

As a third step the Court was obliged under the Act 'to identify the meaning which constitutes the least possible limitation on the right or freedom in question'⁴⁹ as New Zealand's interpretive direction has been understood. The Court accepted the protestor's submissions that the proper meaning of 'dishonour' read consistently with the right to freedom of expression, meant to 'vilify' or 'defile' the flag and this the protestor had not done.⁵⁰ It was that narrow reading, consistent with the protestor's rights, which the Court was therefore obliged to adopt.⁵¹

Such was the effect of the interpretive direction that the protestor's conviction was quashed.

It is worth noting that if there had been no way of interpreting the statutory offence to render it consistent with the protestor's rights, the broader meaning would have had to have prevailed and the conviction would have stood.

A less colourful but nevertheless illustrative case is that of *R v Upton*⁵² heard by Connolly J of the ACT Supreme Court.

Mr Upton was charged in 2002 with common assault and damaging a motor vehicle. There was a committal hearing in the Magistrates Court and it was listed before the Supreme Court for trial in October 2003. A jury was empanelled and the trial commenced. The accused entered a plea of not guilty. There was a real contest of fact. The Crown case was that this was an unprovoked assault while the defence claimed that the incidents occurred when Mr Upton sought to remove from his fireworks business premises an employee whom he had caught engaged in illegal activities.

On the second day of the trial the jury was dismissed when it appeared that a witness had been improperly approached. The matter was set down again to proceed in June 2005. The day before the trial was to commence the DPP sought to vacate the trial date because certain key witnesses, the victims, could not be located.⁵³ This was opposed. If the trial date was vacated Mr Upton would have incurred another round of legal costs, having already incurred costs when the first trial was aborted for reasons beyond his control. A resumed trial would have not been able to be set until February 2006, four years after the events in question.

In those circumstances, Connolly J had to consider whether to grant a permanent stay of the criminal proceeding and to consider the sources of his power to grant a stay. He acknowledged that, of course, he had a power at common law to grant a stay of criminal proceedings that would result in an unfair trial.⁵⁴

However, he also had a statutory power to grant a stay. There was no specific statutory provision which conferred that power but under s 20 of the ACT *Supreme Court Act 1933* the Court had a broad discretionary power to exercise all original and appellate jurisdiction necessary to administer justice in the Territory. This would clearly be broad enough to include the power to grant a permanent stay.

The ambit of the statutory discretionary power and the manner in which it could be exercised was something that could clearly be affected by the interpretive direction under the ACT Human Rights Act. That directive is formulated in these terms:

Section 30(1):
In working out the meaning of a Territory law, an interpretation that is consistent with human rights is as far as possible to be preferred.

And it continues:

FROM WHENCE WE HAVE COME AND WHITHER ARE WE GOING?

The Constitutional and statutory breadth of judicial review under Australian Federal and State Law

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Two World Wars gave a significant impetus to the development of administrative law. Both in the United Kingdom and Australia these wars led to increased governmental intervention in the affairs of the community with the exercise of emergency powers. Yet the increased use of regulatory powers from 1914 onwards continued the increase in greater legislative control, which had commenced in the second half of the 19th century with the Factories Act legislation in the United Kingdom and other regulatory activity.

Judicial review has been described as 'a procedure, by which the courts scrutinise decisions for the purpose of determining if the decision is of a kind that the decision maker has the power to make; to determine whether the decision is lawful, and to determine whether the decision is made fairly. Administrative action may be seen as review of that body of general principles which governs the exercise of powers and duties of public authorities including the Crown and Ministers'¹.

Today judicial review may be seen as the product of a change of approach by the judiciary that occurred during the 1960s. The decision in *Ridge v Baldwin*² was a turning point. Since that decision was given by the House of Lords, Australian Courts have abandoned significant limitations that had existed on the range of decisions subject to judicial review, and have applied the duty to act fairly to decisions that affect rights, interests or legitimate expectations, and have more firmly insisted that fairness be accorded unless clearly excluded by Parliament³.

The Australian Constitution

In Australia judicial review has not been so wide ranging in recent times, as in some other jurisdictions such as England. In part, that present situation may be attributable to the constitutional foundation for judicial review in Australia.

As Gummow J has said:

the subject of administrative law cannot be understood or taught without attention to its constitutional foundation⁴

Under Chapter III the Commonwealth Constitution addresses in which courts the judicial power of the Commonwealth shall be vested (s 71); and the appointment and tenure of the justices of those courts (s 72); the appellate jurisdiction of the High Court as it relates to lower courts and rights of appeal.

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Section 75(iii) gives the High Court original jurisdiction in all matters in which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party. Likewise, in s 75(v) the High Court has original jurisdiction in all matters in which a writ of mandamus, prohibition, or an injunction is sought against an officer of the Commonwealth. It has been said s 75(v) was added because of the possibility s 75(iii) would be read down by reference to decisions on Article III of the United States Constitution so as to make relief unavailable where the Commonwealth itself is not the real party. The Convention debates suggest that the framers of the Constitution were aware of this possibility, and that their purpose, in including s 75(v), was to overcome the defect revealed in *Marbury v Madison*⁵ that the Supreme Court of the United States lacked jurisdiction to grant mandamus⁶.

Sir Anthony Mason has said that it may be a mistake to regard s 75(v) as the only or even the primary source, of the High Court's jurisdiction by way of judicial review. In a jurisdiction with a written Constitution incorporating a separation of powers, it is natural to assign the ultimate authority for the exercise of all curial jurisdiction to that Constitution. If it is accepted, as Sir Owen Dixon contended, that in Australia the common law is the ultimate constitutional foundation, it means the Constitution owes its recognition in part at least to the common law, and that the provisions of the Constitution are framed in the language of the common law and is to be interpreted by reference to the common law.

It is accepted that the duty and the jurisdiction of the courts, as Marshall CJ said in *Marbury v Madison* is 'to say what the law is'. That means, in administrative law, declaring and enforcing the law which determines the limits, and governs the exercise of, the repository's power. The vesting of the federal judicial power in Chapter III courts, and its separation from the other organs of government, is enough to arm the High Court as a Federal Supreme Court with a jurisdiction to declare and enforce administrative law and by way of judicial review. The existence and exercise of this jurisdiction is a manifestation of the rule of law. The Australian Constitution is an instrument framed on the assumption of this rule of law⁷.

Under s 76(ii) of the Constitution the Federal Parliament may make laws conferring original jurisdiction on the High Court in any matter arising under laws made by the parliament. This enabled parliament to enact the *Administrative Decisions (Judicial Review) Act 1977* (ADJR Act) providing for a regime of judicial review extending beyond the constitutional writs referred to in s 75(v). Section 76(ii) enabled parliament to provide for an appeal from federal administrative decisions to both the Federal Court, and to a more recently constituted Federal Magistrate's Court, and also to any other court exercising federal jurisdiction. However, such a court, vested with an appellate jurisdiction, would necessarily be restricted to exercising functions which involved the exercise of judicial power. Because of the decision in the *Boilermakers' case*⁸, a Federal Court is precluded from exercising non-judicial power. By analogous reasoning, under s 77(iii), which allows parliament to make laws investing a court of a State with federal jurisdiction, the vesting of such federal jurisdiction is limited to matters within the federal judicial power.

Neither s 75(iii) nor s 75(v) is a source of substantive rights, except insofar as the grant of jurisdiction necessarily recognises the principles of general law, according to which the jurisdiction to grant the remedies is exercised⁹.

The statutory jurisdiction of the Federal Courts

The Federal Courts' jurisdiction is derived from the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (ADJR Act) and from s 39B(l) of the *Judiciary Act 1903* (Cth).

Under the 1977 Act the Federal Court has jurisdiction to review the decisions of an administrative character made under a Commonwealth enactment or by a Commonwealth Authority under a State or Territory enactment¹⁰. Decisions made under executive or

demonstrate that it was the flag itself which was in distress because of the actions of the New Zealand Government.

The protestor proceeded to douse the flag in kerosene and light it. The flag was consumed in a fireball. The singed end of the pole was extinguished on the grass. No member of the public was harmed.

It will come as no surprise that the protestor was arrested. He was charged with an offence under the *New Zealand Flags, Emblems and Names Protection Act 1981* (the Flag Act). The Flag Act is cast in these terms - every person commits an offence who:

in, or within view of any public place, uses, displays, destroys, or damages the New Zealand flag in any manner with the intention of *dishonouring* it.⁴²

The protestor was convicted by the District Court and fined \$600. He decided to appeal. One of his grounds of appeal was that the Judge in the District Court had not been alert to the variety of meanings that the word 'dishonour' carries. The Judge had interpreted it as meaning 'disrespecting' when he ought to have interpreted 'dishonouring', it was submitted, as equivalent to 'defiling', imputing an active and lively sense of shaming or a deliberate act of callousness. The protestor argued on appeal that, if the statutory offence was interpreted in this way, the type of conduct caught by the offence would be, for example, intentionally urinating on the ashes of the flag or knowingly blowing one's nose on it and he had done no such thing. By contrast, he argued that according to flag etiquette, burning a flag is the only honourable way to destroy it.⁴³

How did the New Zealand Bill of Rights Act affect all of this? It affected it in this way. Under the New Zealand Bill of Rights Act the protestor had a right which belonged to him as an individual person to enjoy freedom of expression which includes 'the freedom to seek, receive, and impart information and opinions of any kind in any form.'⁴⁴ He also had the right of peaceful assembly.⁴⁵

This meant three things. Firstly, on appeal, the Court considered whether, in adopting a natural or broad meaning of the word 'dishonour' as the judge at first instance had done, the offence of dishonouring the flag would restrict or limit the protestor's right of freedom of expression. It found that there was no doubt that, adopting a broad meaning of the word 'dishonour', prima facie the statutory offence of infringing the prohibition on dishonouring the flag would involve a breach of a person's right to freedom of expression.⁴⁶

Secondly, the Court acknowledged that the right to freedom of expression is not absolute, and considered whether the restriction, or interference, or limitation imposed on the right to freedom of expression by the Flag Act was a reasonable or justified limit.

The objective of the Flag Act was recognized as the important one of protecting and preserving the flag as an emblem of national significance.⁴⁷ The Court then engaged in a balancing exercise. This consisted of considering whether the manner in which the Flag Act sought to achieve the objective of preserving the flag as an emblem of national significance, that is, by imposing a criminal sanction which might extend even to protests, was in *reasonable proportion* to the importance of the objective.

The Court concluded that in New Zealand there was an acceptance of the ability to express staunch criticism of the Government, even if many in society disagreed with the criticism. It held that *if* the criminal offence extended even to acts of political protest, it was *not* a justified limit on freedom of expression.⁴⁸

of acknowledging that laws may impose limits on rights where the limits are reasonable and can be demonstrably justified in a free and democratic society, there are five specific factors set out which ought to assist in assessing compatibility.

Those five factors to be considered reflect much the same questions as were in fact used in the compatibility statement we considered from the ACT. They are:

- (1) identifying the nature of the right;
- (2) the importance and purpose of the limitation [on the right];
- (3) the nature and extent of the limitation;
- (4) the relationship between the limitation and its purpose; and
- (5) any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.

The Charter does not prescribe that a compatibility statement for a Bill set out each of those factors (whereas a human rights certificate for a proposed statutory rule must set out those factors if the rule limits or interferes with a human right³⁸). However, it is clear that a consideration of each of the five factors set out in s 7(2) would assist in arriving at an opinion on the compatibility of a Bill.

Those five factors were not formulated as a result of the Consultation Committee's own creativity. Rather, they are drawn from Chapter 2 of the *Constitution of South Africa*³⁹ and intelligence provided from across the Tasman indicated that New Zealand policy and legislative officers informally adopted this rubric as a useful and principled means of assessing compatibility.

The interpretive direction

Let me turn then to the other component of the Charter which I wish to discuss. This is the interpretive direction. There has been some not inconsiderable argument about which human rights instrument has the strongest interpretive direction - the UK or New Zealand's.⁴⁰ There has also been discussion about the complexity of the interpretive direction under the ACT Human Rights Act.

An interpretive direction is in essence a direction to interpret legislation compatibly with human rights. Let me give you a couple of examples of what effect an interpretive direction can have in a court proceeding. The first example comes from New Zealand and the second from the ACT.

The New Zealand Bill of Rights Act directs that:

Whenever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning.⁴¹

This had a significant effect in a political protest case. In March 2003, a crowd of people marched through the streets of downtown Wellington in New Zealand and assembled in the grounds of Parliament House. At the time of the protest the New Zealand Government was hosting the Australian Prime Minister. Rightly or wrongly, the protest was aimed at New Zealand's involvement in pre-war sanctions against Iraq and the New Zealand Government's welcoming of the Australian Prime Minister when he supported the United States' invasion of Iraq.

One of the protestors held a New Zealand flag attached upside down to a pole as a sign of distress. It was later wryly remarked that, while this is a legitimate distress signal in nautical circles to indicate a ship is in trouble, the protestor had hung the flag in this way to

prerogative powers, which do not have a statutory source, are excluded. So, too, are decisions by the Governor-General, or those expressly excluded under Sch 1 of the ADJR Act.

The word 'enactment' is defined in s 3 as referring to an Act, Ordinance, or Instrument which includes rules, regulations and byelaws under a Commonwealth Act. This requires not only that the enactment expressly or impliedly requires or authorises the decision but also the decision itself confers, alters or otherwise affects legal rights or obligations that will arise¹¹.

A person aggrieved by a decision to which the ADJR Act applies may seek from the Federal Court or the Federal Magistrates Court an order of review: in respect of a decision relating to a breach of the rules of natural justice; procedures not being observed in connection with making the decision; an absence of jurisdiction to make the decision; that the decision was not authorised by the enactment; that the decision involved an error of law; that it was induced or affected by fraud; that there was no evidence or other material to justify the making of the decision; or that it was an improper exercise of the power conferred by the enactment. An improper exercise of power includes taking into consideration irrelevant material or failing to take into account a relevant consideration. It also includes an exercise of a power for a purpose other than the purpose for which the power was conferred; an exercise in power in bad faith; and an exercise of power that is so unreasonable that no reasonable person could have so exercised the power¹².

The other source of Federal Court jurisdiction is to be found in the *Judiciary Act* 1903. Under s 39B(1) the court has jurisdiction with respect to any matter in which the writ of mandamus or prohibition or an injunction is sought against an officer of the Commonwealth. However, this does not include a decision to prosecute a person for an offence against the law of the Commonwealth and where the prosecution is proposed to be begun in the court of a State or Territory (s 39B)(1B). There are a limited number of other exceptions also to be found in (s 39.B(2)(a) and s 39B(2)(b)).

There is a quite separate source of jurisdiction in the Federal Court to undertake judicial review to be found in s 39B(1A). This confers jurisdiction arising under any laws made by the Parliament, other than a matter where a criminal prosecution is instituted. In the case of s 39B(1) the prerogative writs or an injunction may be sought at common law against a Commonwealth officer. On the other hand the jurisdiction under s 39(B)(1A) is not limited to Commonwealth officers. Nor is it limited to the remedies specified in s 39B(1).

In the migration area the operation of the ADJR Act is limited. In the main, migration decisions are governed by the *Migration Act 1958* (Cth) and the *Judiciary Act 1903*.

The Federal Magistrates Court

Where the court does have jurisdiction it has power to make orders of such kind and to issue such writs as the court thinks appropriate.¹³

Under the ADJR Act the Federal Magistrates Court has the same jurisdiction as the Federal Court.¹⁴ So too, the Federal Magistrates Court has the same original jurisdiction under the Migration Act in relation to migration decisions, as the High Court has under s 75(v) of the Constitution, and this is set out in s 39B of the Judiciary Act.

Administrative Appeals Tribunal

The *Administrative Appeals Tribunal Act 1975* and the ADJR Act passed three years later signalled a broadening of federal judicial review. Under the Administrative Appeals Tribunal Act (AAT Act) it was provided that where an enactment states that applications may be

made to the Tribunal for review of decisions made in the exercise of powers conferred by a particular enactment, or the review of decisions made in exercise of powers conferred by another enactment having effect under that enactment, then review may lie to the Administrative Appeals Tribunal.¹⁵

Where a decision has been made under an enactment, any person entitled to apply to the Tribunal for a review of the decision, may request that a statement be made in writing, setting out the findings on material questions of fact; and the Act sets out the prescribed procedure for review and the applicable time limits¹⁶. Under s 44(1) there may be an appeal from the AAT Act to the Federal Court 'on a question of law' from any decision of the Tribunal. Where an appeal is pending, the Federal Court may transfer the appeal to the Federal Magistrates Court, except where the Tribunal includes a presidential member.¹⁷

Commonwealth activities subject to judicial review

It can be seen therefore that decisions made, and conduct engaged in, under Commonwealth enactments are subject to judicial review by the Federal Court or the Federal Magistrates Court, with the exception of decisions as to conduct described in Sch 1 to the ADJR Act and decisions as to the conduct of the Governor-General. Where decisions are exempted from the ADJR Act they may be reviewed under s 39B and s 39B(1A) of the Judiciary Act if the criteria there set out are met.

Available remedies

In summary therefore, there are the remedies by way of a writ of mandamus, prohibition and injunction vested in the High Court under s 75(v) of the Constitution where sought against an officer of the Commonwealth. Similar powers are given to both the Federal Court and the Federal Magistrates Court in regard to those remedies. However, all these Courts also have power to give the remedies of certiorari, declarations, and habeas corpus where these are associated with one of the nominated remedies. The High Court has power under s 31 and s 33 of the Judiciary Act to give broad remedies when its jurisdiction is invoked under s 75(iii) of the Constitution. The Federal Court has power to make orders and issue writs as well under s 23 of the *Federal Court of Australia Act 1976* where it has jurisdiction in a specific matter even where mandamus, prohibition and injunctions are not sought.

The nature of these remedies

Mandamus is a command compelling the party to perform a public duty and is given where the public duty is not being performed, or a party has constructively failed to perform it, because the performance was infected with jurisdictional error. Prohibition restrains a person from doing something unlawful that is proposed to be done, or from continuing to do an unlawful act that has commenced. An order of certiorari removes the official record into the court making the order, and where the action is found to have been unlawful quashes the impugned decision. In the case of certiorari, it applies also to an error of law even though there is not a jurisdictional error, but the error must appear on the 'face of the record'.

An injunction has the flexibility of allowing a respondent an opportunity to rectify problems before it is imposed. It lies for both jurisdictional and non jurisdictional illegality. A declaration is just that; a mere declaratory order, but effective because a public authority will give effect to the court's determination. Habeas corpus is for the purpose of securing the release of a person unlawfully detained. So far as these remedies are discretionary, various factors may determine whether the discretion is exercised in favour of the issuing of a writ. It may not be granted if a more convenient and satisfactory remedy exists; no useful result can ensue, or if there has been unwarrantable delay by the parties seeking it; or if there has been bad faith on the part of the applicant¹⁸.

seeks to achieve. And it requires them to think through those difficult issues in a structured and principled way, and to articulate those issues in a manner which should lead to better governance and better public administration.

Before leaving the issue of compatibility statements, might I make these observations about them in Victoria. First, we differ from the ACT in requiring reasoned compatibility statements to be tabled with all Bills.

Under the ACT Human Rights Act there is only a requirement that the compatibility statement state *whether*, in the opinion of the Attorney-General, the Bill is consistent with human rights – not *how* it is consistent. This requirement was complied with in the first year of operation of the ACT's Human Rights Act largely by one-line statements indicating that the Attorney held the relevant opinion. Indeed, the compatibility statement on the Mental Health Bill is, to my knowledge, one of only two reasoned statements yet made – the other accompanied, unsurprisingly perhaps, the Terrorism (Extraordinary Temporary Powers) Bill 2006.

Victoria has learned from this experience in the ACT and the Human Rights Consultation Committee recommended, and included in its draft Bill, a requirement to the effect that the compatibility statement provide reasons. As a result, under s 28 of the Charter a statement of compatibility must state not only *whether*, in the opinion of the Member of Parliament who introduced the Bill, the Bill is compatible with human rights but also, if it is compatible, *how* it is compatible.³² (I might add that in the UK the compatibility statements are only required to be made 'in writing and to be published in such manner as the Minister making it considers appropriate'.³³ These are sometimes one-liners, but there are also reasoned and articulate statements as those expressed in relation to the Offender Management Bill which confers new powers of search and amends existing powers of detention,³⁴ introduced into the House of Commons on 22 November 2006).³⁵

The second way in which we differ from the ACT is that the Charter itself sets out the type of factors which can be taken into account in arriving at an opinion on compatibility. The ACT Act does not provide this. The compatibility statement on the Mental Health Bill in the ACT asked the appropriate questions about the nature of the rights that would be interfered with, the importance of the objective to be achieved by reason of that interference and the rationality of the connection between the involuntary treatment and the objective to be achieved. It did this, however, under the general provision in the ACT Human Rights Act that allows for human rights to be limited or restricted if those limits are 'reasonable limits set by Territory laws that can be demonstrably justified in a free and democratic society'.³⁶

While this notion may sound rather nebulous, there is, of course, authority to assist in its interpretation. In the leading Canadian case of *Oakes* I mentioned before, the Chief Justice of the Supreme Court of Canada noted that the values underlying a free and democratic society include:

- (1) Respect for the inherent dignity of the human person;
- (2) Commitment to social justice and equality;
- (3) Accommodation of a wide variety of beliefs;
- (4) Respect for cultural and group identity; and
- (5) Faith in social and political institutions which enhance the participation of individuals and groups in society.³⁷

While such authority assists in the task of arriving at a position on compatibility, in Victoria the Committee recommended that express guidance be given in the Charter as to the factors to be considered in determining whether a limitation or restriction on a right is a reasonable one. Accordingly, under the important s 7(2) of the Charter and under the general umbrella

Moreover, the nature and extent of the interference with the right was carefully confined under the Bill. Indeed, the Bill made provision for involuntary administration of electro-convulsive therapy only where, as I've said, it was necessary to save a person's life. It was also necessary that the person was incapable of giving consent and the therapy could only be administered pursuant to an order of the Mental Health Tribunal in response to an urgent application.

The safeguards surrounding the interference extended to the requirement that a doctor and the Chief Psychiatrist had to believe on reasonable grounds that the administration of the ECT was necessary to save the person's life. It was also necessary for the Mental Health Tribunal to be satisfied of this as well as being satisfied that the person was incapable of giving consent. Other safeguards included the need for the Mental Health Tribunal to be satisfied either that all other reasonable forms of treatment available had been tried without success or that ECT was the most appropriate treatment reasonably available. Furthermore, the emergency ECT order had to specify the number of occasions on which ECT could be given, to a maximum of 3, and the number of days the order remained in force, to a maximum of 7. The Bill also provided that the emergency ECT order would be superseded by any subsequent order of the Tribunal, for example, one made after a full hearing. Emergency ECT orders were prohibited for minors under 16.

Having considered the safeguards surrounding the interference with the right, the compatibility statement went on to assess whether there was a rational connection between the interference with the right countenanced by the Bill and the purpose the Bill sought to achieve (or the purpose the limits imposed on the right sought to achieve). It noted that emergency ECT treatment was prohibited for persons with the capacity to withhold consent and considered that there was a rational and proportionate relationship between permitting ECT to be administered without consent, where the person was incapable of giving consent and delay would place the person's life at risk.

It was clear that in the circumstances of this measure, the interference with, or limitation upon, the right not to be subjected to medical treatment without freely given consent, was designed to achieve a relevant purpose. Further, it was likely to be effective in achieving its purpose and it was not arbitrary, unfair or based on irrational considerations. As an aside, might I note that these were amongst the central considerations which informed the discussion of proportionality in a leading judgment of the Canadian Supreme Court, that of *R v Oakes*.³⁰

The ACT compatibility statement further considered whether any less restrictive means would have been reasonably available to achieve the purpose of the Bill. However, it should be noted that it is not necessary to show that Parliament has adopted the least restrictive means of achieving its end³¹ - it is sufficient for compatibility with human rights for the interference to be within the range of reasonable solutions to the problem faced.

The statement ultimately concluded that the Mental Health (Treatment and Care) Amendment Bill 2005 was compatible with the human rights it had identified and the Attorney-General for the ACT expressed his opinion that the Bill was indeed consistent with the Human Rights Act.

On the basis of that example, we can draw some conclusions. The central conclusion is that a reasoned statement of compatibility not only raises the question of *how* a law will have an impact upon human rights, but it does so in a way which introduces a structured and principled method of decision-making into the process by which legislation is enacted. It requires that the minds of the legislators and the Executive, and those who act on their behalf, grapple with those difficult questions about the extent to which the laws they pass interfere with rights, and whether the interference is proportionate to the objective the law

Workplace relations legislation

In some Acts, such as the Workplace Relations Legislation, the Act expressly provides for seeking declarations: for example, under ss 178 and 413A of the *Workplace Relations Act 1996* the Federal Court may be invited to find contraventions of certified agreements and make declarations in relation to clauses of such agreements. In such cases the remedy is expressly stated by the Commonwealth statute itself.

The State jurisdiction in Western Australia

The *Supreme Court Act 1935* vests in the Supreme Court of Western Australia general and appellate jurisdiction and this of course includes judicial review of prerogative writs¹⁹.

The West Australian Attorney-General claimed that the introduction of the State Administrative Tribunal (SAT) constituted the most significant reform of a state level system of administrative justice anywhere in Australia. He said that the legislation involved incorporating 1,582 clauses and numbered 742 pages. It was the largest piece of legislation ever passed by the Western Australian Parliament. The centrepiece of this legislation is the *State Administrative Tribunal Act 2004* which created the Tribunal and operates along with the *State Administrative Tribunal (Conferral of Jurisdiction) Amendment and Repeal Act 2004*. It amends 137 enabling Acts. In early 2005 regulations were introduced under both Acts and s 172 of the SAT Act provides for rules made by a Rules committee.

SAT can make original or primary decisions regarding various civil, commercial and personal matters including guardianship and administration, equal opportunity, commercial and strata title matters. The vocational boards, ranging from architects and medical practitioners to plumbers and real estate, can bring disciplinary proceedings in SAT against their members.

It also has a review jurisdiction whereby it reviews administrative decisions, made by public officials or local governments, about personal and commercial activities, and in connection with regulatory bodies operating in an industry or profession.

Where an enabling Act vests jurisdiction in the Tribunal and it does not involve review of a decision, then this forms part of SAT's original jurisdiction²⁰. SAT must act in accordance with the requirements of the enabling Act²¹. Where an enabling Act enables a matter to be brought to SAT the Tribunal may make a decision in relation to that matter.

Where there is a right to have a decision reviewed by SAT there is a choice whether to make application to SAT for review or commence judicial review proceedings in the Supreme Court. There is a need to opt for one or the other. Where a review is by the Tribunal, it is not limited to reviewing matters that were originally before the decision maker, and it has been said that the purposes of the review is to reach the 'correct and preferable decision'²².

A very valuable guide to the jurisdiction, legislation, application procedure, and decisions database is set out at www.sat.justice.wa.gov.au and this website even includes 'a SAT wizard' which sets out the provisions of the enabling Act²³.

Judicial review under the Mining Act 1978 (WA)

Sections 146 to 149 of the *Mining Act 1978* provides for a right of review to the Supreme Court. Under s 146 the Warden's Court may reserve at any stage any question of law for decision by the Supreme Court. Under s 147 any party aggrieved by decisions of the Warden's Court may appeal to the Supreme Court. Section 148 provides where the grounds include any matter of fact the Supreme Court may order that the appeal shall be by way of rehearing before a judge. Section 149 sets out the powers of the Supreme Court. Section

147 allows a party aggrieved by a decision in the Warden's Court a right to appeal except in those matters referred to in s.151. Under that provision where the parties agree in writing that the decision of the Warden's Court would be final, or the Mining Act provides that the determination of a Warden is final and conclusive, then there is no right of appeal. Most significantly, there is no right of appeal in respect of any decisions of the Warden, the Mining Registrar, or the Minister, upon any application for a mining tenement, its forfeiture, or exemption from expenditure or other conditions. This last exception imposes a very wide limit on the right of appeal.

Apart from those appeal procedures it is open to the Supreme Court to use declaratory orders which may be coupled with an injunction to review a Warden's decision.²⁴

A Warden's administrative and judicial decisions, if affected by an error of law or by acting outside jurisdiction, may result in a declaratory order being obtained from the Supreme Court. In addition mandamus, prohibition or certiorari may lie.

In *Harlock: Ex parte Stanford & Atkinson Pty Ltd*²⁵ mandamus was sought to require a mining warden to hear and determine complaints for forfeiture of mineral claims for failure to comply with specific conditions. The warden found that the complaints disclosed no valid cause of action and dismissed them. The Supreme Court granted mandamus requiring the warden to hear the complaints. The plaintiff was held entitled to a judicial hearing of the complaints and mandamus compelled the warden to hear the complaints. So too in *Molopo Australian Ltd v Eastern Gold NL*,²⁶ the warden had failed to address the correct issue and mandamus issued where a tribunal had misconceived its duty by disregarding relevant considerations and addressing the wrong question. Prohibition also lies to prevent an unauthorised exercise of jurisdictional power by a Warden's Court.

It has been held that certiorari will not lie unless the decision under attack prejudicially affects the rights of the applicant. Where a warden's decision was only a report to the Minister which the Minister had a discretion to accept or reject, the warden made no decision as to rights.²⁷ On the other hand in *Re Egypt Holdings Pty Ltd: Ex parte Esso Exploration & Production Australia Inc*,²⁸ it was held certiorari will not go to quash a recommendation by the warden. However, Burt CJ said where it is the warden's report which conditions the Minister's power and not the contents, the report may be quashed and not the recommendation which it contains²⁹. These decisions may now be open to review in the light of *Ainsworth v Queensland Criminal Law Commission* where the High Court said the ultimate decision-maker may not be the only one who can be impugned, where the decision-maker acts on recommendations of a body, which itself is the subject of a prerogative writ.

In *Ainsworth* the High Court said:

the report made and delivered by the Commission has, of itself, no legal effect and carries no legal consequences whether direct or indirect. It is different when a report or recommendation operates as a precondition or as a bar to a course of action, or as a step in a process capable of altering rights, interests or liabilities.³⁰

These matters were explored in *Hot Holdings Pty Ltd v Creasy & Ors*³¹ where a majority of the High Court held that certiorari would lie to challenge a decision by a warden under the *Mining Act 1978* to conduct a ballot to determine which of several applicants for a mining tenement was to receive the priority right. The land became available for mining exploration on the 15 October 1992, and a number of people gathered outside the doors of the Leonora Registry. Eight applications for an exploration licence were lodged in what was described as 'a rather unseemly rush' within 51 seconds. Each of the applications was heard by the warden who concluded that the five applicants complied with the initial requirements at the same time for lodgement, and accordingly that it was appropriate to conduct a ballot to

Well, how then, you may ask will the Charter affect public administration within Victoria?

Statements of compatibility

The principal impact of the Charter within Government will be the preparation of reasoned statements of compatibility to accompany Bills introduced into Parliament, most statutory rules, and policy proposals that are submitted to Cabinet. Not all of these obligations stem directly from the Charter itself. More specifically, the Charter requires that a Member of Parliament who proposes to introduce a Bill into a House of Parliament must prepare and table a statement of compatibility.¹⁸ The Charter also amends the *Subordinate Legislation Act 1994* so as to require a comparable statement, described as a human rights certificate, for most statutory rules.¹⁹ There may also be requirements throughout Government at an administrative level for human rights impact assessments to be made for policy proposals which are submitted to Cabinet, including at the stage of approval-in-principle and when policy has crystallised into a Bill at Cabinet.

What exactly will be the content of statements of compatibility? How will they operate? Perhaps the best way to explain this is by example. A useful example is the compatibility statement prepared in the ACT when legislation was introduced into Parliament to permit the involuntary administration of electro-convulsive therapy, or ECT.²⁰

In 2005 the ACT Government introduced the Mental Health (Treatment and Care) Amendment Bill 2005 (ACT). The compatibility statement, which was tabled in Parliament, first identified what relevant rights this Bill might have an impact upon. What rights might it interfere with, or limit, or restrict? The principal relevant right was identified as the right to refuse medical treatment. More precisely, this is the right of a person under s 10(2) of the ACT Human Rights Act not to be subjected to medical or scientific experimentation or treatment without his or her free consent.

This right heralds from Art 7 of the ICCPR. We recognise the same right in the Charter²¹ although it is there extended to include a right of a person not to be subjected to medical or scientific experimentation or treatment without his or her *full free and informed consent*. This extension was made to reflect the present requirements for consent under Victoria's *Medical Treatment Act 1998*.²²

The other rights identified in the ACT as being relevant to the Mental Health Bill (and I'll spare you the section numbers) were the right not to be subjected to inhuman or degrading treatment;²³ the right to liberty and security of the person;²⁴ the right to humane treatment when deprived of liberty;²⁵ the right to privacy;²⁶ the right of a child to protection;²⁷ and the right to equality and non-discrimination.²⁸

Having identified the relevant rights, the compatibility statement went on to consider whether the involuntary administration of electro-convulsive therapy (as provided for under the Bill) would be an unreasonable interference with any of those rights, in particular, the right not to be subjected to medical treatment without freely giving consent. It set out on this task by considering first the status of that right under international law. The compatibility statement noted that the right is not considered to be absolute under international law.²⁹ The value underlying the right is personal autonomy and there are circumstances where the right may need to be compromised to achieve some other lawful and proper purpose.

The compatibility statement went on to consider what was the purpose of the interference with the right and asked whether that purpose was an important one which addressed a pressing or substantial public or social concern. Indeed, the social concern to which the Bill was addressed was the clearly important one of ensuring that emergency ECT treatment was not unduly delayed where it was necessary to save a person's life.

The principal alternative model was that of a statutory charter of rights. A statutory charter, as it noted:

is an ordinary piece of legislation of the Parliament. It is enacted in a manner that makes it no more difficult to change than other Acts of Parliament. It is subject to amendment or repeal in the same manner as all other legislation. A statutory Charter creates a presumption that other legislation must be interpreted to give effect to the rights listed in that Charter.¹²

The *Justice Statement* went on to say:

The model does not invalidate any provision or allow a court to refuse to apply another Act's provisions because of inconsistency with one of the rights listed in the Charter of Rights instrument. This is the model of the *Human Rights Act 1998* (UK) and the *New Zealand Bill of Rights Act 1990*.¹³

I might add that this is also the model adopted by the ACT in enacting its *Human Rights Act 2004*.

In April 2005 the Attorney-General announced the establishment of the Human Rights Consultation Committee. The Committee was chaired by Professor George Williams and its other members were Professor Haddon Storey QC, Ms Rhonda Galbally and Mr Andrew Gaze. As Solicitor-General I was appointed Special Counsel to that committee and I worked with them.

The Human Rights Consultation Committee released a discussion paper in which they invited responses from the Victorian community about whether change was needed in Victoria to better protect human rights. The Discussion Paper discussed some of the existing ways in which rights are protected in Victoria and identified the rights under the *International Covenant on Civil and Political Rights* (the ICCPR) as those which the Victorian Government had asked the Committee to look at, in considering whether to adopt further measures to protect human rights in Victoria.¹⁴ These rights are primarily associated with individual human liberty.

The rights under the ICCPR include the right to vote; the right to freedom of thought, conscience and religion; the right to freedom of expression, peaceful assembly and association; the right to liberty and security of the person; the right to freedom of movement; the right to a fair trial; the right not to be held in slavery; the right not to be subject to torture or cruel, inhuman or degrading treatment or punishment, nor subjected to medical or scientific experimentation or treatment without consent; the right to life; the right to privacy; the right to equality before the law and non-discrimination; and the right of individuals belonging to ethnic, religious or linguistic minorities to enjoy their own culture.

After community consultation, the Human Rights Consultation Committee delivered its report and made a series of recommendations to Government, including the recommendation that the Victorian Parliament enact a Charter of Human Rights and Responsibilities.¹⁵ The Committee Report said:

This Charter would not be modelled on the United States Bill of Rights. It would not give the final say to the courts, nor would it set down unchangeable rights in the Victorian Constitution. Instead, the Victorian Charter should be an ordinary Act of Parliament like the human rights law operating in the Australian Capital Territory, New Zealand and the United Kingdom. This would ensure the continuing sovereignty of the Victorian Parliament.¹⁶

Relevantly, the Report also said:

The Charter would also play an important role in policy development within government, in the preparation of legislation, in the way in which courts and tribunals interpret laws and in the manner in which public officials treat people within Victoria.¹⁷

determine priority. The Act states that there shall be no right of appeal in respect of any 'decision' of the warden or of the Minister upon any application for a mining tenement. Accordingly the parties unhappy with the warden's 'decision' held a ballot to determine priority and sought prerogative relief in the Supreme Court.

The question was whether a decision taken, prior to the final exercise of the discretion of the Minister, can be said sufficiently 'to affect legal rights' so that certiorari may lie. The result of the ballot would under the Act be included in the report recommending grant or refusal, which is transmitted to the Minister. The question was whether the decision of the warden to conduct a ballot had a sufficient legal effect upon the final decision of the Minister to grant or refuse applications. It was found that the decision which led to the ordering of the ballot to be held, had 'an apparent or discernable legal effect' upon the Minister's decision. The Minister was required to consider the information transmitted by the warden and could not exercise the discretion to grant or refuse until the warden's recommendation and report had been received and taken into account. This being so, merely because the Minister was not bound by the recommendation of the warden and that the report was not decisive, did not mean that certiorari would not lie. The High Court said that certiorari would go.

Federal and State judicial review compared

The Supreme Courts of each State receive the supervisory jurisdiction of the English Courts and therefore face no constitutional constraints. Conversely, as can be seen from the earlier reference to the Federal legislation, the High Court derives its jurisdiction from the constitutional writs under s 75(iii) and (v) of the Constitution and the Federal Court derives its jurisdiction from the *Judiciary Act 1903*, the ADJR Act and other Federal legislation. Because both the High Court and the Federal Court's supervisory jurisdiction are constrained by the Constitution the State Courts enjoy a broader scope for judicial review³².

Range of judicial review: the divide between 'public' and 'private' bodies

In Australia the Federal Constitutional restrictions taken with the High Court decision in the *Boilermakers case* has meant that there has been a marked reluctance to embark upon merits review at least where it can not be concluded:

- That a particular administrative decision was so unreasonable that no reasonable decision-maker could have arrived at it³³.
- That the decision was 'illogical, irrational or lacking a basis in findings or inferences of facts supported on logical grounds'³⁴.
- That there was procedural unfairness amounting to a significant departure from observance of the rules of natural justice.

These areas and perhaps others, are ones which in a more liberal judicial climate, may be expanded as has already occurred in the United Kingdom not only with the existing legislation to which it is now subject as a member of the European Union but also with the development of the proportionality principle and flirtation with substantive as well as procedural unfairness.

It has been observed that a broader application of judicial scrutiny has been impeded in Australia by the restriction contained in the ADJR Act confining decisions subject to review being those decisions 'under an enactment'³⁵.

With the privatisation of many activities previously performed in the public sector the Courts now face the need to develop principles to determine which bodies are amenable to judicial review.

An array of factors fall for consideration. If the source of the entity's power is statutory (eg Telstra) then judicial review is likely. Likewise if the function is one of public concern, such as a private company running a prison, then judicial review will be available. So too, it is relevant to consider the rights and interests of the individual affected in determining whether the accountability that judicial review demands is relevant to the particular body under examination³⁶.

In formulating uniform rules for the availability of judicial review under an integrated judicial system, with the High Court standing at its apex and in seeking to shape appropriate principles to determine the availability of judicial review in the case of privatised bodies, the Australian Courts face a formidable task. Yet judicial review must be a 'go go' area of judicial development if an ever expanding executive power is to be held properly accountable to the Australian community.

Endnotes

- 1 Wade and Phillips: *Administrative Law*
- 2 *Ridge v Baldwin* [(1964) AC 40]
- 3 *Kioa v West* (1985) 159 CLR 550 at 584 per Mason J; *Haoucher v MIMEA* (1990) 169 CLR 648 at 653 per Deane J. See also 'Administrative Law and the Rule of Law': 1998 AIAL; 'Accountability: Parliament, the Executive and the Judiciary' by the Hon John Doyle.
- 4 Justice Gummow 'The Permanent Legacy' (2000) 28 *Federal Law Review* 177 at 180.
- 5 (1803) 5 US 187
- 6 *Deputy Commissioner of Taxation v Richard Walter Pty Ltd* (1995) 183 CLR 168 at 179 per Mason CJ; *Re Refugee Tribunal; Ex parte AALA* (2000) 204 CLR 82 at 92 per Gaudron and Gummow JJ; at 138-139 per Hayne J; see also at 137-138 per Kirby J.
- 7 Sir Anthony Mason 'The foundations and limitations of judicial review' (2001) AIAL Forum. 31 at 3.
- 8 *R v Kirby; Ex parte Boiler Makers Society of Australia* (1956) 94 CLR 254.
- 9 *Deputy Commissioner of Taxation v Richard Walter Pty Ltd* (1995) 184 CLR 168 at 178 per Mason CJ; *Re Refugee Tribunal; Ex parte AALA* (2000) 204 CLR 82 at 139. See again Sir Anthony Mason's comments supra at pp 3 & 4 of AIAL Forum No 31.
- 10 See ADJR Act 1973 s 3
- 11 *Griffith University v Tang* 2005 HCA 7 at [89]
- 12 See ADJR Act 1973 s 5
- 13 s 23, *Federal Court of Australia Act 1976* (Cwlth)
- 14 Section 5(1) of the ADJR Act.
- 15 Section 25 of the AAT Act.
- 16 Section 28 and 29 of the AAT Act
- 17 Section 44AA of the AAT Act.
- 18 *Re Refugee Review Act; Ex parte Aala* (2000) 204 CLR 82 Gaudron and Gummow JJ; at 108 [56]. See the *Scope of Judicial Review*, Report number 47, April 2006, pp 8 to 12.
- 19 Section 16(1)(a) vests the Supreme Court with the like jurisdiction and powers of the Courts of Queen's Bench, common pleas, and exchequer as at the Supreme Court of 1886. See also ss 20 and 24.
- 20 Section 15 of the SAT Act.
- 21 Sections 9 and 16.
- 22 See s 27.
- 23 'Detailed Overview of the State Administrative Tribunal', SAT by Judy Eckert, Brief Volume 32, February 2005 pp 6 to 15.
- 24 Michael Hunt: *Mining Law in Western Australia* (3rd Ed) Federal Press 2001 pp 245-247
- 25 1974 WAR 101
- 26 1989 WAR 270
- 27 *Centamin Exploration (WA) Pty Ltd v Gething* (unrep) WASC FC 28 May 1982 SCL 4527
- 28 1988 WAR 122
- 29 See Hunt: *Mining Law in Australian*, Federal Press 2001 pp 249 to 251
- 30 1992 175 CLR 564 at 580
- 31 1995 HCA 60
- 32 'Crossing the Intersection: How the Courts are Navigating the 'Public' and 'Private' in Judicial Review' Hon Raymond Finkelstein April 2006 48 AIAL Forum 1
- 33 *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* 1948 1KB 223
- 34 *Re: MIMA ex parte Applicant s.20/2002*; 2003 77 ALJR 1165; 2003 198 ALR 59 McHugh and Gummow JJ at [52]
- 35 See note 32. 48 AIAL Forum; Hon Raymond Finkelstein at p 6
- 36 See note 32 and the High Court cases of *Neat Domestic Trading Pty Ltd v AWB Limited* (2003) 198 ALR and *Griffith v Tang* (2005) HCA 7

The second aspect I wish to draw your attention to is the interpretive direction, that is, the direction that all Victorian laws must be interpreted in a way that is compatible with human rights, consistently with the purpose of those laws.

Before I consider the terms of the Charter itself, I would like to say something about its history and origins. It is important to an understanding of its operation for the background story to be told. When the English academic Francesca Klug visited the ACT in 2002, before that Territory had enacted its Human Rights Act in 2004, she warned against attempting to assimilate Australia's circumstances to the constitutional crises which had occurred in other countries. She said:

If there is to be widespread support for ...[human] rights legislation it is no use telling people in an advanced democracy like Australia or the U.K. that they are in the same place as the French or Americans in the late eighteenth century, or India in 1948, or South Africa in the aftermath of Apartheid. Instead, a related but different story must be devised.⁸

That story in Victoria grew out of the Attorney-General's *Justice Statement* in May 2004. One of the key initiatives of the *Justice Statement* was to establish a process of discussion and consultation within the Victorian community on how human rights and obligations could best be promoted in Victoria. The *Justice Statement* recognised that alternative models for human rights protection existed in different jurisdictions.

It also recognised, as Spigelman J, the Chief Justice of the New South Wales Supreme Court has said that:

[w]ith the exception of [the ACT] Australia remains one of the last outposts of resistance to what has been described in contemporary jurisprudence as the "rights revolution".⁹

No doubt that resistance was due in part to what Sir Anthony Mason recognised in 1989 as the training to which Australian lawyers were subject. As he put it:

Australian lawyers like myself, nurtured on Dicey's notion of parliamentary supremacy, find it hard to accommodate a [constitutionally entrenched] Bill of Rights. Dicey himself saw little virtue in such European trifles. Since his day parliamentary supremacy has become all-pervasive. It infuses the whole of our public law; it informs the attitudes of politicians and judges. In the case of politicians it produces an antagonism to judicial review; they see it as a brake on the exercise of political power. Along with the community at large they have come to assume, if not accept, that the will of the majority is a true reflection of democracy.¹⁰

He went on to say:

The phenomenal emergence of human rights as a pre-eminent political force in our time challenges this orthodoxy. ... Human rights are [now] seen as a countervailing force to the exercise of totalitarian, bureaucratic and institutional power – widely identified as the greatest threats to the liberty of the individual and democratic freedom in this century.¹¹

The concern that the model of a constitutionally entrenched Bill of Rights might diminish parliamentary supremacy was reflected in the *Justice Statement*. If legislation which infringes rights could be declared invalid by the courts, as it can in the United States, or under Chapter 2 of the *Constitution of the Republic of South Africa 1996*, judges would be in a position to render inoperative or ineffective laws passed by the Parliament in opposition to the parliamentary will. The criticism was not significantly reduced by allowing the Parliament expressly to override rights in specific cases, as is reflected in the model adopted by the *Canadian Charter of Rights and Freedoms*. If the courts could declare a law invalid, the criticism remained. The *Justice Statement* also noted the rigidity of a constitutionally entrenched model.