if logical or rational or reasonable minds might differ in respect of the conclusions to be drawn from that evidence, a decision cannot be said by a reviewing court to be illogical or irrational or unreasonable, simply because one conclusion has been preferred to another possible conclusion.

That is, a decision will not be 'irrational' in the sense that it can be the basis to set aside an administrative decision if it is a matter on which 'reasonable minds might differ'. Crennan and Bell JJ are concerned primarily with the evidence before the decision-maker and whether a 'reasonable mind' could reach the conclusion on the basis of the evidence presented, not on the basis of the decision-maker's reasons (noting that there is no common law duty to give reasons for an administrative decision in Australia). Their Honours' references to 'possible conclusions' might be seen as similar to the 'possible, acceptable outcomes' of *Dunsmuir v New Brunswick,*[36] but the terms 'illogical' and 'irrational' suggest something stronger than mere 'unreasonable-ness'. It may be that the judgment of Crennan and Bell JJ has simply renamed *Wednesbury* unreasonableness as 'irrationality'.

Gummow ACJ and Kiefel J took a wider view of the term. Their Honours first make it clear that a statutory requirement that a decision maker form an opinion or reach a state of satisfaction in order to make a particular decision constitutes a jurisdictional fact.[37] They also note that while a court is not to engage in 'merits review', 'apprehensions respecting merits review assume that there was jurisdiction to embark upon determination of the merits',[38] and that 'the same degree of caution as to the scope of judicial review does not apply when the issue is whether or not the jurisdictional threshold has been crossed'.[39] Their Honours also equated *Wednesbury* unreasonableness with 'abuse of discretion',[40] therefore more clearly distinguishing irrationality from *Wednesbury* unreasonableness than did Crennan and Bell JJ.

The interpretation of irrationality favoured by Gummow ACJ and Kiefel J is based on the reasons for the decision as well as the evidence before the decision-maker.[41] Their Honours stated that the 'absence of the logical connection between the evidence and the reasons of the RRT's decision became apparent when the RRT assumed that a homosexual would be fearful of returning to Pakistan without there being any basis in the material to found this assumption or to counter the possibility that the sexuality of such a person could be concealed from others in the short period of return to the country'. Their Honours then added (at [53] and [54]):

> To decide by reasoning from the circumstances of the visits to the United Kingdom and Pakistan that the first respondent was not to be believed in his account of the life he had led while residing in the UAE was to make a critical finding by inference not supported on logical grounds. The finding was critical because from it the RRT concluded that the first respondent was not a member of the social group in question and could not have the necessary well-founded fear of persecution.
>
> The Federal Court was correct to quash the decision and to order a redetermination by the RRT.

Any crucial finding of fact that is not based on 'logical grounds' can be the basis for a finding of irrationality. In *SZOOR v Minister for Immigration and Citizenship*, Rares J of the full Federal Court, concurring in the result, described the irrationality ground as follows:[42]

> The approach to irrationality or illogicality dictated by the authorities in the High Court appears to be that even if the decision-maker's articulation of how and why he or she went from the facts to the decision is not rational or logical, if someone else could have done so on the evidence, the decision is not one that will be set aside. It is only if no decision-maker could have followed that path, and despite the reasons given by the actual decision-maker, that the decision will be found to have been made by reason of a jurisdictional error.

Earlier,[43] Rares J had noted that this principle is similar to the law in Canada, citing *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board),*[44] in which Abella J, writing for the court, stated that the adequacy of reasons is not, in itself, a ground for review of an administrative decision. Instead 'the reasons must be read together with the outcome and serve the purpose of showing whether the result falls within a range of possible outcomes'.[45]

Peter Macliver of the AGS has explained the difference between the two joint judgments in *SZMDS* as follows:[46]

> The joint judgment of Gummow A-CJ and Keifel J appears to suggest that if there is illogicality or irrationality in the making of a finding critical to the decision as to a jurisdictional fact, then that is sufficient to establish this ground of review. On the other hand, Crennan and Bell JJ stipulated that the test for illogicality or irrationality must be to ask whether logical, rational or reasonable minds might adopt a different reasoning or might differ in any decision or finding to be made on the evidence upon which the decision is based (see above). Thus, even if the conclusion reached by a decision-maker as to a fact or matter involves illogicality or irrationality, if two conclusions as to that fact or matter are reasonably open upon the evidence and material before the decision maker, on the approach of Crennan and Bell JJ such illogicality or irrationality will not be sufficient to establish this ground of review.

In conclusion, while *SZMDS* may give Australian courts an opening to create a variable standard of reasonableness review in the future, it does not appear to have done so yet. There is simply not enough clarity in the judgments to clearly differentiate irrationality from *Wednesbury* unreasonableness at present and, even if a clear distinction can be drawn, it may be that *Wednesbury* will simply be restricted to 'abuse of discretion' cases, while irrationality will be the term used to describe all other cases that could have been previously regarded as falling within the *Wednesbury* principle.

SZMDS is also notable for the statement by Gummow ACJ and Kiefel JJ that '[s]till less is this the occasion to consider the development in Canada of a doctrine of "substantive review" applied to determinations of law, of fact, and of mixed law and fact made by administrative tribunals'.[47] Their Honours, after referring to *Dunsmuir*, distinguished that case from *SZMDS* and noted that *SZMDS* dealt with a statutory appeal (under s 476 of the *Migration Act 1958*), while *Dunsmuir* was a case exercising the inherent jurisdiction of the Supreme Court. Could this leave the door open in Australia for 'substantive review' of administrative decisions, at least in a case brought by way of the original jurisdiction of the High Court in s 75 of the *Constitution*?

Australian academic commentary on deference

The Australian approach of arguing for a strict separation between the 'merits' of an administrative decision and review for an error of law is both unsustainable and hypocritical. It is unsustainable because it is simply impossible to clearly delineate the two principles. It is also hypocritical because Australian courts *do* review the merits of administrative decisions – a 'patent unreasonableness' standard of review is provided on matters of fact (other than jurisdictional facts) and discretion, and a correctness standard is imposed on questions of law, at least in relation to 'jurisdictional errors' (which are very widely interpreted).

Decisions such as *M70/2011 and M106/2011 v Minister for Immigration and Citizenship*[48] and the High Court's decision in *Minister for Immigration and Citizenship v Li*[49] suggest that Australia is headed for a period of significant intervention in administrative decision-making in its courts. Unlike Canada, however, Australian commentators are unlikely to disapprove of this approach. Instead, it is notable that Australian commentators have not only rejected any move to import a standard of deference into Australian administrative law, but have done so with exceptional vehemence.[50]

Deference as a failure to exercise judicial power

Hayne J, writing extrajudicially, has described deference as a word of 'obfuscation',[51] which conceals an 'abdication of a constitutionally conferred judicial function'.[52] His Honour's ultimate conclusion is that courts use the language of deference when they are too lazy to make all the appropriate findings of fact themselves,[53] which results in failure to comply with the constitutional role of the judiciary.

Hayne J makes a number of specific criticisms of the concept of deference. Firstly, deference is only ever expressed in comparative or relative terms. The basis for comparison between different levels of deference is rarely, if ever, articulated in the case law.[54] Secondly, identification of what responsibilities lie solely with the courts or the legislature and executive is not easy, and no basis for determining where responsibilities lie is discussed by the courts.[55] Thirdly, terms such as deference, 'margin of appreciation' and 'relative institutional competence' (also known as 'expertise') are rarely if ever given any clear context.[56] Fourthly, deference on the basis that a decision-maker obtains powers by means of legislation passed by a democratically elected Parliament makes no sense, because once the courts are given a task, they must perform it.[57] Finally, the *Constitution* requires a court to apply valid legislation, not simply 'rewrite it according to judicial whim', but the principle of the separation of powers cannot require a court to defer to the 'legislature's views as to how any particular laws should be interpreted or applied in any given case'.[58]

Hayne's ultimate conclusion is that any application of deference to administrative decision-makers in Australia would be a 'fraud' on judicial power and should not be countenanced.[59] In my view, the methodology employed by Hayne J in his article is unnecessarily narrow – his Honour focuses solely on UK cases considering the *Human Rights Act 1998*, which has existed for only 14 years and was not examined by a court until 1999. Hayne J did not consider the post-*CUPE* Canadian cases, or *Chevron*, the approach rejected by the High Court in *Enfield*. However, there is a more fundamental objection to the approach taken by Hayne J.

Deference as obsequiousness to governments

In 1999, Dr Mary Crock stated that 'the present Minister [for immigration] clearly believes that the courts are not showing enough deference to government policy',[60] and that 'the High Court has endorsed the notion of judicial deference to government policy in a number of key migration cases'.[61] Crock's main target is privative clauses, especially the (then) proposed privative clause for the *Migration Act 1958*. She notes as follows:[62]

> The effectiveness of the proposed privative clause is predicated on a deference doctrine first enunciated by the High Court in 1945. The comments of Dixon J (as he then was) in *R v Hickman; Ex parte Fox and Clinton* have come to enshrine the notion that Parliament can direct the judiciary to adopt a deferential or noninterventionist role in the review of administrative action.

Crock defends the orthodox approach of deference on matters of fact and no deference on matters of law, but seems to argue that the High Court has been pushing for 'deference' to determinations of law in the immigration context:[63]

> As the courts themselves have readily acknowledged, there may be very real cause for judicial deference in instances where the protected adjudicator is using special knowledge to make an assessment of a factual situation. The more difficult cases are those where the specialist body is enlisted to make determinations that involve both the assessment of facts and the interpretation of the law, for example by determining whether facts exist to meet criteria established by law. It is in this context that the High Court's call for deference towards the migration tribunals becomes problematic.

While Crock did not have the benefit of the *Enfield*[64] decision in writing her article, I do not think that cases such as *Wu Shan Liang* can be regarded as calling for 'deference' to administrative decision-makers in determinations of law. The High Court in *Wu* is more concerned with lower courts reading into decisions of tribunals things that are simply not there – in that case, the Federal Court decided that the decision-maker had decided a claim for refugee status on the balance of probabilities rather than on the 'real chance' test, despite many express statements to the contrary in the decision. At no stage did the High Court state that courts should defer to findings of law made by administrators, something which has been made clear by more recent cases such as *Enfield* and *SZMDS*.

Finally, Crock makes the claim that the existence of constitutional powers for the Parliament to make laws with respect to 'aliens and naturalisation'[65] has created a sense of 'entitlement' in politicians:[66]

> [A] battle royal has raged between the courts and the government over who should have the final say in immigration decision-making. The constitutional power given to the federal Parliament to make laws in this area has both created a sense of entitlement in the politicians and placed pressure on the courts to be deferential and non-interventionist in their review of government action.

This is an odd argument, as the *Constitution* does indeed create an entitlement on the Parliament to make laws relating to aliens and naturalisation. Should the High Court ignore the very wide wording of the *Constitution* and read in restrictions that do not exist? One would think that the express power in the *Constitution* to govern the passage of non-citizens into Australia is a fairly clear indication that Parliament *was* to be given the 'final say in immigration decision-making'. The courts' role is to *review* decisions, not have the final say in the decision-making process, unless of course constitutional questions are at issue.

Deference as an affront to the rule of law

Duncan Kerr's implacable opposition to any form of privative clause has already been discussed.[67] Denise Myerson also puts the point particularly bluntly:[68]

> Government officials must also obey the rules which Parliament has enacted and this can only be ensured if the courts have the jurisdiction to enforce the legal limits which govern the exercise of executive power. It follows that privative clauses – provisions which attempt to limit or exclude the ability of individuals to challenge the abuse of power by government officials in independent courts – are an assault on the rule of law.

In a 2004 article,[69] Crock also considered privative clauses, at least so far as they protect determinations of law made by administrative decision-makers, to be an affront to the entire concept of the rule of law:[70]

> The clashes between the executive and judicial arms of government in Australia in refugee cases may have brought little international credit to the country. On occasion, they have also threatened the very fabric of the rule of law in Australia, embodied as this is in the principle that the judiciary alone is vested with the power to make final determinations on questions of law.

Crock concludes her article even more emphatically:[71]

> The importance of the Courts maintaining their role as interpreters and defenders of the law in the area of refugee protection cannot be overestimated. The Courts may not be able to prevent the political posturing and even manipulation that has characterised the political discourse surrounding refugees and asylum seekers in Australia. However, they are in a unique position to at least moderate the impact of the politicisation process on the refugees themselves. In the area of refugee law, the Australian judiciary can, quite patently, be the last bastion against executive tyranny for the dispossessed and reviled. At risk is life, liberty and the rule of law – not just for the refugee, but for all of us.

If a privative clause was to be interpreted literally by a court, it *would* be an affront to the rule of law. Canada has read privative clauses simply as a clear legislative statement that deference should be provided to the decision-maker, given the *Crevier*[72] ruling that judicial review of administrative decisions can never be completely removed. A privative clause is not even determinative of the standard of review, as can be seen from *Dunsmuir*. In Australia, s 75 of the *Constitution* clearly prevents the Commonwealth Parliament from precluding judicial review altogether, but the High Court in *S157*[73] also found that privative clauses are of virtually no effect, a position that goes further than Canada.

One wonders what the Australian authors would think of Canadian commentators such as Audrey Macklin and Wade MacLauchlan who have defended the role of privative clauses in a modern system of administrative law! Macklin has written that 'the motive behind privative clauses is not always the desire to keep a meddling court at bay; they may also be inserted to encourage prompt and final resolution of disputes, or as a means of allocating scarce judicial resources by restricting access to the courts',[74] while MacLauchlan is critical of the Supreme Court of Canada's decision in *Metropolitan Life*[75] because its 'main point was to find a path around privative clauses'.[76] Canadian commentators, perhaps fortified by the decision in *Crevier*, regard privative clauses overall as a genuine and legitimate expression of legislative intent, while Australians regard them as something to be resisted at all costs.

Judicial review that affirms a tribunal decision is mere 'deference'

Crock has also praised the High Court for making decisions that circumvent government policy, seemingly *because* they circumvent government policy. For example, writing with Daniel Ghezelbash in 2011, Crock lauded the decision in *Plaintiff M61/2010E v Commonwealth; Plaintiff M69 of 2010 v Commonwealth,*[77] which applied common law procedural fairness requirements to decisions on applications for refugee status made by offshore entry persons. The authors referred to the 'sting in the High Court's ruling'[78] for the government, and seemed to positively rejoice in the fact that unlawful entrants to Australia may, as a result of the judgment, have greater procedural fairness rights than immigrants who entered Australia lawfully.[79] The subtext is that a court is only doing its job if it finds against the government in administrative law matters – a decision in favour of the administrator is mere 'deference' to government and represents an abdication of judicial power.

There even seems to be a certain mistrust of democracy in some of Crock's writing. For example, she has stated as follows:[80]

> [R]efugee cases in the High Court have been at the centre of gargantuan struggles between the government and the judiciary. On the one side is a government intent on stifling the judicial review of refugee decisions on the ground that the determination of protection matters should lie with the executive and with elected politicians, rather than with the unelected judiciary. On the other side are judges imbued with the notion that the courts stand between the individual and administrative tyranny; and that refugee decisions must be made in accordance with the rule of law. In 2003, the battle ceased to be a fight over 'Protection' — be it protection of borders or protection of human rights. The fight was all about control, and about the balance of power between Parliament, the Executive and the Judiciary within the compact that is the Australian *Constitution*.

The argument here appears to be that only judges are concerned with the rule of law, while elected governments are simply determined to 'stifle' the courts' role. It reads like an argument that judges can be trusted *because* they are unelected, while 'politicians' are only interested in what is popular.

The idea that courts only do their job correctly if they say 'no' to a government can be seen in other writing by Australian commentators. Catherine Dauvergne, now with the University of British Columbia, has stated that 'while refugee litigation has had a high profile in Australia

over the past decade, until February 2003 the story that executives receive a high degree of judicial deference in the migration law realm has been unchallenged'.[81] Referring to *S157,*[82] she then adds that this case may signify:[83]

> [A] new willingness of the courts to restrain the executive in matters of migration, whether the courts are separating refugee matters from migration matters, or whether a new version of the rule of law[84] might emerge internationally from these beginnings. Each of these possibilities would be welcome.

In my opinion judicial review is pointless if a court is not prepared to set an administrative decision aside in the right case. *Sun v Minister for Immigration and Ethnic Affairs*[85] is an excellent example of a case where judicial intervention was called for, as Ms Smidt of the RRT had, amongst other errors, simply refused to examine an 88-page printout of arrivals and departures through Port Moresby airport on certain dates, information which could have been crucial to Mr Sun proving the truth of at least some of his claims. Another example is *NADH of 2001 v Minister for Immigration and Multicultural and Indigenous Affairs,*[86] in which the applicants claimed to fear persecution in China on the basis of their Catholic faith. The RRT member subjected the applicants to a 'pop quiz' on Catholic dogma, and despite getting about 18 of the 20 or so questions correct, found they were not Catholic. The member also refused to consider a letter from the applicants' Australian church, which stated that they attended Mass weekly, because it did not expressly state that the applicants were Catholic! The decision was set aside on the basis of apprehended bias, but it is also an unreasonable decision by any measure.

However, whether a court of judicial review has made a 'good' decision does not depend solely on who 'wins' or 'loses' in the case. A considered and well-reasoned decision in favour of the administrative decision-maker is of much more value than a decision such as that of the Full Federal Court in *Guo.*[87] Indeed, a high rate of decisions in favour of the government can result from good decision-making, or from applicants for judicial review pursuing their cases regardless of the merits (particularly in immigration cases, in which applicants will commonly pursue any means to avoid their removal from the country in question).

Australian pro-deference writers

There are few, if any, Australian writers who support the introduction of a form of substantive review into Australia law, and few who support any kind of deference to administrative decision-makers. Almost all of these are or were associated with the Commonwealth government. David Bennett's defence of the orthodox line between judicial and merits review has already been noted in Part 1 of this Article.[88] Stephen Gageler, now Gageler J of the High Court, has written of the 'political accountability' of government as follows:[89]

> Why shouldn't the underlying purpose of the *Constitution* continue to be seen, in the terms declared in 1897, as being to enlarge the powers of self-government of the people of Australia? Why shouldn't its establishment of institutions politically accountable to the people of Australia be seen as the primary mechanism by which the *Constitution* achieves that purpose? … Should not the exercise of judicial power take the essentially political nature of those institutions as its starting point and tailor itself to the strengths and weaknesses of the institutional structures which give them political accountability? Why should there not openly be judicial deference where, by virtue of those institutional structures, political accountability is inherently strong? And why should there not openly be judicial vigilance where, by virtue of those institutional structures, political accountability is inherently weak or endangered?

Gageler does not specify which 'institutional structures' have which levels of political accountability, but he does state that 'political accountability provides the ordinary constitutional means of constraining governmental power'.[90] That is, setting aside of a government decision by a court should be an exceptional move, to be undertaken only where the decision-maker would be otherwise unaccountable to Australians. Does this mean that decisions made by elected officials should be scrutinised to a lower degree than those

made by unelected ones? What about decisions made by administrative decision-makers on *behalf* of elected officials, such as those made under the *Migration Act 1958*, where the Minister is the ultimate decision-maker[91] but the Minister's power is widely delegated? What about decisions of review tribunals that are expressly stated to be independent of a Minister, such as the MRT and RRT?

Heydon J of the High Court also believes that judges must decide cases before them on a strictly legalistic basis. In a speech to the annual *Quadrant* dinner in 2002, Heydon J, then a judge of the NSW Supreme Court, stated that '[a] key factor in the speedy and just resolution of disputes is the disinterested application by the judge of known law drawn from existing and discoverable legal sources independently of the personal beliefs of the judge'.[92] His Honour went on to state as follows:[93]

> Rightly or wrongly, many modern judges think that they can not only right every social wrong, but achieve some form of immortality in doing so. The common law is freely questioned and changed. Legislation is not uncommonly rewritten to conform to the judicial world-view … They appear designed to attract academic attention and the stimulation of debate about supposed doctrines associated with the name of the judicial author. Here the delusion of judicial immortality takes its most pathetic form, blind to vanity and vexation of spirit.

His Honour also noted as follows:[94]

> It is legislatures which create new laws. Judges are appointed to administer the law, not elected to change it or undermine it. Judges are given substantial security of tenure in order to protect them from shifts in the popular will and from the consequences of arousing the displeasure of either the public or the government. The tenure of politicians, on the other hand, is insecure precisely in order to expose them to shifts in the popular will and to enable those shifts to be reflected in parliamentary legislation.

It is noteworthy that no Australian law journal published this speech, even after its author was appointed to the High Court. It was published in New Zealand's *Otago Law Journal*, despite the fact that one would think New Zealanders would have only a peripheral interest in what an Australian judge might have to say. Indeed, Heydon's speech was widely derided by Australian commentators as a 'job application' for the place on the High Court recently vacated by Gaudron J.[95]

Heydon carried this approach with him to the High Court. In an increasingly activist and interventionist High Court, he is now the primary dissenting judge, and as at 17 February 2012 had dissented in just under 50 per cent of the High Court judgments in which he took part[96].

Finally, Margaret Allars appears to be the only Australian academic in the pro-deference camp, although less solidly so than Gageler or Heydon. Allars has pointed out that Australian law *has* developed a doctrine of deference to administrative decision-makers, at least in matters of fact-finding and discretion, although Australian judges refuse to apply that label. In particular, there is a clear deference to expert decision-makers in Australian law, although this deference has been somewhat unevenly applied.[97] I would go further and add that the *Wu Shan Liang*[98] approach to interpretation of reasons is not simply a form of deference to expertise (although this is *part* of the reasoning) but a recognition that the Parliament has decided that certain decisions are to be made by administrators and not the courts. Otherwise, the courts *would* expect 'perfection' in administrative reasons.

Allars also points out that, in refusing to adopt the Canadian (and American) substantive review doctrine on the basis that it would open the way for merits review, there is a clear invitation presented by the jurisdictional fact doctrine to courts to trespass on the merits of a decision in any event.[99] While she does not clearly endorse the North American approach,

by pointing out the inconsistencies in the Australian rejection of that approach she could be said subtly to be supporting a deference-based approach to Australian administrative law.

Elsewhere, in a Canadian journal, Allars has argued that some critics of the deference approach are 'too extreme in their conception of deference as a complete submission by courts to the judgment of tribunals'.[100]

Why the vitriol?

In my view, the violent reaction against any kind of deference in Australian administrative law by Australian commentators stems from a misunderstanding of the concept. Taken by itself, deference may have little meaning or could be regarded as a form of mere subservience. Certainly, when one takes the view that only 'errors of law' can form the basis for setting aside a decision, and that the courts function as a sort of angel with a flaming sword outside the Garden of Merits of Administrative Decisions, further 'deference' to administrative decision-makers could be unwarranted.

However, it must be remembered that deference is just one part of a package, known as substantive review in Canada and 'variable reasonableness' or proportionality in the UK. One must consider the whole package, not just the deference principle by itself, to make sense of the concept. Understood in this way, an Australian doctrine of substantive review would simultaneously give the courts *greater* scope to intervene in unreasonable decisions, without needless worrying about trespassing on 'merits review', while at the same time recognising the democratic credentials and expertise (including expertise in at least some determinations of law) of administrative decision-makers.

Let us take the extrajudicial musings of Hayne J as an example.[101] I have already listed the principal objections given by Hayne J to any introduction of a concept of deference into Australian administrative law. If we take into account the fact that we should be looking at the whole concept of substantive review, of which deference is merely one part, his objections can be answered as follows:

> Deference is only expressed in comparative or relative terms. The basis for comparison between different levels of deference is rarely, if ever, articulated in the case law.

This statement is correct insofar as it goes, but does not address the real issue. Deference can *only* ever be a relative term. A fully variable reasonableness standard, such as exists in the UK and as was proposed by Binnie J in *Dunsmuir*[102] and by Binnie and Deschamps JJ in *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association,*[103] would require the court to lay down some principles as to the 'intensity' of review. However, I do not think this is beyond the capacity of the courts. In any event, while the factors listed by *Dunsmuir* as determining whether a correctness or reasonableness standard of review[104] may not be exhaustive and could see reasonable minds come to different conclusions, it is as good an exercise as can reasonably be expected in clarifying a difficult area of law.

> Identification of what responsibilities lie solely with the courts or the legislature and executive is not easy, and no basis for determining where responsibilities lie is discussed by the courts.

It is the role of the executive to make the decision required by the enabling legislation. It is the role of the courts to *review* that decision, including the merits or substance of the decision, and if necessary identify why the decision taken was unreasonable. The matter should then be remitted to the administrative decision-maker for redetermination.

Courts have held that 'legislative intent' is a crucial element in the interpretation of legislation, and that in a parliamentary system, when a majority government exists, the legislature is effectively controlled by the executive (this being the political party with control of the Lower House), unless checked by an effective opposition. The opposition and, indeed, the courts provide the main checks on political power exercised by the executive and legislature in a majority government. However, this does not mean that the courts must act in the role of *opposition* to the government. Deference is not subservience and giving an appropriate amount of 'weight' to the findings of an administrative decision-maker does not equate to obeying the dictates of the executive.

> Terms such as deference, 'margin of appreciation' and 'relative institutional competence' (also known as 'expertise') are rarely if ever given any clear context.

This objection is very similar to the first raised by Hayne J. It is true that it is not always easy to identify a decision-maker's particular area of expertise. However, it is difficult to see why the decisions of people who work frequently with terms that are open to interpretation, such as 'genuine and continuing relationship'[105] or 'substantially lessening competition',[106] or the extraordinarily complex formulae for assessing child support[107] or family tax benefit[108], it is difficult to see why deference should *not* be given to determinations, including determinations of law, made by those decision-makers who make such decisions every day. This is especially the case when one considers that the High Court in *Hepples v Federal Commissioner of Taxation*[109] helpfully split three ways, depriving lower courts of even a majority opinion, in attempting to determine the meaning of ss 160M(5), 160M(6) and 160M(7) of the *Income Tax Assessment Act 1936*. If the High Court had simply determined whether the Commissioner's interpretation of these admittedly appallingly drafted provisions had been reasonable, a lot of difficulty could have been prevented.

> Deference on the basis that a decision-maker obtains his or her (or its) powers by means of legislation passed by a democratically elected Parliament makes no sense, because once the courts are given a task, they must perform it.

It is indisputable that courts must perform a task they are given. Again, however, the 'democratic credential' is simply one reason for giving deference to an administrative decision, and is simply recognition that Parliament intended a particular decision to be made by a particular person or body. It does not dictate the result of the case.

> The *Constitution* may require a court to apply valid legislation, and not simply 'rewrite it according to judicial whim', but the principle of the separation of powers cannot require a court to defer to the 'legislature's views as to how any particular laws should be interpreted or applied in any given case'.

Again, deference is not subservience. Deference is simply recognition of the fact that a decision-maker's interpretation of their 'home statute', or their fact finding processes, should be given appropriate weight in the circumstances. The interpretation of terms in the *Competition and Consumer Act 2010* (Cth) by the Australian Competition and Consumer Commission should be given significant (but by no means determinative) weight, as they are experts in the field. On the other hand, interpretations of (say) international taxation conventions made by the Child Support Agency (CSA) probably should not. This does not mean that any CSA determination on such matters will be *wrong*, simply that they have no more expertise than the court, and the court should make the decision for itself. It cannot be said that there is any abdication of judicial responsibility in showing deference to an administrative decision-maker, when one takes the *Dunsmuir* approach that deference is respect and not subservience.[110]

In my view, Crock's objections to concepts of deference could also be assuaged if she were to accept that deference is but one part of the 'package' of substantive review. She seems to

equate the term 'deference' with obsequiousness to government, or perhaps an unwillingness to make decisions contrary to government interests. The fact that Crock regards the High Court decision in *Lim*[111] as an exercise in excessive deference to government[112] shows, in my view, a misunderstanding of the term – *Lim* was a constitutional case and there was no administrative decision-maker to whom deference could be shown. Again, if it is remembered that deference is simply one part of an overall package of substantive review, it might be thought that Crock would have rather more time for it. Deference is simply an acknowledgement of the expertise of decision-makers, and the fact that reasonable minds may differ over the outcome of many administrative determinations. While the court must act where a decision is truly unreasonable, it should respect the credentials of the decision-maker at the same time. Crock has admitted that deference generally *should* be shown to administrative decision-makers on matters of fact,[113] but why should it not be shown on questions of law with which the decision-maker has particular familiarity?

Crock's violent reaction to any kind of privative clause in legislation may also be mollified when it is made clear that under the Canadian substantive review approach, a privative clause is never the be-all-and-end-all. Leaving aside s 75 of the Australian *Constitution*, a privative clause is simply one more indication that deference should be shown to the administrator. In Canadian law, a privative clause is viewed not so much as a command to the courts to leave an administrative decision alone, but a statement that the Parliament has decided that a particular decision-maker should have responsibility for making a particular decision. Courts will still intervene to set aside a truly unreasonable decision, but they must take the privative clause into account when determining the standard of review. This kind of approach could render obsolete the excruciating arguments as to whether an error of law is jurisdictional or non-jurisdictional in nature, and possibly end the argument about what is a jurisdictional fact and what is not, and it would certainly not offend s 75 of the *Constitution*. It would be a tremendous simplification of Australian administrative law.

The way forward for Australian administrative law

Australia now stands almost alone in the common law world in insisting that it does not undertake review of the merits of administrative decisions, and in refusing to countenance any kind of 'variable unreasonableness' approach. Canada, seemingly, has never concerned itself with the largely illusory distinction between the 'legality' and 'merits' of an administrative decision. Australia's approach is unsustainable, even in theory, because as soon as one admits 'reasonableness' as a ground of review, the merits of the decision are in question, and the only issue is the degree of deference to be given to the decision-maker. In practice, the 'merits / legality' distinction has been all but abandoned, and we have seen that the High Court simply provides a high degree of deference to decision-makers on matters of fact (other than jurisdictional facts) and discretion, and little or no deference on questions of law. Australia would be better off recognising this fact, acknowledging the impossibility of distinguishing between 'review of the merits' and 'review for error of law', and moving to a system of variable intensity of reasonableness review.

It should not be thought that adoption of a Canadian doctrine of substantive review in Australia would somehow create a perfect system of administrative law. However, when an Australian court is faced with an application for judicial review of an administrative decision, it first has to determine whether the applicant's complaint is about an error of law or fact.

Substantive review in Australia?

I believe that, contrary to the statement of Gummow ACJ and Kiefel J in *SZMDS,*[114] now *is* the time for Australian administrative law to adopt a Canadian-type doctrine of substantive

review. Australian courts and commentators seem to have rejected this development because they see it as both contrary to the Australian *Constitution*, particularly s 75, and as generally undesirable.

Substantive review and section 75 of the Constitution

I have already argued that while 'merits review', in the sense of making a de novo decision on the basis of all available (including new) evidence is not an exercise of judicial power, 'review of the merits' is. As long as a court sticks to its constitutional role of *reviewing* an administrative decision, including on the basis of reasonableness, and not simply substituting its own decision, *Guo*-style,[115] it is exercising judicial power and not executive power. There is no breach of s 75 of the *Constitution*. In any event, by applying the grounds of *Wednesbury* unreasonableness and irrationality, the courts already review the merits of administrative decisions, albeit with a high degree of deference on matters of fact or discretion. It is simply hypocritical to argue otherwise.

The main reason, however, for moving to a system of substantive review, including appropriate deference to the decision-maker, is that it is fairer and simpler for both applicants and decision-makers. It is fairer because the courts can examine the actual impact of the decision on the individual in question and the justification for that impact, without asking obtuse questions about whether a particular line in a decision constitutes an error of law or merely an incorrect finding of fact. It is fairer to the decision-makers because their democratic credentials and expertise are acknowledged and respected, without these qualities *binding* the court. It is simpler because courts and the parties before them do not have to worry endlessly about the meaning of terms like 'error of law' and 'jurisdictional error'.

The lack of an Australian bill of rights

Another possible objection to the introduction of some form of substantive review in Australia is that Australia, at the Federal level, lacks any Bill of Rights, whether constitutional (such as the Canadian Charter) or legislative (such as the *Human Rights Act* in the UK). The argument is that if Australia has no Bill of Rights, how can courts determine which rights are 'fundamental' to an applicant for judicial review and which are not?

In my opinion this objection can be overcome. Firstly, as a matter of common law, the High Court has found that rights such as the right to life,[116] freedom from arbitrary imprisonment[117] and freedom from arbitrary search and interception of communications[118] are of the top tier of individual rights. Secondly, the High Court has been prepared on occasion to imply the existence of rights from the *Constitution*. A discussion of the 'implied rights' cases is beyond the scope of this paper, but the High Court has made it clear in cases such as *Australian Capital Television Pty Ltd v Commonwealth*[119] and *Langer v Commonwealth*[120] that because the *Constitution* sets up a system of representative democracy, legislative restrictions on 'political speech' will be very difficult to justify.

Finally, Australia is a party to most, if not all, of the major multilateral human rights treaties, such as the International Covenant on Civil and Political Rights (ICCPR), the Convention on the Rights of the Child (CROC) and UN conventions against racism and discrimination against women. In *Minister for Immigration and Ethnic Affairs v Teoh*, Mason CJ and Deane J stated that 'ratification by Australia of an international convention is not to be dismissed as a merely platitudinous or ineffectual act, particularly when the instrument evidences internationally accepted standards to be applied by courts and administrative authorities in dealing with basic human rights',[121] and while the overall status of the *Teoh* judgment is uncertain,[122] this statement seems unexceptionable. If Australia has gone to the trouble to