FOCUS ARTICLES

BALANCING JUDICIAL REVIEW AND MERITS REVIEW

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It is, of course, an elementary principle of administrative law that a court undertaking judicial review of an administrative decision is concerned only with the legality of the decision and not with its merits. However, the fact that the High Court has repeatedly found the need over recent years to reassert this principle suggests that the distinction is not one that is always perfectly observed by lower courts in practice.

There are several possible reasons for an occasional judicial tendency to "trespass into the forbidden field of review on the merits".[1] The problem is often generated by some of the modern grounds of judicial review which can strike a fine balance between issues of law on the one hand and the merits of the particular decision on the other, such that judicial minds may differ as to the proper scope and application of those grounds of review in particular cases. While one judge may regard an issue as going to the merits of a decision and therefore entrusted to the relevant decision-maker, it may be possible for another judge to characterise the same issue in such a way as to attract a ground of review (such as unreasonableness or jurisdictional error). The High Court is ultimately responsible for ensuring that courts do not exceed their proper supervisory role when reviewing administrative action. However, the broad approaches sometimes adopted by judges have also led to legislative responses aimed at confining the scope of judicial review so as to restrict the ability of courts to second-guess the determinations made by administrators and merits review bodies.

In the first part of this paper, I will examine the basis for the traditional distinction between judicial review and merits review, and identify some of the areas where that distinction is most liable to become blurred. I will then discuss some recent High Court and Federal Court authorities which deal with the limits of judicial review. Finally, I will briefly consider the impact of various statutory measures implemented or proposed over recent years in an attempt to confine the scope of judicial review, particularly in the area of migration decisions.

JUDICIAL REVIEW AND MERITS REVIEW

The starting point in any consideration of the relationship between judicial review and merits review is to recognise that each fulfils a different function and provides

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1 *Minister for Immigration and Ethnic Affairs v. Guo* (1997) 191 CLR 559 at 577.

different remedies. The central distinction between merits review and judicial review is that the former enables a review of all aspects of the challenged decision,[2] including the finding of facts and the exercise of any discretions conferred upon the decision-maker, whereas the latter is concerned only with whether the decision was lawfully made.

Thus, 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.[3] The object of merits review is to ensure that the "correct or preferable" decision is made on the material before the review body.[4]

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. If a court finds that the decision was unlawfully made, the remedy will generally be limited to setting aside the decision and remitting the matter to the decision-maker for reconsideration according to law, at least where the court's decision leaves the decision-maker with any residual discretion or where outstanding facts remain to be found.[5]

A classic and oft-cited statement of the limits on judicial review arising from the law / merits distinction can be found in the judgment of Brennan J in *Attorney-General (NSW) v. Quin*:[6]

> "The essential warrant for judicial intervention is the declaration and enforcing of the law affecting the extent and exercise of power: that is the characteristic duty of the judicature as the third branch of government. . . .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

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2 Except the constitutional validity of any legislation under which the decision was made: see *Re Adams* (1976) 1 ALD 251.

3 Administrative Review Council, *Better Decisions: Review of Commonwealth Merits Review Tribunals* (1995), paras 2.2-2.3, 2.54-2.55; Justice M Kirby, 'Administrative Review on the Merits: The Right or Preferable Decision' (1980) 6 Mon.U.L.R. 171, at 172-173. See, for example, the powers of the AAT conferred by s.43(1) of the *Administrative Appeals Tribunal Act 1975*.

4 *Drake v Minister for Immigration and Ethnic Affairs* (1979) 2 ALD 60 at 68; *Re Becker and Minister for Immigration and Ethnic Affairs* (1977) 1 ALD 158 at 161-162.

5 See *Minister for Immigration and Ethnic Affairs v. Guo* (1997) 191 CLR 559 at 578-579, 598-600; *Minister for Immigration and Ethnic Affairs v. Conyngham* (1986) 11 FCR 528 at 536-539, 541. *Cf. Commissioner of State Revenue (Vict) v. Royal Insurance Australia Ltd* (1994) 182 CLR 51 at 80-81, 88.

6 (1990) 170 CLR 1 at 35-36.

> distinguished from legality, are for the repository of the relevant power and, subject to political control, for the repository alone.
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> The consequence is that the scope of judicial review must be defined not in terms of the protection of individual interests, but in terms of the extent of power and the legality of its exercise. In Australia, the modern development and expansion of the law of judicial review of administrative action have been achieved by an increasingly sophisticated exposition of implied limitations on the extent or the exercise of statutory power, but those limitations are not calculated to secure judicial scrutiny of the merits of a particular case."

As Brennan J recognises, the limits on the role of the courts means that there will be instances where a "wrong" decision (that is, a decision which is not the correct or preferable decision on the merits) will not be open to correction by a court on judicial review, just as there may be occasions where the "right" decision must be set aside because it is infected by legal error (subject to the court's discretion to refuse relief).[7] In the former case, any remedy lies with the appropriate administrative machinery, either for review of the decision on its merits or for the reconsideration of the decision by the relevant decision-maker, or with the political process. In the latter case, upon the remittal of the matter to the decision maker, the same decision might be reached, but this time according to law.[8] In other cases, however, the legal error may have in fact caused the "wrong" decision to be made, in which case the decision-maker has another opportunity of reaching the correct or preferable decision when reconsidering the matter.

The passage from Brennan J also serves to highlight the central importance of the separation of powers to the maintenance of the distinction between the legality and the merits of decision-making. The separation between judicial and executive power

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[7] The latter situation (that is, the setting aside of a "right" decision) would usually only occur where there was a legal defect in the *process* by which the decision was reached (such as a failure to accord an adequate hearing, or to take into account a relevant consideration). Where the legal error comprised the making of a decision which was *ultra vires* in the narrow sense (that is, one which was outside the decision-maker's powers), that decision could never be regarded as the "right" decision and would not be open to the decision-maker upon remittal.

[8] Thus, success in judicial review proceedings may not lead to the result that the applicant is ultimately seeking, namely a favourable decision under the relevant administrative scheme. This limitation was highlighted by the Kerr Committee in the following passage: "If, being driven to seek in the courts an invalidating judgment, [an applicant] succeeds in having a decision set aside, he is, in effect, in many cases back where he started with the administrative process to be faced again before the same administrative officer or body. . . . [S]uccess in the courts in many cases involves the risk of the same decision on the merits being reached, after the previous judicial decision has been given, by the same administrative body and by processes which can no longer be attacked in the courts." (Commonwealth Administrative Review Committee Report 1971 (Kerr Committee Report), Parliamentary Paper No.144 of 1971, at para.20.)

marks out the respective functions of the courts and the administration. For a court to go beyond its supervisory role of examining the legality of the exercise of administrative powers would be contrary to this fundamental concept. Although lengthy, it is worth setting out a further passage from Brennan J's judgment in *Quin*:[9]

> "Some advocates of judicial intervention would encourage the courts to expand the scope and purpose of judicial review, especially to provide some check on the Executive Government which nowadays exercises enormous powers beyond the capacity of the Parliament to supervise effectively. Such advocacy is misplaced. If the courts were to assume a jurisdiction to review administrative acts or decisions which are 'unfair' in the opinion of the court - not the product of procedural unfairness, but unfair on the merits - the courts would be assuming a jurisdiction to do the very thing which is to be done by the repository of an administrative power, namely, choosing among the courses of action upon which reasonable minds might differ: see *Secretary of State for Education and Science v. Tameside Metropolitan B.C.* [1977] AC 1014, at p 1064, and *Council of Civil Service Unions v. Minister for the Civil Service* [1985] AC 374, at pp 414-415. The absence of adequate machinery, such as an Administrative Appeals Tribunal, to review the merits of administrative acts and decisions may be lamented in the jurisdictions where the legislature has failed to provide it, but the default cannot be made good by expanding the function of the courts. The courts - above all other institutions of government - have a duty to uphold and apply the law which recognizes the autonomy of the three branches of government within their respective spheres of competence and which recognizes the legal effectiveness of the due exercise of power by the Executive Government and other repositories of administrative power. The law of judicial review cannot conflict with recognition of the legal effectiveness of the due exercise of power by the other branches of government.
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> If judicial review were to trespass on the merits of the exercise of administrative power, it would put its own legitimacy at risk. . . . If the courts were to postulate rules ostensibly related to limitations on administrative power but in reality calculated to open the gate into the forbidden field of the merits of its exercise, the function of the courts would be exceeded: *cf. R. v. Nat Bell Liquors Ltd* [1922] 2 AC 128, at p 156."

Kirby J recently echoed these sentiments in *Minister for Immigration and Ethnic Affairs v. Guo,*[10] when expressing the view that the court should in most cases remit a matter to the decision-maker for reconsideration rather than substitute its decision for that of the decision-maker:

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[9] (1990) 170 CLR 1 at 37-38.

[10] (1997) 191 CLR 559 at 599-600.

> "No course would be more likely to undermine the legitimacy and acceptability of judicial review than a usurpation by the courts, where this is not warranted, of the ultimate functions committed by law to the decision-maker. . . . The proper course, legal error having been found, was to return the matter to the Tribunal.[11] 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."

To the extent that the boundary between law and merits derives from the nature of judicial power, it may have added significance at the Commonwealth level where the separation of judicial power is constitutionally entrenched. This places significant restrictions on the ability of federal courts to provide review of administrative action "on the merits", and also limits the ability of the Parliament to extend the jurisdiction of federal courts. Such courts will only be able to review those aspects of a decision that involve issues which are justiciable in the exercise of judicial power. While this may allow some scope for the conferral of jurisdiction to review findings of fact, it would certainly not permit the court to review on their merits decisions which have a significant discretionary element.[12]

Behind the theory of the separation of powers lies a more practical reason for delimiting the proper role of the courts. An administrative decision-maker will often be required to take account of interests extending beyond those of the person directly affected by the decision. This is a task for which the executive branch is well-suited, and in relation to which it is ultimately accountable to the Parliament. The courts, on the other hand, are not well-placed to consider and resolve the broader issues of administrative policy which are often central to the exercise of an administrative discretion.[13]

As I commented at the beginning of this paper, all of this is trite law. So why has there been a renewed emphasis on these issues in recent years, arising from a growing suspicion that some courts (and in particular, the Federal Court) are

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[11] *Minister for Immigration and Ethnic Affairs v. Wu Shan Liang* (1996) 185 CLR 259; *Minister for Immigration and Ethnic Affairs v. Conyngham* (1986) 11 FCR 528 at 541; *Cocks v. Thanet District Council* [1983] 2 AC 286 at 295.

[12] See generally the Commonwealth Administrative Review Committee Report 1971 (Kerr Committee Report), Parliamentary Paper No.144 of 1971. The Committee stressed that "the vast majority of administrative decisions involve the exercise of a discretion by reference to criteria which do not give rise to a justiciable issue" (para.68) and concluded that, as a result, in most cases merits review could not be entrusted to a court (see recommendation 15 in para.390).

[13] See *Attorney-General (NSW) v. Quin* (1990) 170 CLR 1 at 37 per Brennan J; *Minister for Immigration and Ethnic Affairs v. Wu Shan Liang* (1996) 185 CLR 259 at 292 per Kirby J.

overstepping their proper role by engaging in "disguised merits review"?[14] I suspect that the difficulty can be largely attributed to the problematic nature of some of the grounds of judicial review themselves.

At common law, the prerogative writs are generally only available in cases of absence or excess of jurisdiction, failure to observe natural justice or (in the case of certiorari) error of law on the face of the record.[15] However, the development in the concept of jurisdictional error,[16] at least in the case of administrative bodies as opposed to inferior courts,[17] has resulted in an expansion of available grounds of review derived from various implied limits which will deprive the administrative body of jurisdiction, such as taking into account irrelevant considerations, failing to take into account relevant considerations, acting for an improper purpose, or acting unreasonably. All of these grounds of review have been codified in the *Administrative Decisions (Judicial Review) Act 1977*, along with a general right to review for error of law (whether or not on the face of the record).

Most if not all grounds of judicial review are concerned either with the process by which the decision was made (rather than with the result or outcome), or with the enforcement of the limits of the power conferred on the decision-maker. The limited scope of the grounds of review is the foundation of the distinction between the legality and the merits of a decision. However, the dividing line between the two is not always clear, creating the potential for "disguised" merits review by the courts. One of the problems in this area is that it is always much easier to notice when a court is asserting and enforcing the law / merits distinction than to detect when it is being improperly encroached. Thus, appellate courts must be particularly vigilant to ensure that the grounds of judicial review are properly applied and kept within sensible limits.

As will appear from the cases discussed in the next section of this paper, some grounds of review have a greater tendency than others to blur the line between the legality and the merits of a decision, and provide tools by which a court can re-examine aspects of the merits of a decision. The functions that are generally accepted as being aspects of the merits include the finding of facts, the assessment of credibility, the attribution of weight to relevant information, and the formation of discretionary judgments involving the making of choices from amongst a range of courses of action. Some grounds of judicial review can be invoked in an attempt to gain review of these functions, such as by arguing that the decision-maker acted unreasonably, or that he or she made an incorrect finding of fact upon which his or her jurisdiction depended, or that certain evidence was a relevant consideration that he or she failed to take into account.

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[14] See generally J McMillan, "Recent Themes in Judicial Review of Federal Executive Action" (1996) 24 *Federal Law Review* 347.

[15] Note, however, that the availability of equitable remedies such as an injunction or declaration may not be as confined: see, for example, the observations by Gaudron J in *Abebe v. The Commonwealth* (1999) 162 ALR 1 at 30-31 [paras 103-105].

[16] *Anisminic Ltd v. Foreign Compensation Commission* [1969] 2 AC 147.

[17] See *Craig v. South Australia* (1995) 184 CLR 163 at 176-180.

The ground of "*Wednesbury*" unreasonableness, for example, involves the review by a court of the substantive exercise of discretion by the decision-maker. Was the exercise of that discretion so unreasonable that no reasonable decision-maker could have so acted? This ground of review effectively places a legal limit on the width of a discretionary power, removing from the decision-maker the outer range of choices which might otherwise be open to him or her. However, *within* these limits, the decision-maker still has the responsibility to decide on the merits. The precise theoretical basis for the unreasonableness ground is not settled. One approach might be to regard instances of unreasonableness as involving inferred or deemed legal error – that is, the unreasonableness of the outcome of the exercise of the discretionary power suggests that the power has not been properly exercised. This approach is reflected in the formula that a decision is so unreasonable that no reasonable decision-maker, *acting in accordance with the law*, could have made such a decision. However, I suggest that this approach is inadequate in that it does not admit that the ground of unreasonableness may itself provide an independent substantive limit on the width of a discretionary power, either as a manifestation of the implied legislative intention derived from the statute, or as a limit derived from the common law.[18]

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"[19] and requires "something overwhelming",[20] so that it should only be in exceptional circumstances that a court should interfere with the exercise of discretion by the decision-maker. It should always be remembered that the case that gave its name to the unreasonableness ground of review, *Associated Provincial Picture Houses Ltd v. Wednesbury Corporation*,[21] held that the decision under challenge in that case was *not* unreasonable in the necessary sense.

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[18] Chief Justice Spigelman has recently written about the shift in the basis of judicial review from statutory intention (enforcing the will of the Parliament) to common law limits on the exercise of public power (albeit limits which are inherently subject to a contrary legislative intention). While often there will little if any difference between these two approaches, the common law approach is capable of extension to review of non-statutory powers, such as prerogative powers and even private powers. See J Spigelman, "Foundations of Administrative Law" (1999) 4 *The Judicial Review* 69. See also *Abebe v. The Commonwealth* (1999) 162 ALR 1 at 33 [para.113] per Gaudron J, 47 [para.169] per Gummow and Hayne JJ.

[19] *Attorney-General (NSW) v. Quin* (1990) 170 CLR 1 at 36 per Brennan J.

[20] *Associated Provincial Picture Houses Ltd v. Wednesbury Corporation* [1948] 1 KB 223 at 230.

[21] [1948] 1 KB 223. The case involved a challenge to a decision by a local authority to impose a condition on the grant of a licence to operate a cinema on a Sunday. The condition imposed prevented children under the age of 15 from being admitted to any Sunday performance, whether with or without an adult.

The potential subjectivity of the unreasonableness ground is perhaps illustrated by two English cases. In *Wheeler v. Leicester City Council*,[22] a rugby football club challenged the council's refusal to permit it to use a particular football field after three members of the club had played in a team which had recently toured South Africa. The council had put a series of questions to the club eliciting its attitude to apartheid policies, and indicating that it would refuse permission to use the field unless all four questions were answered in the affirmative: did the club support the government opposition to the tour of South Africa?; did the club agree that the tour was an insult to a large proportion of the local population?; would the club press for the cancellation of the tour?; and would the club press the players to pull out of the tour? The club refused to answer the questions, indicating that it condemned apartheid but recognised that there were differences of opinion as to how it could be broken down, and that the decision whether or not to play in the tour was left to individual players. It was clear from the relevant statute that, in making its decision to grant or refuse permission, the council was entitled to have regard to the need to promote good race relations. However, a majority of the House of Lords held that the council's decision was so unreasonable that no reasonable council could have made it,[23] crossing the line from persuasion into "illegitimate pressure coupled with the threat of sanctions".[24] Without getting involved in the heated South African sport controversies of the early 1980s, it seems to me virtually impossible to hold that no reasonable person could have reached the decision taken by the council. The conclusion reached by the House of Lords appears to be based on little more than a political view, either as to the merits of the sporting boycott of South Africa or the sanctity of the club's right to adopt a neutral stance without suffering any consequential disadvantage.

Another example is *West Glamorgan County Council v. Rafferty*,[25] where it was held that a decision to evict some gypsies without providing alternative accommodation was one which no reasonable council could have reached. Perhaps the only thing that can be said in favour of this decision is that it indicates that unreasonableness may occur on the right side of politics as well as on the left.

These English authorities might be viewed as quasi-political decisions where judges have had strong emotional reactions to what can be seen as extreme political decisions of which they disapprove, although I am sure that the English judges would not characterise it this way. Australian courts, on the other hand, have generally taken a much more cautious approach when considering challenges based on unreasonableness to decisions which involve broad policy or political considerations.[26]

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[22] [1985] 1 AC 1054.

[23] *Cf.* the comments of Ackner LJ in the Court of Appeal, emphasising that the courts are not concerned with the merits of the two rival views as to the value of severing sporting links with South Africa: [1985] 1 AC 1054 at 1061.

[24] [1985] 1 AC 1054 at 1078.

[25] [1987] 1 WLR 457.

[26] For example, see *Botany Bay City Council v. Minister for Transport* (Federal Court, unreported, Finn J, 3 November 1998), discussed below.

Further difficulties might arise from the variety of contexts in which the ground of unreasonableness can be raised. The most straightforward situation is the argument that the final decision by the decision-maker, or the reasoning by which it was reached, is patently absurd or illogical.[27] However, it might also be argued that the *manner* in which a decision was reached was "so devoid of any plausible justification that no reasonable person could have taken this course".[28] Obviously, in this area the ground of unreasonableness is likely to intersect or overlap with other grounds of review, including denial of procedural fairness or failure to take into account relevant considerations. One recent example of a decision being held invalid on the basis that it was exercised in an unreasonable manner is *"A" v. Pelekanakis*,[29] where the decision-maker proceeded to reject an application for a protection visa without waiting for the provision of further information by the applicant, despite the fact that the applicant had foreshadowed that such information would be provided. Weinberg J considered that the decision-maker should have warned the applicant that he was about to determine the application, giving him an opportunity to provide the additional information supporting the application. His Honour held that the unreasonableness of the decision-maker's actions "was, in my view, both manifest and extreme", and that his conduct was "unprincipled". A minor point of interest was that the availability of merits review was not regarded as a reason why the court should not grant relief to set aside the decision.

Unreasonableness is sometimes also raised in an attempt to obtain review of other aspects of a decision which would ordinarily form aspects of the merits; for example, unreasonableness in particular factual findings, or in the weight attributed to particular information. In general terms, it is not possible to challenge a decision on the basis of alleged factual errors made by the decision-maker. In other words, it is not an error of law to make a wrong finding of fact.[30] However, there is scope for a court to set aside a decision where there is *no* evidence to support the decision or a material finding of fact on which the decision is based.[31] Further, the *Administrative Decisions (Judicial Review) Act 1977* contains a "no evidence" ground that is in some respects wider than the position at common law.[32] The first limb of this ground operates only in respect of matters which are legal pre-conditions to the making of a particular decision, where there was no evidence or other material from which the decision-maker could *reasonably* have been satisfied that such a matter was established. The second limb of the statutory "no evidence" ground enables a decision to be set aside where it can be shown that a particular fact upon which the decision was based did not exist. However, this limb requires the positive proof of

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[27] See, for example, *Minister for Primary Industries and Energy v. Austral Fisheries Pty Ltd* (1993) 112 ALR 211, where the making of a management plan allocating fishing quotas was held to be based on a "statistical fallacy".

[28] *Prasad v. Minister for Immigration and Ethnic Affairs* (1985) 65 ALR 549 at 560-561 per Wilcox J.

[29] [1999] FCA 236 (Weinberg J).

[30] *Waterford v. The Commonwealth* (1987) 163 CLR 54 at 77-78 per Brennan J.

[31] See generally *Australian Broadcasting Tribunal v. Bond* (1990) 170 CLR 321 at 355-357 per Mason CJ.

[32] ADJR Act, ss.5(1)(h), 5(3). See also *Migration Act 1958*, ss.476(1)(g), 476(4).

the non-existence of the relevant fact by the tendering of admissible evidence before the reviewing court.[33]

Arguments that a decision-maker has failed to take into account a relevant consideration, or has taken into account an irrelevant consideration, may also be used in a way which comes close to attempted merits review. As Deane J made clear in *Sean Investments v. MacKellar*,[34] these grounds of review are fairly confined in scope. This is particularly so where the statute does not specify the considerations that must be taken into account by the decision-maker:

> "In a case such as the present where relevant considerations are not specified, it is largely for the decision-maker, in the light of matters placed before him by the parties, to determine which matters he regards as relevant and the comparative importance to be accorded to matters which he so regards. The ground of failure to take into account a relevant consideration will only be made good if it is shown that the decision-maker has failed to take into account a consideration which he was, in the circumstances, bound to take into account for there to be a valid exercise of the power to decide."

As I will discuss further below, it should not be permissible for a person who is dissatisfied with the findings of an administrative decision-maker to challenge the decision on the basis that the failure to make a particular finding of fact constituted a failure to take that fact into account in making the decision. For similar reasons, a complaint that a particular factual finding was incorrect should not be turned into an argument that the decision-maker took into account an irrelevant consideration, except perhaps where the finding of fact was unreasonable or not supported by any evidence, and was central to the ultimate decision.

Finally, another way of seeking to challenge a finding of fact by an administrative body is to seek to characterise it as a jurisdictional fact. Where the jurisdiction of an administrative body depends on the actual existence of a particular fact, a reviewing court can determine for itself the existence or non-existence of the that fact, and any finding made by the administrative body will not be conclusive.

RECENT AUTHORITIES

Minister for Immigration and Ethnic Affairs v. Wu Shan Liang

It is now some years since the decision of the High Court in *Wu Shan Liang*,[35] which was widely received as sending a message to lower courts to exercise greater restraint in the review of tribunal decisions. In this case, the Full Court of the Federal Court had set aside a decision made by the Refugee Review Tribunal on the basis

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[33] See *Yilan v. Minister for Immigration and Multicultural Affairs* [1999] FCA 854 (Carr J).

[34] (1981) 38 ALR 363 at 375.

[35] (1996) 185 CLR 259.

that certain phrases in its reasons suggested that the Tribunal had required the likelihood of persecution to be established on a balance of probabilities, contrary to the High Court's earlier decision in *Chan v. Minister for Immigration and Ethnic Affairs*.[36] In allowing an appeal, and restoring the decision of the Tribunal, the High Court took pains to emphasise the limits on the proper role of a court reviewing administrative action.

The majority cautioned against a close and "over-zealous" scrutiny of the reasons given by an administrative decision-maker "seeking to discern whether some inadequacy may be gleaned from the way in which the reasons are expressed", and stressed that -

> "any court reviewing a decision upon refugee status must beware of turning a review of the reasons of the decision-maker upon proper principles into a reconsideration of the merits of the decision."[37]

Kirby J echoed these points, encouraging a generous approach to the construction of the reasons for the decision under challenge, but he nevertheless noted that it is legitimate -

> "to analyse both their language and structure to derive from them the suggestion that a legally erroneous approach has been adopted or erroneous considerations taken into account or a conclusion reached which is wholly unreasonable in the requisite sense."[38]

The approach adopted by the High Court in *Wu Shan Liang* was not new,[39] but it provided a timely reminder to judges of lower courts to be more realistic in the standards expected of administrative decision-makers in providing statements of reasons.

Abebe v. The Commonwealth; Re Minister for Immigration and Multicultural Affairs; ex parte Abebe

A more recent High Court decision which is of interest is *Abebe v. The Commonwealth*.[40] In this case, the prosecutor had been refused a protection visa, and had unsuccessfully sought review of that decision in both the Refugee Review Tribunal and the Federal Court. The Federal Court proceedings had been brought under Part 8 of the *Migration Act 1958* (Cth), which placed significant restrictions on

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[36] (1990) 169 CLR 379. In *Chan*, the High Court decided that an applicant for refugee status need only show that there was a "real chance" that he or she would be persecuted upon return to his or her country of origin in order to establish a well-founded fear of persecution.

[37] (1996) 185 CLR 259 at 272 per Brennan CJ, Toohey, McHugh and Gummow JJ.

[38] (1996) 185 CLR 259 at 291.

[39] See the cases cited and approved by the majority: (1996) 185 CLR 259 at 271-272.

[40] (1999) 162 ALR 1.

the grounds of review which could be raised.[41] There were two separate proceedings heard together by the High Court – the first was a challenge to the constitutional validity of Part 8 (this aspect of the case is considered further below); the second was an application pursuant to s.75(v) of the Constitution for prerogative relief against the Refugee Review Tribunal, raising some of the grounds (such as unreasonableness) which were excluded in an application under Part 8. The main complaint of the prosecutor was that the Tribunal had not considered whether her allegations that she had been raped by government officials while detained in custody gave rise to a well-founded fear of persecution.

The Court unanimously dismissed the application for prerogative relief, holding that it was open to the Tribunal to conclude that it could not rely on the prosecutor's evidence about her arrest and detention. Some of the judgments contain interesting observations on the scope of various grounds of review such as unreasonableness and failure to take into account relevant considerations. Gaudron J suggested that unreasonableness could often lead to a denial of procedural fairness or to jurisdictional error, so as to attract remedies such as certiorari, prohibition or mandamus:[42]

> "A decision that is so unreasonable that no reasonable person could have arrived at it will often be a decision involving a denial of procedural fairness. And there may be situations in which a decision of that kind cannot be related either to the matter to be decided or to the relevant head of legislative power. Moreover, reasonableness may have a further significance.
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> As with the rules of procedural fairness, it is difficult to see why, if a statute which confers a decision-making power is silent on the topic of reasonableness, that statute should not be construed so that it is an essential condition of the exercise of that power that it be exercised reasonably, at least in the sense that it not be exercised in a way that no reasonable person could exercise it."

Gummow and Hayne JJ were more reluctant to examine the limits of *Wednesbury* unreasonableness in this case, and in particular the question whether or not that ground of review was confined to the exercise of discretionary powers where "the decision taken lies outside the range of decisions at which a reasonable person could arrive."[43] However, their Honours suggested that the "relevant considerations"

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[41] The detail of this legislation is considered further below. The main grounds of review which cannot be considered by the Federal Court in a Part 8 application are denial of procedural fairness (although failure to observe procedures required by the Act or the Regulations does constitute a ground of review), unreasonableness, taking into account an irrelevant consideration, and failure to take into account a relevant consideration.

[42] (1999) 162 ALR 1 at 33.

[43] (1999) 162 ALR 1 at 53. This comment appears to be a precursor to the more extended analysis in Gummow J's judgment in *Minister for Immigration and Multicultural Affairs v. Eshetu* (1999) 162 ALR 577 at 605-607, in which his Honour

ground of review was being misused in this case as a means of gaining review of the facts found by the Tribunal. They noted that a submission that the Tribunal had failed to take into account as a relevant consideration whether or not the applicant had been raped in detention slid into a contention that the Tribunal should have concluded that the applicant had been raped, and said:

> "the latter form of contention (that the tribunal should have concluded that the applicant had been raped) is self-evidently a contention that depends upon the court reviewing the merits of the tribunal's decision rather than the process by which it arrived at its decision. Such a contention could not be advanced as a ground for the grant of relief."

The judgment of Gummow and Hayne JJ indicates that some precision is needed when analysing an argument based on an alleged failure to take into account relevant considerations. As their Honours suggest, the identification of relevant and irrelevant considerations should be drawn from the empowering statute, and not from the facts of the particular case. To argue that a decision-maker failed to take into account a particular fact, when that fact may have been found not to exist by the decision-maker, really amounts to an attempt to reopen the factual findings of the decision-maker to review by the court. Similar caution should be exercised in dealing with an argument that the decision-maker failed to consider particular information; while there may be scope for such a scenario to constitute a failure to take into account a relevant consideration in circumstances where the decision-maker does not consider that information at all,[44] it would not be enough to show merely that the decision-maker *did not accept* the particular information as correct or accurate, or attributed little weight to it.

Thus, the level of generality at which a "relevant consideration" is identified can be significant. The issue can be illustrated by taking a hypothetical example of a statute which confers a power to give approval for a development on land. One might construe the relevant statute so that the decision-maker is required to take into account the impact of the development on the environment. It would clearly be open to a person aggrieved by the decision to challenge it on the basis that the decision-maker had failed to turn his or her mind to such environmental considerations. What if a person challenging the decision argued that the decision-maker had failed to consider a particular report prepared by an expert as to the likely impact of the proposed development on the environment? At least where the report was available to the decision-maker, it is conceivable that this could constitute a failure to take into account a relevant consideration. Finally, what if someone challenged the decision on the basis that the decision-maker failed to take into account the fact that the

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argues that the ground of unreasonableness is concerned with the abuse of discretionary powers. Gummow and Hayne JJ in *Abebe* also expressly leave open the principles governing the application of *Wednesbury* unreasonableness to review findings or inferences of fact.

[44] See generally *Minister for Aboriginal Affairs v. Peko-Wallsend Ltd* (1986) 162 CLR 24.

proposal would pose a significant threat of harm to protected animal species? At this level, the challenge has become an impermissible attempt to re-open the factual findings made by the decision-maker.

Gummow and Hayne JJ summed up the applicant's challenges in *Abebe* in the following terms:[45]

> "In the end, the criticisms made by the applicant of the tribunal's reasoning are criticisms of the factual findings it made and are criticisms that fasten upon the weight that the tribunal attributed to various pieces of information that it had available for consideration. But what weight the tribunal gave to those various pieces of information was for it to say."

Minister for Immigration and Multicultural Affairs v. Eshetu; Re Minister for Immigration and Multicultural Affairs; ex parte Eshetu

Just under a month after delivering judgment in *Abebe*, the High Court handed down another important decision, *Minister for Immigration and Multicultural Affairs v. Eshetu*.[46] This case also involved an application for a protection visa, this time by an Ethiopian student. The Refugee Review Tribunal had not accepted certain assertions made by Mr Eshetu (including an allegation concerning the arrest and detention of Mr Eshetu along with other members of a university student council), on the basis that there was no independent corroboration of those assertions. At first instance, Hill J dismissed an application for review made under Part 8 of the *Migration Act 1958*; although stressing that he considered the Tribunal's conclusion to be illogical and unreasonable, he noted that the ground of unreasonableness was not available in an application under Part 8. A majority of the Full Court of the Federal Court allowed an appeal, relying primarily on an argument that the unreasonableness of the Tribunal's decision constituted a failure to comply with s.420(2)(b) of the Act (which requires the Tribunal to act "according to substantial justice and the merits of the case") and therefore attracted a ground of review which falls within Part 8 (s.476(1)(a) - failure to observe prescribed procedures). The High Court proceedings involved both an appeal by the Minister against the Full Court's decision (which was allowed[47]), and an application pursuant to s.75(v) for review of the Tribunal's decision on the ground of unreasonableness (which was dismissed).

The decision by the Court in the s.75(v) application reasserts the confined nature of *Wednesbury* unreasonableness as a ground of judicial review. Gleeson CJ and McHugh J considered that there was serious doubt whether the suggested error in the Tribunal's reasoning was of the kind to which the *Wednesbury* principles are

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[45] (1999) 162 ALR 1 at 54.

[46] (1999) 162 ALR 577.

[47] Gaudron and Kirby JJ dissented, on the basis that the Tribunal had erred in law by failing to take into account the possibility of persecution on the basis of imputed political opinion: see (1999) 162 ALR 577 at 597-598.

directed, drawing attention to the looseness of language which often accompanies references to unreasonableness:[48]

> "Someone who disagrees strongly with someone else's process of reasoning on an issue of fact may express such disagreement by describing the reasoning as 'illogical' or 'unreasonable' or even 'so unreasonable that no reasonable person could adopt it'. If these are merely emphatic ways of saying that the reasoning is wrong, then they may have no particular legal consequences."

Their Honours referred to overseas authority[49] which points out that the existence or non-existence of a fact may involve a spectrum from the obvious to the debatable to the just conceivable. Within this spectrum, the finding of facts must be left to the decision-maker, unless it is clear that the conclusion reached is "perverse". In this case, the fact that Hill J and the dissenting judge in the Full Court had reached opposite conclusions on the defensibility of the Tribunal's findings illustrated that "the issue involved was an issue of fact upon which different minds could reach different conclusions", and therefore fell within the spectrum entrusted to the decision-maker. Criticisms of undue or inadequate weight given to particular considerations will not be sufficient to establish unreasonableness so as to attract relief under s.75(v). Again, the applicant's challenge was characterised as going to the merits rather than the legality of the decision:[50]

> "What emerged was nothing more than a number of reasons for disagreeing with the tribunal's views of the merits of the case. The merits were for the tribunal to determine, not for the Federal Court."

The judgment of Gummow J takes an interesting approach, perhaps revealing the potential creativity that might be employed by judges in attempting to limit the impact of the restrictions on judicial review imposed by Part 8 of the Migration Act. His Honour considered that the provisions contained in the Migration Act for the grant of a protection visa did not confer a discretionary power, but rather imposed an *obligation* to grant a visa subject to an anterior condition comprising the Minister's satisfaction that the applicant is a refugee within the meaning of the Convention (see ss.36 and 65 of the Migration Act). As a result, the satisfaction of the Minister becomes a jurisdictional fact upon which the power to grant a visa depends, and which is therefore subject to judicial review to ascertain whether that opinion was properly formed:[51]

> "A determination that the decision-maker is not 'satisfied' that an applicant answers a statutory criterion which must be met before the decision-maker is empowered or obliged to confer a statutory

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[48] (1999) 162 ALR 577 at 587 (para.40).
[49] *Puhlhofer v. Hillingdon London Borough Council* [1986] AC 484 at 518.
[50] (1999) 162 ALR 577 at 589 (para.56).
[51] (1999) 162 ALR 577 at 607 (para.131).

> privilege or immunity goes to the jurisdiction of the decision-maker and is reviewable under s.75(v) of the Constitution."

Of course, because the "jurisdictional fact" in such a case is the opinion of the decision-maker, the scope of review by a court is limited to ensuring that the opinion was formed in good faith, for a proper purpose, after taking into account all relevant considerations and not taking into account any irrelevant considerations, and so on.[52] Such a review may include the ground of *Wednesbury* unreasonableness, although "where the criterion of which the authority is required to be satisfied turns upon factual matters upon which reasonable minds could reasonably differ, it will be very difficult to show that no reasonable decision-maker could have arrived at the decision in question."[53] However, because these issues will arise in a context of whether a jurisdictional fact is established, Gummow J suggested that they will attract a ground of review under Part 8 of the Migration Act (such as the decision not being within jurisdiction or authorised by the Act, error of law, or no evidence), notwithstanding the exclusion of *Wednesbury* unreasonableness as a direct ground of review.[54]

Gummow J's judgment in *Eshetu* also contains some interesting observations which may be potentially relevant to the scope of review under s.75(v) of the Constitution (and s.39B of the *Judiciary Act 1903*).

- For the purposes of error of law on the face of the record (a ground of review which will attract certiorari at common law), the record includes the statement of reasons provided pursuant to the Act (which sets out the decision, the reasons for the decision, the material findings of fact and the supporting evidence on which those findings were based). However, the subject matter for judicial review remains the decision itself, and not the cogency of the reasoning nor the adequacy of factual findings. The statutory obligation to provide a statement of reasons "does not provide the foundation for a merits review of the fact-finding processes of the tribunal."[55]

- The principles of *Wednesbury* unreasonableness are concerned with the abuse of discretionary power rather than with the enforcement of the limits of power. "What have come to be known as principles of '*Wednesbury* unreasonableness' have developed by analogy to

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[52] See *Buck v. Bavone* (1976) 135 CLR 110 at 118-119 per Gibbs J, who also noted that "where the matter of which the authority is required to be satisfied is a matter of opinion or policy or taste it may be very difficult to show that it has erred in one of these ways, or that its decision could not reasonably have been reached."

[53] (1999) 162 ALR 577 at 609 (para.137).

[54] (1999) 162 ALR 577 at 613 (paras 154-155).

[55] (1999) 162 ALR 577 at 603 (para.117).

principles governing the judicial control in private law of the exercise of powers and discretions vested in trustees and others."[56]

- The ground of Wednesbury unreasonableness may often overlap with other grounds of review, such as error of law or denial of procedural fairness.[57]

- The ground of *Wednesbury* unreasonableness might be derived from the intention of the legislature when conferring a power that it must be exercised reasonably. Accordingly, any failure to comply with this obligation would be *ultra vires*, or tantamount to a refusal to exercise the discretion, providing a footing for the grant of relief under s.75(v).[58]

- While a finding or inference of fact which is made or drawn in the complete absence of any supporting evidence will constitute an error of law, there is no error of law in simply making a wrong finding of fact. However, where the question is whether the decision-maker could reasonably have been satisfied of statutory criteria upon which his or her jurisdiction depends, s.75 of the Constitution "controls jurisdictional fact-finding" by allowing the High Court to determine for itself whether in a particular case the tribunal has jurisdiction.[59] Particularly in the case of a specialist tribunal, however, the Court will give some weight to the tribunal's decision on questions of jurisdictional fact. Gummow J criticised decisions which gave "too great a latitude" to courts to substitute their view for that of the decision-maker on the existence of jurisdictional facts, noting that the fact-finding processes employed by the latter differed from those applicable to civil litigation before the courts. He endorsed a criterion of "reasonableness review" of the decision of an administrative decision-maker on jurisdictional facts, allowing review where the requisite satisfaction of the decision-maker was arrived at unreasonably, or was based on findings or inferences of fact which were not supported by some probative material or logical grounds.[60]

On the facts of the particular case, Gummow J concluded that it could not be said that the fact-finding and reasoning of the Tribunal was unreasonable or unsupported by probative material. It was not enough to argue merely that other decision-makers may have reached a different view, and done so reasonably.

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[56] (1999) 162 ALR 577 at 605 (paras 123-124).
[57] (1999) 162 ALR 577 at 605-606 (para.125)
[58] (1999) 162 ALR 577 at 606 (para.126).
[59] (1999) 162 ALR 577 at 609-610 (paras 138-140).
[60] (1999) 162 ALR 577 at 610-611 (paras 141-145) .

In a short concurring judgment, Hayne J expressed no view on the question whether *Wednesbury* unreasonableness is a ground for granting any of the remedies referred to in s.75(v), nor on whether it is a ground that concerns only the exercise of discretion rather than the finding of facts.[61]

In relation to the appeal by the Minister from the Full Court's decision that the Tribunal had failed to comply with the statutory direction to act "according to substantial justice and the merits of the case" (s.420(2)(b)), the High Court unanimously rejected the argument that this direction prescribes any particular procedures which the Tribunal must follow. The Court regarded s.420 as intended to *free* the Tribunal from constraints otherwise applicable to courts of law, rather than as operating to mandate any specific procedures to be observed by the Tribunal.[62] Accordingly, it is no longer possible to argue that unreasonableness or a denial of procedural fairness can constitute a failure by the Tribunal to act according to substantial justice in a manner which is reviewable in an application for judicial review under Part 8 of the Migration Act.

The significance of the decisions in *Abebe* and *Eshetu*

The judgments in both *Abebe* and *Eshetu* indicate that the High Court is still keeping a tight rein on the scope of judicial review of administrative action, and in particular the application of grounds of review such as unreasonableness and relevant / irrelevant considerations. It is clear that an administrative decision-maker continues to bear the primary responsibility for assessing the credibility and weight of information which is put before it, and for making findings and inferences of fact based on that information. In particular, the Court is unlikely to permit grounds such as unreasonableness or relevant / irrelevant considerations to be used as a way of reopening the factual findings of a tribunal on their merits.

However, at the same time, the judgments of the Court reveal an aversion to any limitations being placed on the jurisdiction of the High Court to review the legality of Commonwealth administrative action.[63] As a result, the court's jurisprudence in this area is likely to take account of the potential impact on the scope of the constitutionally entrenched avenue of judicial review under s.75(v). This will in turn prompt a closer analysis of the nature of the grounds of review such as *Wednesbury* unreasonableness, in order to ascertain whether they lead to jurisdictional error or denial of natural justice capable of attracting the grant of prerogative writs.

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[61] (1999) 162 ALR 577 at 613 (para.159).

[62] (1999) 162 ALR 577 at 588-589 (paras 46-51) per Gleeson CJ and McHugh J, 592-594 (paras 69-77) per Gaudron and Kirby JJ, 600-601 (paras 106-109) per Gummow J, 613 (para.158) per Hayne J, 620 (para.179) per Callinan J.

[63] It should be noted, on the other hand, that the majority of the Court upheld the statutory limitations placed on the jurisdiction of the Federal Court to review migration decisions under Part 8 of the Migration Act.

Recent examples of Wednesbury unreasonableness: *Botany Bay City Council*, *Thredgold*, *Betkhoshabeh* and *Rajalingam*

I will now turn to consider some recent decisions from courts other than the High Court which have raised issues concerning the proper scope of judicial review. However, I emphasise that the survey of authorities in the following pages is intended to be illustrative rather than in any way comprehensive.

Botany Bay City Council v. Minister for Transport[64] was a further instalment in a series of legal challenges brought by several local councils against the implementation of the "Long Term Operating Plan" (LTOP) for the distribution of aircraft noise from the use of Sydney airport. In these proceedings, the councils challenged the decision by the Minister for Transport to give a direction to Airservices Australia to implement the LTOP, and a decision by the Minister for the Environment to give an exemption from the statutory requirement to prepare an environmental impact statement. The main issue raised by the councils was an allegation that the Ministers had failed to consider the differential impact of aircraft noise across different areas (for example, depending on types of aircraft involved, the extent of previous noise exposure, and so on). Finn J rejected arguments that the relevant decisions were unreasonable or had failed to take into account relevant considerations, commenting that the applicants had effectively sought to engage in merits review of the fairness of the noise redistribution plan. The decisions under challenge each involved a balancing of many interests and policy objectives. In the course of his judgment, Finn J said:

> "It is important to emphasise at the outset that the ADJR Act's s 5(2)(g) 'so unreasonable' ground is one that is 'extremely confined': *Attorney-General (NSW) v Quin* (1990) 170 CLR 1 at 36. It does not provide a mask for merits review. It does not, under another guise, allow the review of a decision on grounds of substantive unfairness: *ibid* 37. And it is not made out by demonstrating that the decision reached is one with which reasonable minds might differ and with some vigour. It is not sufficient to show that a different conclusion or course of action could reasonably have been arrived at or taken: *Friends of Hinchinbrook Society Inc v Minister for Environment (No 2)* (1997) 69 FCR 28, at 59-65; see also *Botany Bay City Council v Minister of State for Transport and Regional Development* (1996) 66 FCR 537, at 561-563. . . .
>
> While it may well be the case that a different approach necessitating different (possibly further) actions could reasonably have been taken by the Minister before arriving at his decision, his failure to take such a different approach did not render that taken (and the resultant decision) unreasonable in the *Wednesbury* sense – the more so as the

[64] Federal Court, unreported, Finn J, 3 November 1998.

> Minister was not required to inquire into noise "impact" in the extended (*ie* subjective) sense proposed by the applicant. . . .
>
> The Minister was responsible to Parliament for his administration including the reconciliation of potentially conflicting objectives pursued by statutory bodies within his portfolio dealing with a related subject matter. That reconciliation (or accommodation) is not a matter for the courts in the way implied in the applicant's submission in relation to Mr Sharp. It is even less so in relation to Senator Hill. I hardly need say it is not my function to prescribe what is the appropriate hierarchy of policy objectives that either minister ought pursue."

This passage was cited with approval by O'Loughlin J in *Thredgold v. Australian Community Pharmacy Authority*,[65] who observed that "it is clear, therefore, that the courts are (and should continue to be) reluctant to interfere with factual findings on the unreasonableness ground alone." However, in *Thredgold*, O'Loughlin J concluded that the decision under challenge was unreasonable, and should be set aside. The Authority had decided to recommend the approval of the second respondent's proposed new pharmacy premises pursuant to a statutory scheme. The decision of the Authority depended on the second respondent establishing that the "shortest lawful access route" from its current pharmacy premises to the proposed new premises was not more than one kilometre. The route relied on by the Authority in making this decision supposed that a pedestrian might, instead of using either of two sets of traffic lights, cross a main arterial road at a 45-degree angle, irrespective of whether or not such a route was safe or practical, and without any reason to believe that actual pedestrians would or might cross the road in that fashion. This was a case in which it was not reasonably open for the Authority to conclude that such a route would provide the "shortest lawful access route" for the purposes of the relevant legislation.

Minister for Immigration and Multicultural Affairs v. Betkoshabeh[66] concerned a criminal deportation order made against the holder of a protection visa after his conviction of offences involving aggravated burglary and threats to kill. The Administrative Appeals Tribunal affirmed this order, finding that the respondent did not fall within Article 33(1) of the Refugees Convention, which imposes an obligation of *non-refoulement* of refugees. In the opinion of the Tribunal, changes in the circumstances prevailing in the respondent's country of origin indicated that he no longer had a well-founded fear of persecution on Convention grounds if he were to return. At first instance, the Federal Court found this conclusion to be so unreasonable that no reasonable tribunal could have come to it, and went on to find that the respondent was in fact a refugee entitled to the protection of the *non-refoulement* obligation. In allowing an appeal by the Minister, the Full Court held that the Tribunal's conclusion was supported by probative material, and was not perverse. Referring to *Puhlhofer*,[67]

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[65] [1999] FCA 23 (O'Loughlin J, 22 January 1999).
[66] [1998] FCA 980 (Full Court: O'Connor, Sundberg and North JJ).
[67] *Puhlhofer v. Hillingdon London Borough Council* [1986] AC 484.

the Court noted that in the spectrum from obvious to debatable to just conceivable, the Tribunal's conclusion lay in the "debatable" area and was therefore open to it. The attack on the Tribunal's decision –

> "consisted in taking parts of [the Tribunal's] reasons out of context and meticulously examining them in pursuit of error. . . . In essence, the Court was asked to substitute its own view on the merits of the case for the view of the Tribunal. As we have explained in these reasons, the function of the court is much more limited."

The primary judge had not only erred in setting aside the Tribunal's decision on the basis of *Wednesbury* unreasonableness, but had also exceeded his proper supervisory role by considering the prospects that the respondent would face upon return to his country of origin, and purporting to make a positive finding that the respondent was a refugee.

Finally, in *Minister for Immigration and Multicultural Affairs v. Rajalingam*,[68] the Full Court of the Federal Court considered the principles established in *Minister for Immigration and Ethnic Affairs v. Guo*[69] concerning the circumstances in which the Refugee Review Tribunal may make and rely on findings about past events. The High Court held in *Guo* that, in appropriate circumstances, the Tribunal must take into account the *possibility* that an alleged past event occurred in determining whether the applicant has a well-founded fear of future persecution, even if it considers on the balance of probabilities that the event probably did not occur. However, if the Tribunal has *no real doubt* that its findings are correct, it does not have to take into account the possibility of error in those findings.

The argument in *Rajalingam* was that the Tribunal *should have had* a real doubt about the correctness of its findings, notwithstanding that there was no indication in the Tribunal's reasons which qualified its own confidence in its findings. The primary judge accepted this argument, holding that the reasons for the rejection of the applicant's allegations were not *objectively* cogent or compelling enough to impute to the Tribunal a view that the possibility of error was insignificant. As a result, the judge held that it would have been unreasonable for the Tribunal to attain such a degree of conviction in its rejection of the applicant's allegations as would relieve it from considering the possibility that the alleged events did occur.

The Full Court allowed an appeal by the Minister, on the basis that the question whether the Tribunal should have taken into account the possibility that its findings of fact may not be correct depended on whether any "real doubt" as to the correctness of those findings appeared from a fair reading of the Tribunal's reasons themselves, and not from any doubt implied or imputed upon a reconsideration of the reasons by a reviewing judge. Sackville J (with whom North J agreed stated:

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[68] [1999] FCA 719 (Full Court: **Sackville, North and Kenny JJ)**.
[69] (1997) 191 CLR 559.

> "Nor do I think that there is anything in the reasoning of the High Court which permits a court exercising powers of judicial review to 'impute' to the RRT (or other administrative decision-maker) a lack of conviction or confidence in its findings of fact, such as to warrant a holding that the RRT should not or could not have relied on those findings to hold that the applicant's fear of persecution was not well-founded. To take this course on the basis of the court's own assessment of the evidence before the RRT, is to enter the territory of merits review. It is one thing to find error in a decision-maker's failure to apply the correct legal test or to comply with statutory obligations (for example, to set out findings on material questions of fact as required by *Migration Act*, s 430(1)(c)). It is another to decide what factual findings the RRT should or should not have made."

Kenny J agreed in a separate judgment, stating:

> "A tribunal such as the RRT does not commit an error of law merely because it finds facts wrongly or upon a doubtful basis, or because it adopts unsound or questionable reasoning. . . . In my view, the effect of his Honour's judgment was to turn what his Honour saw as doubtful fact-finding into an error of law. What his Honour did, I think, was erroneously attribute to the RRT the doubts his Honour had about the facts the RRT had found. Once that step was taken, his Honour treated the RRT's failure to address those doubts as indicative of a failure to take them into account in reaching its ultimate decision, as the decisions in *Guo* and *Wu Shan Liang* indicated it should have done. I agree with the remarks of Katz J in *Zuway* (unreported, 31 December 1998) [1998] FCA 1738 that a search by the Court for objective cogency in the reasons of the RRT creates a real risk that the Court will substitute its own view of the merits of the case for that of the Tribunal. . . .
>
> The analysis made by the judge at first instance is, it seems to me, essentially a criticism of the RRT's findings of fact, of the weight that it attributed to the different items of information before it, and of the reasoning process adopted by it in reaching its factual conclusions. For present purposes (and certainly under the present statutory regime) a criticism of that kind, no matter how sound, does not establish an error of law."

However, her Honour's concluding comments indicate an awareness of the potential difficulties in separating aspects of legality and merits in particular cases:

> "For the reasons given, I would allow these appeals. It should be borne in mind, however, that the borders of review for error of law, which is permissible, and review on the merits, which is not, are often indistinct. Minds can, and do, reasonably differ as to where those borders are. Mapping the borders is made more difficult by

> Parliament's decision to constrain the review jurisdiction of the Court to the errors of law specified in s 476(1) of the Act.".

The above authorities, although somewhat randomly selected, may provide some encouragement that the Federal Court (at least at the Full Court level) appears to be keenly aware of the limits on the scope of judicial review, and has taken to heart the recent warnings of the High Court against any tendency to review administrative decisions on their merits.

Jurisdictional facts: *Mt Isa Mines* and *Timbarra Protection Coalition Inc.*

One way in which to attempt to reopen a factual finding made by an administrative body is to argue that the jurisdiction of the body depends on the actual existence of the relevant fact, so that it is open to the reviewing court to receive evidence and determine for itself whether the tribunal had jurisdiction. In order to succeed in such an argument, it is necessary first to characterise the relevant fact as a jurisdictional fact, and then to establish that the body does not have power to determine conclusively the facts on which its jurisdiction depends. Putting aside questions of jurisdictional fact that reflect or are derived from constitutional limitations, each of these questions will ultimately turn on the legislative intention to be discerned from the terms of the empowering statute.

The High Court confronted such an argument in *Australian Heritage Commission v. Mount Isa Mines*,[70] which concerned the power of the Commission to enter a place into the register of the national estate. The "national estate" was relevantly defined to comprise places "that have aesthetic, historic, scientific or social significance or other special value for future generations as well as for the present community". The Commission had power to enter in the register places that it considered should be recorded as part of the national estate. A decision by the Commission to enter a particular place in the register was challenged on the basis that the place did not in fact form part of the national estate. The High Court considered that whether a place formed part of the national estate was not a matter of objective jurisdictional fact upon which the Commission's powers were dependent, but rather involved matters of opinion and degree which were entrusted to the Commission for determination. While the formation of an opinion by the Commission was not immune from judicial review on various grounds, "those grounds do not include re-opening of the merits of the decision reached by the Commission on a ground which in substance expresses a contention that there was an absence of jurisdictional fact".[71]

The decision in *Mount Isa Mines* has been recently considered by the New South Wales Court of Appeal in *Timbarra Protection Coalition Inc v. Ross Mining NL*.[72] This case involved a challenge by an environmental group to the grant by a local council

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[70] (1997) 187 CLR 297.

[71] (1997) 187 CLR 297 at 308.

[72] (1999) 46 NSWLR 55 (Spigelman CJ, Mason P and Meagher JA). The High Court refused an application for special leave to appeal on 14 May 1999.

of a development consent for a proposed extension to a gold mine. The issue was whether or not the application for the development consent should have been accompanied by a species impact statement. The relevant legislation provided that a species impact statement was required where the application was "in respect of development on land that is part of a critical habitat or is likely to significantly affect threatened species, populations or ecological communities, or their habitats". Spigelman CJ (with whom the other members of the Court agreed) concluded that the question whether an application satisfied this description *was* a question of jurisdictional fact, upon which the powers of the council to grant a development consent depended. Accordingly, it was open to the appellant to adduce evidence in the Land and Environment Court in order to establish that, notwithstanding a view to the contrary by the council, the proposed development was likely to affect threatened species.

Spigelman CJ's approach stresses that the question whether or not a factual issue is one of jurisdictional fact is a question of statutory construction, namely, to ascertain whether the Parliament intended that the actual existence of the fact was an essential pre-condition to the administrative decision-maker's powers, or instead intended that the decision-maker could authoritatively determine the existence of that fact. In the latter case, a court can only review the determination by the decision-maker on grounds such as unreasonableness, absence of evidence, and so on. If a question of fact involves a jurisdictional fact, however, the court can reconsider that question on its merits. Spigelman CJ suggested that a critical factor may be the stage at which a factual issue arises:[73]

> "the important, and usually determinative indication of parliamentary intention, is whether the relevant factual reference occurs in the statutory formulation of a power to be exercised by the primary decision-maker or, in some other way, necessarily arises in the course of the consideration by that decision-maker of the exercise of that power. Such a factual reference is unlikely to be a jurisdictional fact. The conclusion is likely to be different if the factual reference is preliminary or ancillary to the exercise of a statutory power."

In *Timbarra*, the factual issue arose in the context of statutory provisions governing the manner in which an application was to be made, rather than in the course of determining whether a development consent should be granted. Another factor was the importance of species impact statements to the purpose of the legislative scheme of ensuring effective public consultation and informing the decision-maker. These considerations led Spigelman CJ to the conclusion that the question whether an application was required to be accompanied by a species impact statement was one of objective jurisdictional fact, notwithstanding that this question raised matters of broad judgment on which reasonable minds might differ (that is, the likelihood that an application would significantly affect threatened species).

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[73] (1999) 46 NSWLR 55 at 65.

While providing some further guidance, difficult questions will continue to arise as to whether factual issues in particular statutory schemes are ones of objective jurisdictional fact. Spigelman CJ mentions one earlier case which involved a restriction on making applications for a liquor licence that turned on the distance between two premises, where the factual issue was held to be one of jurisdictional fact that could not be conclusively determined by the relevant decision-maker.[74] This appears to be a reasonable conclusion: measurements of distance would seem to be relatively objective, and the requirement was a condition of application rather than a matter considered in the exercise of the substantive power. However, a different result was reached by O'Loughlin J in *Thredgold v. Australian Community Pharmacy Authority*,[75] who considered that the question concerning the length of the "shortest lawful access route" between two premises was not one of jurisdictional fact, but rather was a matter for decision by the Authority. Accordingly, O'Loughlin J refused to consider further evidence which the applicant sought to adduce as to the distance between the two locations. One possible distinction between *Thredgold* and the earlier case mentioned in Spigelman CJ's judgment is that, in the former, the distance requirement was a condition of the grant of an approval rather than of the making of an application. Also, the question of which of several access routes is the "shortest" would appear to call for the exercise of judgment, and might be a matter of opinion and degree.

I note that the Full Court of the Federal Court distinguished *Timbarra* in another recent decision, *Canberra Tradesmen's Union Club Inc. v. Commissioner for Land and Planning*,[76] which involved the question whether an environmental assessment was required in connection with an application by the Canberra Casino for a licence to use its premises as a club (which might later enable it to sub-lease its premises to a club licensed to operate poker machines). The question whether the relevant proposal fell within the classes of proposal in respect of which an environmental assessment was required was not regarded as a jurisdictional fact which could be reconsidered on the merits by the Court, primarily on the basis that it involved matters of opinion or assessment (such as whether the proposal "does not cause significant change in the scale, size and purpose" of an existing situation).

The potential uncertainty in any particular case as to whether the satisfaction of a statutory criterion is a pre-condition to the existence of an administrative decision-maker's jurisdiction is likely to encourage attempts to challenge the findings of the decision-maker as to whether the relevant criterion was satisfied. The only way to reduce the prospect of such challenges is to ensure (where appropriate) that the relevant legislation is drafted so as to make it clear that the decision as to the criterion is entrusted to the decision-maker –for example, by using subjective "state of mind" provisions (e.g. "where X is satisfied that . . .") or by making the criterion one which arises in the exercise of the relevant power as opposed to a condition of making a valid application to the decision-maker.

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[74] See *Manning v. Thompson* [1976] 2 NSWLR 380; [1977] 2 NSWLR 249; [1979] 1 NSWLR 384.

[75] [1999] FCA 23 (O'Loughlin J, 22 January 1999).

[76] (1999) 86 FCR 266 (Miles, Matthews and Lehane JJ).

Remedies: *Guo Wei Rong* and *Trong*

As mentioned above, a court exercising judicial review functions is generally limited to the remedy of quashing the decision under challenge, and remitting the matter to the administrative decision-maker. Other than in exceptional circumstances, it is not appropriate for the court itself to substitute its decision for that of the decision-maker.

Thus, in *Minister for Immigration and Ethnic Affairs v. Guo*,[77] the Full Court of the Federal Court had purported to make a declaration that the applicants for judicial review were refugees and were "entitled to the appropriate entry visas". Putting aside the problems arising from the lack of specificity in the formulation of the order, the High Court emphasised that the making of a declaration in such terms pre-empted the exercise of powers by the Minister or the Refugee Review Tribunal. The entitlement of each applicant to a visa would not arise until the requisite statutory criteria had been met, one of which was that the Minister (or the Tribunal) was satisfied that the person was a refugee within the scope of the Convention.

This is not to say that there may not be situations where a decision-maker may face only one lawful course of action, and a court may effectively require the decision-maker to exercise his powers in that manner. This will most often be where the power is relevantly non-discretionary. Mason CJ outlined the principles in *Commissioner of State Revenue (Vict) v. Royal Insurance Australia Ltd*:[78]

> "Although the argument was not elaborated, it is to be understood as invoking the principle that mandamus requires the exercise of the relevant statutory discretion rather than its exercise in a particular way.[79] But that principle means no more than that the administrator to whom mandamus is directed will be required to perform the legal duty to the public which is imposed by the statute and ordinarily that duty is limited to exercising the statutory discretion according to law, there being no obligation to exercise the discretion in a particular way. However, if the administrator is required by the statute to act in a particular way and in certain circumstances, or if the exercise of a statutory discretion according to law in fact requires the administrator to decide in a particular way, so that in neither case does the administrator in fact have any discretion to exercise, then mandamus will also issue to command the administrator to act accordingly.[80]"

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[77] (1997) 191 CLR 559.

[78] (1994) 182 CLR 51 at 80-81.

[79] *Randall v. Northcote Corporation* (1910) 11 CLR 100 at 105.

[80] *Reg. v. Anderson; Ex parte Ipec-Air Pty Ltd* (1965) 113 CLR 177 at 188 per Kitto J. (dissenting but not on this point), 203, 206 per Windeyer J; *Minister for Immigration and Ethnic Affairs v. Conyngham* (1986) 68 ALR 441 at 448-451.

While it is not hard to understand how a court might exceed its proper role by being over-zealous in the grant of a remedy to an applicant, it is also possible for a court to mistake its function when *declining* to grant relief. Most remedies available on an application for judicial review, whether at common law or under the ADJR Act, are of a discretionary nature. In some circumstances, the invocation of the court's discretion to refuse relief may potentially lead the court into a consideration of the merits of the decision.

In T*rong v. Minister for Immigration, Local Government and Ethnic Affairs*,[81] the applicants had sought judicial review of a decision by the Minister to issue conclusive certificates under the *Migration Act 1958*, denying them recourse to merits review by the Refugee Review Tribunal of decisions refusing them refugee status.[82] Although the issue of the conclusive certificates was driven by public interest considerations, Merkel J concluded that the applicants should have been given notice and an opportunity to be heard in relation to the decisions, and had therefore been denied procedural fairness. One of the Minister's submissions was that, even if the court found that a decision was invalid due to a failure to accord procedural fairness, the court should refuse relief on the basis that the same decision would have been made even if adequate notice and an opportunity to be heard had been provided.

While Merkel J acknowledged that there were occasions on which courts had denied relief on the ground that the outcome was inevitable, he noted that it would ordinarily be difficult for a respondent to establish the factual basis for such a submission, namely, to prove that the decision would in fact have been no different if it had not been affected by legal error. More importantly, however, such a submission has a dangerous tendency to lead courts into a consideration as to the merits of the decision. Merkel J advocated a conservative approach, under which the court would not exercise its discretion to refuse relief to an applicant where there was *any* possibility that the result may have been different if the applicant had been given procedural fairness. Thus, the court should not be required to speculate as to what the result would have been on the merits had a fair hearing been given. Unless it *clearly* appears that the grant of relief would be futile, for example where there is no possibility that a different decision will be made on remittal to the decision maker, the court should ordinarily grant the appropriate relief to set aside the decision.

THE IMPACT OF LEGISLATIVE REFORMS

Notwithstanding the emphasis in recent High Court and Federal Court decisions on judicial restraint in the review of administrative action, a consistent theme of government policy over the last decade has been the need to rationalise the available

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[81] Federal Court, unreported, Merkel J, 2 August 1996.

[82] The primary factor motivating the issue of conclusive certificates was that the applicants had previously applied for and been denied refugee status in a screening process conducted in Indonesia pursuant to what is known as the "Comprehensive Plan of Action". However, the applicants claimed that this process was flawed, and tainted by bribery and corruption.

avenues of review and to limit the scope of judicial review. This has been particularly evident in the area of immigration, where there has been a perception of undue delays and costs associated with multiple levels of review, and of potential abuses of the review system by unlawful non-citizens seeking to defer their removal from Australia.

I will briefly consider several reforms or proposed reforms concerning the review of migration decisions:

(i) the specialised scheme for judicial review contained in Part 8 of the Migration Act;

(ii) the recent abolition of internal merits review; and

(iii) the current proposals to limit judicial review by way of a privative clause.

Part 8 of the Migration Act 1958

In September 1994, a new scheme for the judicial review of migration decisions commenced operation. Part 8 of the *Migration Act 1958* excluded the review jurisdiction which was previously conferred on the Federal Court by Commonwealth legislation[83] in respect of migration decisions, replacing it with a special jurisdiction to review such decisions *on specified grounds*. Thus, with the exception of the High Court's jurisdiction under s.75 of the Constitution, Part 8 created an exclusive avenue for the judicial review of migration decisions made under the Act, being an avenue which is generally only available after the applicant has exhausted all opportunities for merits review of the decision.

The central provision in Part 8 is s.476, which limits the grounds of review which can be made the subject of a judicial review application under that Part. Sub-section 476(2) provides that an application cannot be made on the ground that there was a breach of the rules of natural justice nor on the ground of *Wednesbury* unreasonableness. Further, sub-section 476(3) exhaustively defines the ground of improper exercise of power for the purposes of Part 8, expressly excluding the grounds of relevant/irrelevant considerations and bad faith. As a result of these provisions, the effect of Part 8 was to introduce a divergence between the grounds of review available in the Federal Court in an application under that Part, and the grounds of review which might be available in an application to the High Court pursuant to its entrenched original jurisdiction under s.75 of the Constitution.

A challenge to the constitutional validity of Part 8 was dismissed by a majority of the High Court in *Abebe v. The Commonwealth*.[84] The basis of the challenge was that Part 8 was inconsistent with Chapter III of the Constitution, primarily because it prevented the Federal Court from considering all of the possible grounds upon

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[83] Such as the *Administrative Decisions (Judicial Review) Act 1977* and s.39B of the *Judiciary Act 1903*.

[84] (1999) 162 ALR 1.

which the decision might be held to be unlawful, and therefore prevented the Court from determining the entire "matter" or controversy between the parties.

The majority held that the limitations on the grounds of review which could be considered by the Federal Court were not inconsistent with Chapter III. The majority (Gleeson CJ, McHugh, Kirby and Callinan JJ) considered that, for the purposes of s.77 of the Constitution, Part 8 of the Migration Act was a law "defining" the jurisdiction of the Federal Court "with respect to" a class of matter falling within sections 75 and 76 of the Constitution. In their view, there is no constitutional requirement that the Parliament, when conferring jurisdiction on a federal court, must confer jurisdiction to determine the entire controversy arising between the parties. Gaudron, Gummow and Hayne JJ dissented, emphasising that the right at issue between the parties in judicial review proceedings concerns the legality of the relevant decision or other action by the executive, and that Part 8 did not enable the Federal Court to make a final determination of that or any other right.

It is beyond the scope of this paper to examine in detail the constitutional issues considered in *Abebe*. But it is worth making some brief comments on the reasons for the enactment of Part 8, and on the potential effect of that Part on the review of migration decisions. It is quite clear that a primary motivating factor behind Part 8 was a desire to increase certainty in the review of migration decisions, and to reduce the potential for any broad-ranging review by courts of either the procedural fairness or the substantive fairness of migration decisions. The Explanatory Memorandum to what became Part 8 noted that the codification of the procedural requirements applicable to migration decision-making would provide greater certainty, and justified the exclusion of *Wednesbury* unreasonableness as a ground of review on the following basis:

> "It has long been recognised that this ground of review, if not interpreted with great care and precision, will come close to a review of a decision on the merits, especially where review on the merits is not available. The review procedures established in this Bill provide for comprehensive merits review of all visa related decisions and in recognition of this, this ground of review will no longer be available."

In his judgment in *Abebe*, Kirby J also speculated as to the policy considerations which had led to the enactment of Part 8:[85]

> "It must be assumed that the Parliament enacted the restrictions on the jurisdiction of the Federal Court of Australia for a reason. Ostensibly, that reason was because of a conclusion that all of the grounds of judicial review, provided by the common law or by other federal laws[86], were not appropriate to review of decisions concerning the status of a person claiming to be a refugee. The

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[85] (1999) 162 ALR 1 at 60 (para.223).

[86] For example *Administrative Decisions (Judicial Review) Act* 1977 (Cth).

> delays, uncertainties and costs attending litigation of such cases have been noticed, including by this Court[87]. Those who framed and those who supported such legislation may have concluded that some applications for judicial review in this context were thinly disguised attempts to procure judicial redeterminations of the facts or the merits[88]."

It remains to be seen whether Part 8 will significantly narrow the scope of judicial review of migration decisions in the Federal Court. For example, the approach taken by Gummow J in *Eshetu*[89] may allow excluded grounds of review such as unreasonableness or denial of procedural fairness to be raised indirectly in the context of other grounds of review which are included within s.476(1) of the Act. Further, some Federal Court judges may attempt to read the limitations contained in Part 8 as narrowly as possible. Subsection 485(3), which limits the "powers" of the Federal Court in matters relating to "judicially-reviewable decisions" which are remitted to it by the High Court, has been construed by one judge as not limiting the jurisdiction of the court or the available grounds of review.[90] In any event, the limitations imposed by s.485(3) do not appear to be applicable where the Federal Court has remitted to it a s.75(v) application for review of a primary decision (as opposed to a decision made by a merits review tribunal).[91]

The potential difference in the scope of review available in the Federal Court from that available in the High Court, combined with the qualifications on the High Court's ability to remit matters to the Federal Court, may encourage applicants to pursue their broader review rights in the original jurisdiction of the High Court. This tendency, which may unduly burden the workload of the High Court, was highlighted and criticised by several members of the majority in *Abebe*.[92] In some respects, this is an issue that is acknowledged by the Department of Immigration and Multicultural Affairs and advanced in support of the introduction of a privative clause which would apply equally to review by the Federal Court and the High Court.

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87 See eg *Minister for Immigration and Ethnic Affairs v Guo* (1997) 191 CLR 559 at 579-580.

88 cf *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 40-41; *Attorney-General (NSW) v Quin* (1990) 170 CLR 1 at 37; *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 341; Aronson and Dyer, *Judicial Review of Administrative Action* (1996) at 186-202.

89 (1999) 162 ALR 577 at 613.

90 *"A" v. Pelekanakis* [1999] FCA 236 at paras 71-74 per Weinberg J; cf. *Thambythurai v Minister for Immigration and Multicultural Affairs* [1997] FCA 997 (Finklestein J) and *Cam Mui Chi v Minister for Immigration and Multicultural Affairs* [1998] FCA 692 (Mansfield J). Nevertheless, some of the judgments in *Abebe* appear to assume that s.485(3) would preclude reliance on the excluded grounds of review upon remittal to the Federal Court: see (1999) 162 ALR 1 at 29-30 (para.100) per Gaudron J.

91 See *"A" v. Pelekanakis* [1999] FCA 236 at paras 69-70, 74 per Weinberg J.

92 (1999) 162 ALR 1 at 17 (para.50) per Gleeson CJ and McHugh J, 56 (para.207), 62 (para.231), 64-65 (para.237) per Kirby J.

Abolition of internal merits review – Migration Legislation Amendment Act (No.1) 1998

Prior to the commencement of the *Migration Legislation Amendment Act (No.1) 1998*,[93] migration decisions (other than protection visa decisions) were generally subject to two tiers of merits review: internal merits review by departmental officers followed by external merits review by the Immigration Review Tribunal. This legislation replaces these tiers with a single level of external merits review by the newly-established Migration Review Tribunal. While on its face this appears to be a reduction in merits review, the overall effectiveness of formal internal review mechanisms can be questioned. In a situation where the review officer is not independent from the Department, the internal review process is unlikely to satisfy unsuccessful applicants, and is likely to correct only the most obvious errors. There is a good case for transferring the resources employed in internal review to a more thorough and well-resourced external review process.

Privative clause proposals – Migration Legislation Amendment (Judicial Review) Bill 1998

The Migration Legislation Amendment (Judicial Review) Bill 1998 is currently before the Parliament, and was the subject of a report by the Senate Legal and Constitutional Legislation Committee which was tabled in April 1999.[94] The main object of the Bill is to introduce a "privative clause" applicable to most administrative decisions made under the Migration Act. In general terms, this clause will provide that such decisions are final, conclusive and not subject to challenge, appeal or review in any court.

The effect of such a privative clause would be to render lawful decisions which would otherwise be in excess of statutory power, so that relief would not be available by way of judicial review except on relatively limited grounds. The High Court has held that such a privative clause can ensure the validity of the decisions to which it applies, provided that the relevant decision is a *bona fide* attempt to exercise the power, relates to the subject matter of the legislation, and is reasonably capable of reference to the power given to the body.[95] The precise scope of these qualifications is still somewhat unclear, but they would appear to limit the available grounds of judicial review to fraud and perhaps jurisdictional error (or ultra vires) in the narrow sense. Nevertheless, courts construing and applying such a privative clause may

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[93] I note that a Bill to similar effect was introduced into but not passed by the previous Parliament (*Migration Legislation Amendment Bill (No.4) 1997*).

[94] A Bill to similar effect was introduced into but not passed by the previous Parliament (*Migration Legislation Amendment Bill (No.5) 1997*). The Senate Legal and Constitutional Legislation Committee reported on this Bill in October 1997.

[95] *R v Hickman; Ex parte Fox and Clinton* (1945) 70 CLR 598 at 615 per Dixon J.

seek to develop the concepts of what is "*bona fide*" or reasonably capable of reference to the power to cover situations presently catered for by grounds of judicial review.[96]

Because a privative clause effectively operates by "validating" decisions in a substantive sense, rather than removing the jurisdiction to review invalid decisions, it is capable of applying to the High Court without any inconsistency with s.75 of the Constitution.

If it were to be passed by the Parliament, such a privative clause would place much greater reliance on external merits review to correct errors in primary decision-making and to provide normative guidance to departmental officers. It would remain to be seen how effective such a merits review process would be in achieving these twin objectives.

The significance of government reforms to review mechanisms

The proper balance between merits review and judicial review is ultimately a matter of legislative policy, subject of course to any constitutional restrictions on the complete removal of judicial review. It is for the government to determine whether to have any merits review of administrative decisions, and if so, the appropriate number of levels or "tiers" of merits review (whether internal or external). Within constitutional limits, it is also open for the government to find ways to limit the availability and scope of judicial review avenues, so as to place more emphasis on a merits review process.

A generalised approach may not always be adequate - the appropriate position may vary between different areas of administrative decision-making. In some areas, there may be strong reasons for having a comprehensive merits review process, possibly with multiple tiers of review, subject to supervision by the courts in respect of any legal error. In other areas, more emphasis might be placed on one of either merits review or judicial review.

CONCLUSION

I have attempted in this paper to elaborate on the essential distinction between judicial review and review on the merits, and to assess the efforts by the High Court and the Federal Court respectively to maintain that distinction by ensuring that judicial review is kept within its proper limits. Following the lead set by the High Court, it appears that the Federal Court, at least at the intermediate appellate level, is prepared to restrain incursions into merits review by primary judges. This has not, however, prevented the continued development of reforms to the administrative review system which impact on the extent of both merits review and judicial review. Both judicial developments and legislative reforms, and often the ongoing

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[96] There may be a hint of this in Gaudron J's comments in *Abebe* (1999) 162 ALR 1 at 33, that "there may be situations in which a decision of that kind [ie an unreasonable decision] cannot be related either to the matter to be decided or to the relevant head of legislative power."

interaction between the two, ensure that our system of review of administrative action is not static, but is constantly evolving to address contemporary circumstances and needs.