REFUGEE CLAIMS AND AUSTRALIAN MIGRATION LAW: A MINISTERIAL PERSPECTIVE

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This article attempts to set out the context in which the refugee determination system in Australia operates and the international and internal pressures to which the system is subject.

I. AUSTRALIA'S REFUGEE DETERMINATION SYSTEM

Four objectives influence, to varying extents, the shape of Australia's refugee determination system. These are compliance with international obligations; administrative justice for the individual; practical, efficient and lawful administration; and the public accountability of government. These objectives, and the determination system itself, are set within the broader context of Australia's international protection obligations. In examining the refugee determination system it is appropriate at the outset to turn to Australia's international obligations.

The cornerstone of Australia's international protection obligations is the 1951 Convention Relating to the the Status of Refugees ("Refugees Convention") and its 1967 Protocol.[1] The Convention defines the concept of 'refugee' and imposes certain obligations on signatory states. The Convention presupposes that there must be a determination that an individual in question satisfies the relevant legal criteria for refugee status.[2] In practice, such determinations are made at two levels. At the international level, they are made by the United Nations High Commissioner for Refugees ("UNHCR").[3] At the domestic level, they are determined by the administrative or judicial processes of individual nation states.

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1 1951 Convention Relating to the Status of Refugees 189 UNTS 150 and United Nations 1967 Protocol Relating to the Status of Refugees 606 UNTS 267.

2 GS Goodwin-Gill, *The Refugee in International Law*, Oxford University Press (2nd ed, 1996) p 32; see also *Simsek v McPhee* (1982) 148 CLR 636 at 643, per Stephen J.

3 The function of the UNHCR in determining refugee status is part of its mandate: see the Statute of the Office of the United Nations High Commissioner for Refugees, Annex to UNGA Resolution 428(V), 14 December 1950, Chapters I and II.

Australia's refugee determination system allows applicants to have their claims considered at potentially five levels: at the primary stage, at the merits review stage (by the Refugee Review Tribunal ("RRT")) and if the merits review miscarries, in the sense that the RRT fails to reach its decision lawfully, at the judicial review stage.[4] The refugee determination system is complemented by a statutory discretion vested in the Minister to substitute a more favourable decision to the applicant than that of the RRT in unique and exceptional circumstances and when the Minister considers it in the public interest to do so.[5] Unique and exceptional circumstances include those involving compassionate and humanitarian considerations.

Australia's refugee determination system is recognised as being a highly developed one. In its submission to a 1997 inquiry of the Senate Legal and Constitutional References Committee, the UNHCR stated:

> [T]he Australian RSD [refugee status determination system], as presently constituted, is a high quality one which reflects a strong commitment to Australia's international obligations relating to refugee protection. The present system currently offers a RSD process which provides a fair and effective first instance and appeal procedure...[and] is widely held to be a model structure for the determination of refugee status applications.[6]

More recently, the UNHCR has commented that:

> Australia's system is in compliance with the provisions of the Executive Committee Conclusion No 8 (XXVIII) .... Neither judicial review nor recourse to ministerial discretion are strictly required by the Executive Committee Conclusions, and the Convention is silent on this point.[7]

As the UNHCR has acknowledged, Australia's determination system exceeds the requirements contained in the Conclusion adopted by the Executive Committee on the International Protection of Refugees[8] in two significant respects. First, the Australian system provides for judicial review in addition to administrative review, when only one form of review is recommended by the Committee.[9] Second, it provides for an overarching ministerial discretion in recognition of the fact that the public interest may be served through the Australian Government responding with care and compassion to the plight of certain individuals in particular circumstances.[10]

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4 The judicial review stage itself comprises three levels: first instance proceedings in the Federal Court, appeal proceedings in the Full Federal Court and appeal proceedings in the High Court.

5 *Migration Act* 1958 (Cth), s 417.

6 UNHCR Submission to the Senate Legal and Constitutional Legislation Committee Inquiry into the Migration Legislation Amendment Bill (No 5) 1997 (Cth), dated 14 October 1997.

7 UNHCR, Submission to the Senate Legal and Constitutional References Committee Inquiry into Australia's Refugee and Humanitarian Determination Processes, pp 1433–4, referred to in the Committee's report, *A Sanctuary Under Review*, June 2000, pp 183–4.

8 UNGA Doc No 12A (A/32/12/Add.1), No. 8(XXVIII) Determination of Refugee Status.

9 Executive Committee of the United Nations High Commissioner for Refugees Programme, Conclusions on the International Protection of Refugees No 8 (XXVIII), para (e)(vi).

10 Department of Immigration and Multicultural Affairs, *Migration Series Instructions 225*- Ministerial Guidelines for the identification of unique or exceptional cases where it may be in the public interest to substitute a more favourable decision under ss 345, 351, 391, 417, 454 of the *Migration Act* 1958 (Cth), at [4.1]. The exercise of the discretion may be in the public interest even although Australia's protection obligations are not engaged.

The refugee determination system gives every applicant an opportunity for his or her claim to be thoroughly and objectively considered, and for Australia's obligations towards the applicant to be properly and lawfully determined. Ironically, it is the quality of our refugee determination system which is the cause of its vulnerability. The system is burdened by applicants who engage it either to extend their stay in Australia or to achieve a migration outcome.

The main pressures on the refugee determination system may be conveniently characterised as those from without, and those from within. Those from without include the unauthorised arrival of non-citizens and associated people-smuggling operations. From within, pressure stems from those who abuse the review processes in the refugee determination system. Each of these pressures is explored in greater detail below.

II. PRESSURES FROM OUTSIDE – UNAUTHORISED ARRIVAL AND PEOPLE TRAFFICKING

A. Unauthorised Arrival

A major threat to Australia's refugee determination system is illegal entry. In 1999-2000, 75 boats were intercepted off the north and north west coast of Australia, carrying 4 175 people, 3 486 (83 per cent)[11] of whom presented information that prima facie may have engaged Australia's protection obligations. This is more than twice the number for the 1998-99 financial year.

Illegal entry challenges both the operational and the policy priorities of the Department of Immigration and Multicultural Affairs ("DIMA"). The international protection framework depends on orderly and managed people movement for its effective operation.[12] The increasing number of asylum seekers who arrive unlawfully and make applications for protection visas frustrates the operation of Australia's humanitarian migration program as a whole. The more resources that are required for the on-shore refugee determination system, the fewer resources that are available for the off-shore caseload.

Due to Australia's geographical isolation, the unauthorised arrival of asylum seekers in practice forecloses, temporarily at least, the possibility that other durable alternatives may be found for those asylum seekers. Resettlement in a third country is the last of three solutions to the problem of refuge advocated by the UNHCR; the other two solutions being voluntary repatriation and local integration in the country of first asylum.[13] In conjunction with the UNHCR, Australia actively promotes repatriation and integration wherever appropriate. We facilitate repatriation through our diplomatic and aid programs aimed at

11 DIMA Fact Sheet 81: *Unauthorised Arrivals by Air & Sea*, 3 May 2000, <http://www.immi.gov.au/facts/81boats.htm>.

12 DIMA Fact Sheet 46: *Australia's International Protection Obligations*, 25 July 2000, <http://www.immi.gov.au/facts/46protect.htm>.

13 UNHCR, Chapter 2: Searching for Lasting Solutions, *The Resettlement Handbook*, June 1997.

addressing the cause of refugee flows. A significant amount of the humanitarian and emergency aid program is also used to support countries of first asylum.[14]

While for many refugees resettlement may be the best, or the only, alternative,[15] this is not true for all refugees. In view of this fact, and in order to discourage the perception of Australia as a soft target, we now only provide temporary residence (rather than permanent residence as was previously the case) to asylum seekers who arrive unlawfully and are owed protection obligations by Australia.[16] At the same time, Australia continues to have one of the highest resettlement rates per capita in the world, providing permanent protection to an average of 8 000 off-shore asylum seekers each year.[17] As resettlement is not required by the Refugees Convention, this is a way in which Australia exceeds its international obligations.

B. People Trafficking

Australia's recent experience of illegal entry has been that it is orchestrated by people traffickers.[18] People trafficking is an organised international crime which undermines the effectiveness of Australia's refugee determination system by encouraging and actively facilitating forum shopping.[19] The Parliament has responded legislatively to forum shopping by inhibiting this practice by asylum seekers.[20] This legislative amendment is consistent with Australia's international legal obligations.

The illegal nature of people trafficking necessarily results in people arriving in Australia either with false travel documents or, in some cases, without any documents. DIMA is investigating the use of fingerprinting and biometric testing in order to verify the true identity of asylum seekers, so that their residency status in other countries – and hence the extent of Australia's protection obligations – may be more effectively determined.

People trafficking also threatens the welfare of the people who are the subject of the trafficking, by grossly exploiting their desire for a better life in a more prosperous country and often by providing them with dangerous passage. The

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14 Australia will provide $14.3 million to the UNHCR and $51.7 million towards other humanitarian aid, including support for refugees, internally displaced people and other vulnerable groups in 2000–01. See Chapter 5, *Australia's Overseas Aid Program*, Statement by the Hon Alexander Downer MP, Minister for Foreign Affairs, 9 May 2000.

15 UNHCR, note 13 *supra*, Chapter 1.

16 *Migration Regulations* 1994 (Cth) in Part 866 Sch 2, Cl 8676.221 - Subclass 785 Protection Visa (Temporary Protection Visa).

17 DIMA, *Refugee and Humanitarian Issues: Australia's Response*, October 2000, at 13.

18 All passengers and the crew of illegal entrant vessels are interviewed in relation to the circumstances of their arrival in Australia. The information they provide is corroborated by a range of overseas sources. Many of the key figures in the people trafficking syndicates (in both countries of origin and transit) have been identified and are known to the Australian government which works actively with national and international immigration and law enforcement agencies in monitoring, and developing measures to counter, people trafficking.

19 The term 'forum shopper' refers to a person who has effective protection, or who could have sought effective protection elsewhere, and failed to do so. For example, people who have transited through a country where asylum could have been sought and provided en route to Australia, are forum shoppers.

20 Section 36(3) of the *Migration Act* 1958 (Cth), inserted by the *Border Protection Legislation Amendment Act* 1999 (Cth).

Parliament has strengthened the offences associated with people trafficking,[21] as well as Australia's general powers to protect its border.[22] At the international level, Australian representatives are participating in negotiations on a protocol to the draft United Nations Convention Against Transnational Organised Crime that deals with the trafficking in, and transporting of, migrants.[23]

III. PRESSURES FROM WITHIN – ABUSE OF REVIEW PROCESSES

Australia's refugee determination system is also subject to internal factors which impede its effective functioning. The system is vulnerable to abuse by applicants who engage the review processes in bad faith without any legitimate prospect of success. It has also been affected by a degree of tension which has developed between the Executive and the Judiciary. Before looking more closely at each of these forces, it is appropriate to describe the setting of Australia's refugee determination system.

A. The Setting of Australia's Refugee Determination System

As outlined at the beginning of this article, it is possible to identify four objectives which shape the refugee determination system. Although each of the four objectives is individually critical to the determination system each objective must also accommodate the other objectives. For example, the view that administrative justice for the individual requires the exploration of every conceivable legal argument for an individual, regardless of the expense, does not sit comfortably with practical, efficient and lawful administration. This is especially so when the pursuit of administrative justice often does not result in a different practical outcome for the individual. Neither is the individual's sense of justice, which often encompasses more than administrative justice, nor the public accountability of government, aided by such an approach.

Some would argue that the objective of administrative justice for the individual should be paramount and that the rule of law requires administrative justice for the individual to include almost unlimited judicial review of tribunal and departmental decisions.[24] The Government's stated policy, upon which it was elected in 1998, is to restrict access to judicial review in visa-related matters to all but exceptional circumstances.[25] This policy is not founded on any disregard for the function of judicial review. Indeed, the Government, aware of

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21 *Migration Act* 1958 (Cth), ss 232A, 233A inserted by *the Migration Legislation Amendment Act (No 1)* 1999 (Cth).

22 *Border Protection Legislation Amendment Act* 1999 (Cth).

23 UNGA Doc A/AC.254/34, *Report of the Ad Hoc Committee on the Elaboration of a Convention Against Transnational Organised Crime on its Tenth Session held in Vienna from 17 to 28 July 2000.*

24 See, for example, LJ Kirk, "Chapter III and Legislative Interference with the Judicial Process: *Abebe v Commonwealth* and *Nicholas v The Queen*" in A Stone and G Williams (eds), *The High Court at the Crossroads: Essays: Essays in Constitutional Law*, Federation Press (2000) at 120.

25 The Liberal and National Parties, *Immigration: Building on Integrity and Compassion.*

the limitations of ministerial responsibility in ensuring justice for the individual,[26] has stated:

> Administrative law exists to enhance administrative justice. It is a crucial means by which the government and the bureaucracy are directly accountable to individuals affected by their actions.[27]

Thus the Government affirms the principle of legality – the need for lawful authority for executive action – as a core element of the rule of law. There are two features of Australian migration law which have a special, and mutually opposing, bearing on the ideal of the rule of law. The first is the codification of migration legislation in 1989, which replaced broad discretions vested in decision-makers with sets of statutory criteria for the making of decisions.[28] The rule of law depends upon certainty in the meaning and application of the law. Reduction of the discretionary power of decision-makers has therefore lessened the possible threat to the rule of law in the migration portfolio.

The second feature, which is not peculiar to Australian law but applies to migration law generally, is the fundamental rights with which it deals. Migration matters in all countries regularly involve, either directly or indirectly, issues relating to the life and liberty of an individual. This is particularly so in cases concerning removal action, or challenging the lawfulness of detention, although fundamental rights also arise in protection visa cases. Since the rule of law exists to protect the individual from arbitrary interference with their fundamental rights, such matters potentially present a greater threat to the rule of law. In such matters, the rule of law requires more than formal legality, it requires those fundamental rights of life and liberty to be safeguarded.[29] This in turn, justifies greater judicial scrutiny in such cases.[30]

The mutual opposition of these two features of migration law demonstrates that even from a jurisprudential perspective, the proper scope of judicial review in the migration context is uncertain, and that it is a complex issue in respect of which arguments may vary. The Chief General Counsel at the Australian Government Solicitor, Henry Burmester, has recently said that the view that unconstrained or expansive judicial review provides the best safeguard for fundamental individual rights is both dangerous and misconceived. In his opinion such a view:

> insufficiently recognises the constitutional basis for deference where parliament weighs up the social justice issues in a particular situation and decides to provide limited grounds for judicial review.[31]

The constitutional basis for deference by the courts in conducting judicial review, to which Burmester refers, is, as the Chief Justice has noted in a recent

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26 *R v Toohey; Ex parte Northern Lands Council* (1981) 151 CLR 170 at 222, per Mason J.

27 The Liberal and National Parties' Law and Justice Policy, 23 February 1996.

28 Codification was implemented by the *Migration Legislation Amendment Act* 1989 (Cth).

29 J Jowell & A Lester, "Beyond Wednesbury: Substantive Principles of Administrative Law" (1987) *Public Law Review* 368, quoted in Kirk, note 24 *supra*.

30 *Bugdaycay v Home Secretary* [1987] 1 All ER 940 at 1888, per Lord Bridge; and A Mason "The Importance of Judicial Review of Administrative Action as a Safeguard of Individual Rights" (1994) *AJHR* 3, both quoted in Kirk, note 24 *supra*.

31 H Burmester, "Commentary on Chapter 4" in A Stone and G Williams (eds), note 24 *supra* at 142.

address,[32] the principle that the foundation of judicial power lies in the will of the people as expressed through Parliament. In fashioning the refugee determination system, the Parliament has chosen not to promote administrative justice for the individual at all costs, but rather to balance this with the other important objectives identified above. There are good reasons for this approach, from both political and legal policy standpoints.

Politically, the nature of the refugee determination system, like many other aspects of the migration portfolio, is controversial. As must be expected, it gives rise to a divergence of opinions and views within the community. Notably, it is particularly amongst the legal profession that criticism of the refugee determination system is voiced. Yet it is precisely because of its controversial nature, and the competing objectives and values which it involves, that it is appropriate for the Parliament, which represents the will of the Australian people, to determine the shape of the refugee determination system.

From a legal perspective, administrative justice for the individual is not the purview of the courts alone. As explained above, the rule of law requires the courts to be ultimately responsible for administrative justice for the individual. However, this does not mean that the other arms of government should not also be concerned with this objective. The entire refugee determination process is designed to operate fairly in respect of individual applicants and to ensure that Australia's protection obligations are properly discharged.

The refugee determination system comprises more than a mechanism for judicial review of administrative action. As Margaret Allars acknowledges, many disciplines, such as political and organisational theory, and social psychology, impinge upon administrative law, such as political and organisational theory and social psychology.[33] Associated with these disciplines are values other than legal norms such as the rule of law, including public accountability, fiscal responsibility, administrative efficiency and, in the migration area, international comity.

The courts, charged with responsibility for the rule of law, are clearly not in a position to weigh the relative influence of these values in the refugee determination system. In part this is because, as McMillan has observed, the judiciary believes that it has a special duty to protect individual rights – or at least, to protect individual rights as portrayed in the circumstances of the case before the court.[34] It is also because, as Lee J acknowledged in *Minister for Immigration and Multicultural Affairs v Amani*,[35] the courts are ill-suited to consider the sensitive political issues that arise in some aspects of the refugee determination system.[36] The final reason for the courts' inability to balance the forces at play in the refugee determination system is that they are constitutionally

32 The Hon M Gleeson AC, Chief Justice of Australia, "Judicial Legitimacy", an address given at the Australian Bar Association Conference, New York, 2 July 2000.

33 M Allars, *Introduction to Australian Administrative Law*, Butterworths (1990), Chapter 1.

34 J McMillan, "Law and Administration — Conflicting Values", SES Breakfast Seminar, Public Service and Merit Protection Commission, 31 May 2000.

35 [1999] FCA 1040.

36 *Ibid* at [23].

barred from doing so.[37] The task of assigning priorities to the numerous competing values inherent in the refugee determination system properly falls to the Parliament.

B. Abuse of Judicial Review Rights

The Government has sought to restrict access to judicial review in all but exceptional circumstances because it believes there is clear evidence that some non-citizens engage it as a means of prolonging their stay in Australia. It is hard not to reach this conclusion in view of the fact that approximately 30 per cent of all applicants for judicial review withdraw prior to hearing, and the Government successfully defends approximately 85 per cent of those applications which do proceed to hearing.[38]

The present Government's approach of encouraging merits review over judicial review is not new. The approach has been pursued by successive governments, including former Labor governments, since 1989. The first major overhaul in the migration area was the codification of the *Migration Act* 1958 (Cth) by the *Migration Legislation Amendment Act* 1989 (Cth), which also introduced a statutory merits review system. In his second reading speech of the Bill, the then Minister, Senator Robert Ray, noted that:

> Immigration is an unusual jurisdiction in that delay in decision making can be to the advantage of the applicant [in Australia]. ... Delay is compounded where the same matter is repeatedly reopened through fresh applications, reviews and appeals. The new [merits] review system proposed in the Bill aims to ensure that cases are resolved fairly and speedily.[39]

That aim was never completely realised. Codification prompted a spate of applications for judicial review, mostly under the *Administrative Decisions (Judicial Review) Act* 1977 (Cth) ("the *ADJR Act*"). This in turn led to the second major reform, Part 8 of the *Migration Act*, introduced by the *Migration Reform Act* 1992 (Cth). Part 8 excluded the *ADJR Act* and set out the appropriate grounds for judicial review in relation to migration matters.

C. Part 8 of the *Migration Act*

Specifically, Part 8 removed the grounds of natural justice while the Act was amended to codify its principles so as to bring certainty to decision-making processes. It removed the grounds of relevant and irrelevant considerations which were largely made redundant by regulations that set out in considerable detail the criteria needed to be satisfied for the grant of a visa. The ground of *Wednesbury*[40] unreasonableness was also removed because its uncertain scope

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37 *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254.

38 Australia, Senate, Debates, p 1025 (2 December 1998). Senator the Honourable K Patterson, Parliamentary Secretary to the Minister for Immigration and Multicultural Affairs, Migration Legislation Amendment (Judicial Review) Bill 1998 (Cth), Second Reading Speech.

39 Australia, Senate, Debates, p 922 (5 April 1989). Senator the Honourable RF Ray, Minister for Immigration, Local Government and Ethnic Affairs, Migration Legislation Amendment Bill 1989 (Cth), Second Reading Speech.

40 *Associated Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223.

allowed the judiciary to use it as a means of conducting merits review. The codified procedures and criteria for making decisions were designed to leave little room for the decision-maker to reach a decision so unreasonable that no reasonable decision-maker could have made it. Indeed, there is force in the Government's belief that a decision made by a delegate who complies with the legislative framework provided for by Parliament, and whose decision is subject to independent merits review by a statutory tribunal, would necessarily produce outcomes which are lawful, fair and reasonable.

The hope that revised grounds for judicial review, in conjunction with more certain statutory decision making procedures, would decrease the number of applications for judicial review, has not been realised. Applications for judicial review of migration matters exceeded 1200 in 1999-2000, at a public cost of some $12.7 million in litigation alone. This compares with 1132 and 798 applications in the 1998-99 and 1997-98 financial years respectively, and 392 applications in 1994-95, the financial year the *Migration Reform Act* first operated.

D. Recent Interpretation of Part 8 of the *Migration Act*

The Government's policy of providing for extensive merits review by independent statutory tribunals is impeded by the approach taken by some members of the Federal Court in the interpretation of Part 8 of the *Migration Act*. John McMillan has analysed the emerging jurisprudence from the Court, particularly with respect to ss 420 and 430 of the *Migration Act*. He argues that some judges have been drawn into review of what are fundamentally merits and factual issues rather than specifically undertaking judicial review.[41] McMillan summarises his analysis by stating that:

> at any time in the last decade there has been a doctrine or approach that has held sway within the Federal Court and which is inimical to the validity of immigration decision-making.[42]

The doctrines and approaches, which are often developed by a minority of the judges of the Court, invariably take time to be established, and to 'take hold' as judicial precedent. During their developmental phase, inconsistent lines of authority often prevail in the Court. This does not assist the objective of practical, efficient and lawful administration, since as Peter Nygh, Acting Principal Member of the RRT has noted, it results in confusion for decision-makers.[43] Nor does the constant spectre of applications for judicial review assist public accountability in a high profile area of administration involving over 6 000 merits review applications each year, and many more primary decisions.

McMillan concludes that the pattern of judicial encroachment on the Tribunal's domain is unlikely to change, as novel doctrines and approaches will be developed by the Federal Court as soon as current ones are closed down by

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41 J McMillan, "Federal Court v Minister for Immigration", (1999) 22 *AIAL Forum* 1.

42 *Ibid* at 8.

43 Dr P Nygh, Acting Principal Member of the Refugee Review Tribunal, Evidence to the Senate Legal and Constitutional Legislation Committee's Inquiry into the Migration Legislation Amendment (Judicial Review) Bill 1998 (Cth), 29 January 1999.

the High Court and the Full Federal Court.[44] This is so despite clear and repeated directions from both the High Court and the Full Federal Court for judges to observe their proper role in conducting judicial review.

The extent of the continuing encroachment or 'overreach' is clearly demonstrated by juxtaposing two recent decisions, one each of the High Court and the Federal Court respectively. In *Minister for Immigration & Multicultural Affairs v Eshetu* ("*Eshetu*"),[45] Gleeson CJ and McHugh J, reversing a decision of the Full Federal Court (which had set aside the decision of the RRT), commented that:

> 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.[46]

This comment can be contrasted with the view of Hill J at first instance, who stated that the RRT decision "totally lacks logic" and "was so unreasonable that no reasonable tribunal could reach it".[47] In *Applicant N 403 of 2000*,[48] Hill J made the following comment in respect of another decision of the RRT:

> Some of the factual conclusions reached are difficult to understand. Indeed the decision is a very unsatisfactory one.[49]

His Honour continued:

> The fact that it is the direct Parliamentary intention that this Court have no jurisdiction to embark upon what is often termed merits review, and indeed to pursue the most curious course of ensuring that this Court can not interfere, even where a decision is so unreasonable that no reasonable decision-maker could reach it, where the decision is based on irrelevant considerations, is affected by ostensible bias or reached even where there is a denial of natural justice is hard to accept in what one would like to think of as a liberal democracy, let alone one which had committed itself to the international obligations to refugees reflected in the United Nations Convention and Protocol relating to the Status of Refugees. That, however, is the basis upon which I must proceed.[50]

The Federal Court should proceed on the basis, consistent with the Constitution, that the Parliament has adopted the current refugee determination system to achieve what the Parliament considers to be the optimal balance between administrative justice, public accountability and lawful and efficient administration. In the address referred to earlier, the Chief Justice of the High Court, in speaking about judicial legitimacy in Australia, commented:

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44 Note 41 *supra* at 14.

45 (1999) 197 CLR 611.

46 *Ibid* at 630.

47 *Eshetu v Minister for Immigration & Multicultural Affairs* (1997) 142 ALR 474 at 486-7, cited in *Minister for Immigration & Multicultural Affairs v Eshetu*, note 45 *supra*.

48 *Applicant N 403 of 2000 v Minister for Immigration & Multicultural Affairs* [2000] FCA 1088 (23 August 2000).

49 *Ibid* at [3].

50 *Ibid.*

> The Constitution, the legislation governing judicial review, and the relevant principles of the common law, define the limits of the authority of courts to override administrative decisions. The legislation changes from time to time, and the common law principles develop. But the Australian statutes on the subject, and the principles of common law, distinguish between review of the merits of administrative decisions, which is usually undertaken by specialist tribunals, and judicial review based upon principles of legality. The difference is not always clear-cut; but neither is the difference between night and day. Twilight does not invalidate the distinction between night and day; and *Wednesbury* unreasonableness does not invalidate the difference between full merits review and judicial review of administrative action.[51]

The Executive Government is of course aware of the distinction between merits and judicial review, and the grey area that exists between the two. In the migration area, the Government through the Parliament has, for the reasons explained earlier in this article, expressly excluded the ground of *Wednesbury* unreasonableness. It is, as the Chief Justice indicates, clearly within the prerogative of the Parliament to so limit the powers of a court created by statute.[52]

Of relevance here, and also of interest to administrative lawyers generally, is the background to the principle of *Wednesbury* unreasonableness. In *Eshetu,* Gummow J stated that the principle developed by analogy to principles governing judicial control of the powers and discretions of trustees.[53] His Honour, quoting Mason J in *Minister for Aboriginal Affairs v Peko-Wallsend Ltd*,[54] drew attention to the fact that in their discussion of the principle, courts and academics have always emphasised that "the limited role of a court reviewing the exercise of an administrative discretion must constantly be borne in mind". The role of the Court was clearly delineated by Brennan J in *Attorney-General (NSW) v Quin*.[55] His Honour stated:

> The duty and jurisdiction of the court to review administrative action do not go beyond the declaration and enforcing of the law which determines the limits and governs the exercise of the repository's power. If, in so doing, the court avoids administrative injustice or error, so be it; but the court has no jurisdiction simply to cure administrative injustice or error. The merits of administrative action, to the extent that they can be distinguished from legality, are for the repository of the relevant power and, subject to political control, for the repository alone.[56]

E. Tension Between the Executive and the Judiciary

In arguing for a different approach to the review of migration decisions, McMillan comments:

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51 Note 32 *supra*.

52 The Federal Court of Australia is created by statute: see section 71 of the Constitution and the *Federal Court of Australia Act* 1976 (Cth).

53 (1999) 197 CLR 611 at 649, per Gummow J.

54 (1986) 162 CLR 24 at 40.

55 (1990) 170 CLR 1.

56 170 CLR 1 at 35–6.

> The distortions that are caused by judicial overreach are inimical not only to immigration adjudication, but to administrative law generally and, no doubt in the mind of some, to public policy in the operation of government and the relationships between the branches of government.[57]

There will always be some tension between the branches of government. Indeed, some would argue that a degree of tension is an indicator of a healthy government. It is also true that the migration area has traditionally been fraught with tension between the Executive and the Judiciary.

In the former colony of New South Wales the *Influx of Chinese Restriction Act* 1888, which was considered by the Supreme Court,[58] is said to have produced "an unprecedented clash between the courts and the executive".[59] Australian migration policy, and the Australian nation, have changed considerably since the colonial era. While it is perhaps understandable – even from the title alone – that the 1888 Act of the New South Wales Parliament should generate tension between the Executive and the Judiciary, this is not so with respect to the Commonwealth *Migration Act* 1958.

The recent tension between the Federal Court on the one hand, and the Parliament and the Executive on the other, could be alleviated to some extent by acknowledging that all three branches of government are aware of the dilemmas inherent in the refugee determination system. The dilemmas arise from the often compelling nature of asylum claims, and the limited capacity for Australia to provide protection.

In this respect, the dilemmas we face are no different from those faced by governments of other liberal democracies around the world. However, consistent with Australia's constitutional system, it is for the Parliament to decide the shape that the determination system should take. Individual Australians are free to express the view that they prefer a different approach, but decision-makers and judges are constrained by the settings that Parliament has enacted. To claim otherwise is to deny the rule of law.

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57 Note 41 *supra* at 14.

58 *Ex parte Lo Pak* (1888) 9 NSWR(L) 221; *Ex parte Leong Rum* (1888) 9 NSWR(L) 250; *Ex parte Woo Tin* (1888) 9 NSWR(L) 493, referred to in P Finn, *Law and Government in Colonial Australia*, Oxford University Press (1987) pp 42-3.

59 P Finn, *ibid*, p 85.