THE INTERSECTION OF MERITS AND JUDICIAL REVIEW: LOOKING FORWARD[1]

JUSTICE D KERR*

Over the past four decades three administrative law revolutions have transformed the legislative and constitutional basis of Australian public law. Judicial review has been constitutionalised and can set aside a decision and compel duties to be performed but it cannot substitute a better decision. Only merits review can substitute a correct or more preferable decision. Merits review is now firmly built into the architecture of the Australian system of government but there is room for further championing of this vital area of administrative law. Critical issues in public law, the requirement of reasons, unreasonableness as a ground of review and the availability of review rights in respect of private bodies exercising public power are explored.

I THE FIRST ADMINISTRATIVE LAW REVOLUTION

As Dennis Pearce reminds us,[2] the establishment of the Administrative Appeals Tribunal ('AAT') was recommended in the Commonwealth Administrative Review Committee's (the 'Kerr Committee') report of 1971.[3]

The Committee recognised that the scope and complexity of government intervention in Australian society had grown greatly since federation and was concerned that review of government decisions through Parliament and the courts had provided an inadequate response. The system was flawed both with regard to substance and accessibility. What was needed, it reported, was an accessible, informal and relatively cheap means for obtaining review of the merits of administrative decisions.

The AAT was established as a result of the passage of the *Administrative Appeals Tribunal Act 1975* ('AAT Act'). It was a unique creation of the Australian legal system and, at that time, a world first. Many hundreds of enactments have since conferred merits review jurisdiction upon the AAT. When a decision falls short of what is required and review is sought, the AAT has the power to set the decision aside and substitute a correct or preferable decision.

The Kerr Committee also recommended that significant changes be made to enhance the federal system of judicial review. The then means of seeking judicial review of Commonwealth government decisions was pursuant to s 75(v) of the *Constitution* – seeking relief by way of what were previously referred to as the prerogative writs.

Because federal review jurisdiction had not been conferred on State Supreme Courts the High Court had exclusive jurisdiction. Anyone seeking judicial review of Commonwealth government administrative action had to commence their action in the

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1 This article is adapted from a speech delivered by Justice D Kerr at the QCAT Annual Conference 2012, Brisbane Customs House, 25 September 2012.

2 Denis Pearce, *Administrative Appeals Tribunal* (LexisNexis Butterworths, 2nd ed, 2007).

3 Commonwealth Administrative Review Committee, Parliament of Australia, *Commonwealth Administrative Review Committee Report*, Parl Paper No 144 (1971).

High Court. They were then confronted by an area of law that was procedurally complex and substantively arcane.

The Kerr Committee's recommendations included codifying the grounds for judicial review, simplifying the procedures for review applications and to reduce the burden on the High Court[4] establishing a superior Federal court with jurisdiction to hear such judicial review applications.

The subsequent Committee of Review of Prerogative Writ Procedures chaired by RJ Elliott QC shared its conclusion that the state of the law relating to judicial review of administrative action was overly technical, complex and required reform.

The upshot was that the Commonwealth Parliament enacted the *Administrative Decisions Review Act 1977* ('ADJR Act'). That Act came into force in 1980. The ready availability of statutory review rights in the Federal Court was expected to lead to the less accessible provisions that only could be invoked in the High Court's original jurisdiction becoming largely redundant. The ADJR Act introduced simplified procedures for judicial review applications. It set out the grounds for which review might be sought. It provided for flexible remedies described in plain language.

A parallel and similarly motivated reform initiative led to the passage of the *Ombudsman Act 1976*. The Ombudsman was given power to receive complaints regarding performance of Commonwealth administrative functions. He or she could, if thought fit, make recommendations for their remedy and report failure to do so to the Parliament.

Together these legislative initiatives of the mid 1970s constitute Australia's first administrative law revolution.

II THE SECOND ADMINISTRATIVE LAW REVOLUTION

The first administrative law revolution took statutory form but the second was judicial, or more correctly, constitutional in character.

In the course of the last decade of the twentieth century Australian public policy grappled with the challenge of increasing numbers of unauthorised persons arriving at the nation's borders. Many of those arriving claimed entitlement to protection as refugees. When their claims were rejected some sought, and a considerable number were successful in obtaining, judicial review. Political pressures grew. Having expanded the availability of judicial review two decades previously, Parliament now sought ways to restrict it.

At the height of the 'Tampa' controversy the Parliament passed the *Migration Legislation Amendment (Judicial Review) Act 2001*. The amendment sought to abolish judicial review for most decisions made under the *Migration Act 1958*. A new s 474 was inserted in that Act. It read:

> (1) A privative clause decision:
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> a) is final and conclusive; and
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> b) must not be challenged, appealed against, reviewed, quashed or called into question in any court; and
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> c) is not subject to prohibition, mandamus, injunction, declaration or certiorari in any court in any account.
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> (2) In this section;
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> *privative clause decision* means a decision of an administrative character made, proposed to be made, or required to be made under this Act or under a regulation or other instrument made under this Act (whether in the exercise of

[4] Ibid [241].

> a discretion or not), other than a decision referred to under subsection (4) or (5).

In *Plaintiff S157/2002 v Commonwealth*,[5] the new law was challenged on the grounds that it was inconsistent with s 75(v) of the *Constitution*. The plaintiff complained that the Refugee Review Tribunal had taken into account material directly relevant and adverse to his claim without giving him notice of it or an opportunity to respond to it. He applied in original jurisdiction of the High Court for a declaration that the amendments which excluded judicial review were invalid.

The Commonwealth conceded the terms of s 75(v) of the *Constitution* precluded the privative clause applying in literal terms. However it argued that s 474 had been drafted based on the statements of Dixon J in *R v Hickman*.[6] Thus the outcome should be viewed as a model of cooperation between the judicial and legislative arms of government – the courts explaining how an outcome could be achieved and the Parliament legislating accordingly. Review was available only if there had been a failure to exercise the power bona fide, the decision did not relate to the subject matter of the legislation or it was not reasonably capable of reference to the power given to the Tribunal.

That was not the conclusion the High Court came to.

The Court held that the definition of a privative clause decision in s 474(2) did not include 'purported decisions'. Gaudron, McHugh, Gummow, Kirby and Hayne JJ explained;[7]

> When regard is had to the phrase 'under this Act' in s 474(2) of the Act, the words of that subsection are not apt to refer either to decisions purportedly made under the Act or...to decisions of the kind that might be made under the Act.

As a consequence s 474 did not apply to a decision involving jurisdictional error; such a decision was 'regarded, in law, as no decision at all'.[8] A decision flawed for reasons of a failure to comply with the principles of natural justice was no decision at all. It was merely a purported decision.

This outcome meant that the plaintiff could pursue his claim. The High Court did not need to find s 474 to be invalid.

However, in strong obiter remarks their Honours also anticipated and answered the question of what would have been the result if Parliament had sought to expressly exclude review of purported decisions. If s 474 had applied to decisions involving jurisdictional error, it 'would be in direct conflict with s 75(v) and invalid'.[9] Their Honours' joint judgment stated that section 75(v) 'introduces into the *Constitution* of the Commonwealth an entrenched minimum provision of judicial review' as a means of 'assuring to all people affected that officers of the Commonwealth obey the law and neither exceed nor neglect any jurisdiction the law confers on them'.[10]

The Commonwealth then sought to narrow the breadth of jurisdictional error. What constituted jurisdictional error had been a contentious issue. In *Craig v South Australia* it had appeared to have been settled:[11]

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5 (2003) 211 CLR 476.
6 (1945) 70 CLR 598, 614-615.
7 *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 505-506 [75].
8 Ibid 506 [76].
9 Ibid 506 [75].
10 Ibid 513-514 [103]-[104].
11 (1995) 184 CLR 163, 179 (Brennan, Deane, Toohey, Gaudron and McHugh JJ). This was a unanimous decision.

> If … an administrative tribunal falls into an error of law which causes it to identify a wrong issue, to ask itself a wrong question, to ignore relevant material, to rely on irrelevant material or, at least in some circumstances, to make an erroneous finding or to reach a mistaken conclusion, and the tribunal's exercise or purported exercise of power is thereby affected, it exceeds its authority or powers. Such an error of law is jurisdictional error which will invalidate any order or decision of the tribunal which reflects it.

The Commonwealth had no success. In the course of disposing of two special leave applications which were heard together Gummow J responded to its counsel, 'It is a neat Bauhaus construction and you want to start building a Gothic cathedral.'[12]

This outcome unsurprisingly led to increased focus on jurisdictional error as criterion of invalidity. It also led to a revival of interest on the part of practitioners in what had previously been termed the prerogative, now restyled as the constitutional, writs. By this time much of the technicality in obtaining those writs had been stripped away. The Federal Court had jurisdiction pursuant to 39B of the *Judiciary Act 1903* to grant relief in all such matters. It thus transpired that there were two, almost equally convenient, paths to judicial review – via the ADJR Act and via the constitutional writs – and, critically, the latter path was constitutionally entrenched.

III THE THIRD ADMINISTRATIVE LAW REVOLUTION

The States have been absent from this discussion thus far. However, State law-makers were also influenced by identical considerations to those that had led at the Commonwealth level to the passage of the AAT and ADJR Acts. In its aftermath legislation to confer similar entitlements to judicial review of State decisions of an administrative character was enacted in most States. Utilising the greater flexibility inherent in the lest strict division of powers doctrine that applied to them, a number of States also constituted their tribunals as courts enabling them to exercise adjudicative judicial powers and be conferred with broader jurisdictions.

However, in one important regard the States were thought immune from the jurisprudence of the first and second administrative law revolutions. Section 75(v) of the *Constitution* confers original jurisdiction on the High Court to supervise the conduct of officers of the Commonwealth. It does not extend any power to grant constitutional writs against officer of a State. Because *Plaintiff S157* took its force from that provision, the States continued to legislate in the understanding that a well drafted privative clause could exclude judicial review both of decisions and purported decisions in exclusively State matters.

Kirk v Industrial Relations Commission of New South Wales[13] revealed that understanding to be flawed. The result in *Kirk* flowed from the application of the constitutional doctrine the High Court had earlier articulated in *Kable v Director of Public Prosecutions (NSW)*[14].

Kable had held that the *Constitution* required that State Supreme Courts remain capable of being invested with federal jurisdiction. Accordingly a Supreme Court of a State could not be abolished or granted functions repugnant to its constitutionally required Chapter III role.

In *Kirk* the High Court held that a court lacking capacity to supervise the lawfulness of the conduct of inferior courts and tribunals would cease to be a fit

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[12] Transcript of Proceedings, *MIMIA v Scargill, MIMA v Lobo* [2004] HCATrans 21 (13 February 2004) 135.

[13] (2010) 239 CLR 531.

[14] (1996) 189 CLR 151.

repository for Commonwealth judicial power. A court shorn of that capacity would no longer fall within the constitutional language of a Supreme Court of a State. State Parliaments therefore could not legislate to remove that power.

Hopes that *Kirk* might be distinguished and applied only to its particular facts were dashed by the High Court's decision in *Public Service Association of South Australia v Industrial Relations Commission of South Australia*[15].

The third revolution in administrative law has ensured that the right to challenge administrative decisions in respect of jurisdictional error is also constitutionally entrenched at the State level.

IV SYNTHESIS

A *Judicial Review: ARC Report No 50/2012*

It is not possible to assess precisely what proportion of filings is initiated under the ADJR Act in contrast with proceedings pursuant to s 75(v) of the *Constitution*. The Administrative Review Council ('ARC') suggests it still may be slightly more than 50 per-cent, but the notion underlying the Kerr and Ellicott Committees' recommendations that non-statutory judicial review was inaccessible and overly technical and complex no longer holds true. Since jurisdiction to grant relief under s 75(v) has been conferred upon the Federal Court pursuant to s 39B(1) of the *Judiciary Act 1903* the convenience and simplicity of review under s 75(v) now rivals that of review pursuant to the ADJR Act.

Ironically, as a result, the case for the continued existence of the ADJR Act has come under scrutiny. The immediate focal point of that scrutiny was the Administrative Review Council's Report No 50/2012 *Federal Judicial Review in Australia*. The option of repealing the ADJR Act and relying solely on constitutional judicial review was suggested as a possibility by the then Solicitor-General Stephen Gageler SC.

On 24 September 2012 the ARC released its Report. One member of the Council, Mr Roger Wilkins AO, supported that approach[16] but the Council's recommended model was otherwise. It considered that, with amendments to ensure streamlined decision making, there were good reasons to retain the ADJR Act. It concluded:[17]

> The Council considers that the scope of the ADJR Act should be expanded to encompass the jurisdiction of the High Court under s75(v) of the *Constitution*. The Council recommends a new section be added to the ADJR Act to allow an application to be made under the ADJR Act where a person would otherwise be able to initiate proceedings in the High Court under section 75(v) of the *Constitution*. This amendment will allow applicants who would otherwise have had standing under the ADJR Act to make a judicial review application under that Act without needing to make an application in the alternative under s 39B of the Judiciary Act. Applicants who would otherwise only have been able to make an application under section 39B would be able instead to apply for an order at review under the ADJR Act.
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> The Council's preferred model incorporates the 'officer of the Commonwealth' test of constitutional judicial review and the current ADJR Act test of 'a decision of an administrative character… made under an enactment'. By providing for the court to have jurisdiction to make an order of review under the ADJR act in relation to both of

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15 (2012) 289 ALR 1.

16 Administrative Review Council, 'Federal Judicial Review in Australia' (Report No 50/2012) Appendix A, 195-200.

17 Ibid 12-13.

> these jurisdiction tests, the following decisions remain subject to judicial review: decisions of officers of the Commonwealth, regardless of the source of power being exercised or the nature of the action preformed; decisions made 'under an enactment' whether or not a jurisdictional error has occurred; and, decisions by persons other than officers of the Commonwealth, if made 'under an enactment'.

The Government response to the Report is expected this year.

B *Merits Review*

Many younger Australian lawyers were not yet born when the legislation which set off the first administrative law revolution was passed. They, and those of us who were, have come to take for granted what was achieved. Public and academic attention has tended to focus on the subsequent entrenchment of non-statutory judicial review.

However, the most remarkable Australian innovation of establishing independent merits review remains exclusively the product of statute.

Merits review is more frequently accessed than is judicial review. It remains, by comparison, far less daunting for participants. The AAT, and State tribunals which share its heritage, operate largely without fanfare offering relatively convenient, informal and cheap processes whereby citizens can challenge adverse administrative decisions. Merits review undertaken by skilled independent members allows these tribunals to reach the correct or preferable decision – not merely to set a flawed decision aside and send it back for reconsideration.

Judicial review and merits review may have common roots in their motivation but in Australia, constitutional considerations have held they must remain conceptually different. Chapter III of the *Constitution* has been held to require a strict separation of powers to apply precluding the admixture of Commonwealth judicial and non-judicial functions preventing the conferral of judicial power on any tribunal other than a court.

Merits review – that is the function of evaluating and substituting the correct or preferable decision standing in the place of a decision maker – as opposed to enforcing the law that constrains and limits the powers of the other branches of government – is, on that analysis, beyond judicial power.

In *Attorney General (NSW) v Quin* Brennan J stated:[18]

> 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.

There have been many thoughtful critics of the assumptions that lie behind that conclusion – or, at least, of the strictness of its application. 'Proportionality' is now an accepted component of English administrative law as a ground of review. It requires English courts to weigh whether a particular decision was reasonably proportionate to the circumstances in which it was made. Former Chief Justice of the High Court of Australia Sir Anthony Mason has argued that the separation of powers doctrine should not stand in the way of Australian courts applying analogous principles.[19] However, even conceding that the practice has sometimes blurred, to date there has been

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[18] (1990) 170 CLR 1, 35-36.

[19] Sir Anthony Mason, 'The Scope of Judicial Review' (2001) 31 *Australian Institute of Administrative Law Forum* 21.

resistance to that outcome because the prevailing view remains that 'in Australian legal theory [there is] a bright line between judicial review and merits review.'[20]

The natural excitement and interest of lawyers about the rapidly evolving sphere of judicial review, its increased availability and its constitutional entrenchment at both a federal and state level, has led to less attention being given to the bread and butter role of merits review. That role has become taken for granted, but merits review deserves better than that. Its creation was an Australian world first autochthonous innovation in administrative law.

Judicial review can set decisions aside, compel duties to be performed and prevent wrongs, but it cannot substitute a correct or preferable decision – that is a step beyond judicial power. Only merits review can do that.

Merits review might appear firmly built into the architecture of the Australian system of government but we should constantly remind ourselves that on current constitutional theory, it must remain a creature of statute. What Parliaments can enact they can repeal. That requires tribunals to meet large expectations. To retain the support of the public and the Parliament bodies exercising merits review need to remain responsive to charter obligations of the kind set out in s 2A of the AAT Act:

> In carrying out its functions, the Tribunal must pursue the objective of providing a mechanism of review that is fair, just, economical informal and quick.

While those obligations sometimes press against each other, in that, for example, fairness may require the taking of time, the sentiment represented can be readily understood.

The AAT has jurisdiction to engage in merits review only if an enactment specifically confers rights to merits review. While repeal of existing review rights is not on the horizon merits review needs champions lest it become residual, available to citizens only in well-established niches. The members of the Kerr Committee had broad aspirations for merits review and intended that it be available across all areas of government administration.

It may be time to reflect on whether the AAT should have universal jurisdiction, subject to express exclusion, rather than the reverse.

It may also be time to revisit the recommendations of the Administrative Review Council's *Better Decisions* Report of 1996. The initial attempt to implement the ARC's common-sense recommendations went off the rails when key safeguards were omitted and the process was seemingly driven by cost savings. Instead of improving effectiveness and structurally reinforcing the independence of merits review within the Commonwealth, many perceived what was being proposed as an attempt to cut back on the structural independence of merit review tribunals.

However, the rationale that underpinned the *Better Decisions* Report was sound and retains my strong support. In 2012 Cabinet took a small step, consistent with that rationale, when it decided in response to the Skehill Report that no new stand-alone tribunals would be created and any future merits review jurisdiction would be conferred on the AAT.

In many ways the States have overtaken the Commonwealth in bringing coherence to their systems of merits review. That can be illustrated by the model adopted in Victoria (VCAT) Queensland (QCAT) Western Australia (SAT) and the recently announced New South Wales decision to meld their existing tribunals together under the leadership of a Supreme Court judge as NCAT.

Merits review should be more to the fore in academic and public debate.

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[20] Stephen Gageler, Submission to the Administrative Review Committee Report, 50/2012 *Federal Judicial Review in Australia.*

The Kerr Committee was very aware of the landmark nature of the administrative law reforms it proposed. We take for granted the availability of merits review at some peril.

V LOOKING FORWARD

Some time ago I tentatively suggested that references to State Supreme Courts in Chapter III of the *Constitution* might be the source of an implication that State Parliaments could not enact effective privative clauses.[21]

Having once risked my hand as prognosticator of the future I should leave well enough alone – but here are some further speculations ventured at the risk of proving that point. Of their nature they are advanced tentatively and without the benefit of 'the purifying ordeal of skilled argument on the specific facts of a contested case.'[22]

A *Right to Reasons?*

Perhaps there will be further attention given in the next decade as to whether Australian law should recognise a right to reasons.

One of the central recommendations of the Kerr Report in 1971 was to propose the introduction of an obligation on federal decision makers to make findings and give reasons if they were requested by a person whose interests were affected. As a result of the passage of the AAT and ADJR Acts Commonwealth decision makers now can be required to provide a statement of reasons in a wide range of areas.

However in *Public Service Board of NSW* v *Osmond*,[23] the High Court of Australia held unanimously that there is no common-law right to reasons in Australian administrative law.[24] Their Honours declined to follow the evolving common-law jurisprudence of England. While acknowledging the desirability of bodies exercising administrative functions giving reasons the Chief Justice declined to endorse 'a departure from a settled rule on grounds of policy'.[25]

Deane J was somewhat more open to the possibility:[26]

> The statutory developments [for rights to reasons enacted by Parliament] … are conducive to an environment within which the courts should be less reluctant than they would have been in times past to discern in statutory provisions a legislative intent that the particular decision- maker should be under a duty to give reasons or to accept that special circumstances might arise in which contemporary standards of natural justice or procedural fair play demand that an administrative decision maker provide reasons for a decision to a person whose property rights or legitimate expectations are adversely affected by it.

Perhaps for that reason, and despite *Osmond*, there has been a continuing trend towards wider judicial acceptance that a right to reasons ought readily to be implied as a matter of statutory interpretation.

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21 Duncan Kerr, 'Privative Clauses in the Courts: Why and How Australian Courts Have Resisted Attempts to Remove the Citizen's Right to Judicial Review of Unlawful Executive Action' (2005) 5(2) *Queensland University of Technology Law and Justice Journal* 195, 215.

22 *Cordell v Second Clanfied Properties Ltd* [1969] 2 Ch 9, 16

23 (1986) 159 CLR 656.

24 (1986) 159 CLR 656, 656.

25 Ibid.

26 Ibid 679

In a recent paper, 'A Tribunal Law Update' Anita Johnson cited Basten JA's statements in *L&B Linings v WorkCover Authority of New South Wales*[27] as accurately stating the current law with respect to the obligation of an administrative decision maker to give reasons:[28]

> In determining whether a there is an obligation for an administrative decision maker to give reasons one starts with the process of implication of as statutory obligation and then assesses the extent of the implied duty. The extent of the duty will necessarily affect the approach of a court exercising supervisory jurisdiction reviewing the reasons given and the consequences of failure to give reasons – ranging from jurisdictional error entailing the invalidity of the decision; error of law on the face of the record entitling an aggrieved party to obtain a quashing order; failure to complete the function required of the decision maker attracting a mandatory order to give reasons to no direct legal consequence 'other than an available inference that the body had no good reasons for its determination.

In his Whitmore Lecture 2012, 'The Reasons for Reasons – *Osmond* Revisited', former justice of the High Court of Australia Michael Kirby forcefully argued that *Osmond* should be revisited by the High Court.[29]

Perhaps a path to that desired outcome also might be by way of constitutional implication.

In *Minister for Home Affairs of the Commonwealth v Zentai*,[30] counsel for the respondent, Geoffrey Kennett SC, submitted that an implied obligation to give reasons could be drawn from Chapter III of the *Constitution*, and particularly s 75(v).[31] His submission was that a minister making a decision that had a serious effect on an individual should provide some statement of justification to explain it as otherwise the High Court's jurisdiction to judicially review such decisions would be frustrated and rendered ineffectual:[32]

> Viewed in the light of the significance of s 75(v), a decision which is unexplained is in the same category as a decision which is unreasoned. Both involve an attempt to dispense with limits on the decision-maker's power; and a statute which conferred powers whose limits could be dispensed with would be, to that extent, invalid. Another way of putting the point is that the conferral of a public power, without an express or implied obligation to explain purported exercises of that power, creates 'islands of power immune from supervision or restraint' the existence of which is inconsistent with the constitutional principle embodied ins 75(v).

The respondent succeeded on other grounds so the majority found it unnecessary to consider the notice of contention filed on his behalf. Heydon J (dissenting) considered, and rejected, the submission.[33] That does not, however, foreclose the same argument being advanced in future.

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27 [2012] NSWCA 15 (20 February 2012) (McColl and Wheatly JJA agreeing).

28 Anita Johnson, 'A Tribunal Law Update' (Paper presented at the Council of Australasian Tribunals, Sydney, 2012).

29 Michael Kirby, 'The Reasons for Reasons – *Osmond* Revisited' (Speech delivered to the Council of Australasian Tribunals, Whitmore Lecture, Sydney, 2 May 2012).

30 (2012) 289 ALR 644.

31 Transcript of Proceedings, *Minister for Home Affairs of the Commonwealth v Zentai* [2012] HCATrans 82 (28 March 2012) 2896-2966 (Kennett SC).

32 *Charles Zentai*, 'First Respondent's Submissions', Submission in *Minister for Home Affairs of the Commonwealth v Zentai*, No P56 of 2011, 10 February 2012, [42].

33 *Minister for Home Affairs of the Commonwealth v Zentai* (2012) 289 ALR 644, [91]-[98].

B *The Rehabilitation of the Wednesbury Doctrine and Irrationality*

The next decade may also see some reconsideration of the current hesitancy to apply review grounds based on the decision in *Associated Provincial Picture Houses v Wednesbury Corporation*.[34] *Wednesbury* is authority for the proposition that a decision that is 'so unreasonable that no reasonable authority could ever have come to it' is void.[35]

In its Report *Federal Judicial Review in Australia* the ARC noted:[36]

> In the UK *Wednesbury* unreasonableness developed in the 1990s to mean …the graver the impact of the decision on the affected person, the more substantial the justification will be required to uphold it. However, these developments…have not been accepted by the Federal Court because it may involve consideration of the merits of the decision.

Ironically the *Wednsesbury* doctrine has also fallen into disfavour in the UK but for precisely the opposite reason: because it is less flexible than proportionality and more limited by rule of law and separation of power considerations.[37]

Goodwin makes a powerful case that the *Wednesbury* doctrine, because it respects the distinctions historically mandated by the separation of powers, is the epitome of judicial restraint – requiring only decisions which are beyond the power actually conferred on a decision maker to be set aside. It simply assumes, absent express authorisation, that no power would ever be conferred on a decision maker in terms that would authorise him or her to make decisions so unreasonable that no reasonable decision maker could have arrived at them.

It will be interesting to see if reasoning of the kind articulated by Goodwin assists in removing hesitation that *Wednesbury* involves improper intrusion of judges into non-judicial functions and encourages a more confident application of the doctrine in Australia.

Closely associated with *Wednesbury* unreasonableness is the common law doctrine of irrationality or illogicality.[38] It too has suffered from some disfavour, If and when relief should be available has been highly controversial. Quite different approaches to the doctrine were illustrated by the decision in *Minister for Immigration v SZMDS*[39] (Crennan and Bell JJ and Heydon J; Gummow ACJ and Kiefel J dissenting). Given the narrowness of the majority in that case, the altered composition of the Court and the strength of the contesting views expressed by the majority and minority Justices and some uncertainty as to what the case decided, it seems almost certain that the High Court will be faced with a case requiring it to adjudicate on the rival approaches in the not distant future.

In a recent decision of the Full Court of the Federal Court of Australia*; SZOOR v Minister for Immigration and Citizenship*,[40] Rares J set out his understanding of the law as it stands following *SZMDS*;[41]

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34 [1948] 1 KB 223.
35 Ibid 230 (Lord Greene MR).
36 Administrative Review Council, 'Federal Judicial Review in Australia' (Report No 50/2012) [3.30].
37 See, e.g., James Goodwin, 'The Last Defence of *Wednesbury*' [2012] *Public Law* 445.
38 *SZADC v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCA 1497 (16 December 2003); *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002* (2003) 198 ALR 59.
39 (2010) 240 CLR 611.
40 (2012) 202 FCR 1.
41 Ibid 7-8 [15]-[19].

> The approach to irrationality or illogicality dictated by the authorities in the High Court appears to be that even if the decision maker's articulation of how and why he or she went from the facts to the decision is not rational or logical, if someone else could have done so on the evidence the decision is not one that will be set aside. It is only if no decision maker could have followed that path, and despite the reasons given by the actual decision maker, that the decision will be found to have been made by reason of a jurisdictional error.
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> Unfettered by the authorities. … I would have concluded that the tribunal's use of the anonymous letter as evidence of the fact that the appellant had fabricated his claims was irrational, illogical and unreasonable. The author of the letter was unknown and had given nor reasons why he or she (1) knew the appellant, (2) knew the information conveyed in the letter and (3) had not revealed his or her identity. For all the tribunal knew, the letter could have been written by a former resident in the appellant's home, or even by a malicious person within the staff or the tribunal or the department, who had access to material on the appellant's file. Critically, there was no material before the tribunal to indicate that whoever was its author had any personal knowledge of the assertions in the letter about the veracity of the appellant's claims…It is difficult to see how it is in the public interest that unknown persons who give no basis for their being in a position to make prejudicial assertions about another person are entitled to any credence in decision making under the Act. Unconstrained by authority I would have found that to do so is as irrational, illogical and unreasonable as having regard to a person saying that the red headed applicant for a visa should have his claim rejected because he has red hair and a liar. However the law appears otherwise.

As a matter of principle there would appear to be nothing inconsistent with what Brennan J said in *Quin*[42] regarding the limited duty of a court to declare and enforce the limits of the law, to reject the proposition that it is implicit in a grant of statutory power that a decision maker is empowered to draw conclusions lacking probative roots in the facts found, or assumed, upon which the decision was based. If there is no such inconsistency the separation of powers doctrine cannot be violated. And, if that is so, why should, as Rares J suggested he was required by the majority in *SZMDS* to conclude, a finding of illogicality or irrationality require more than the reviewing court finds itself in 'emphatic disagreement' with the reasoning processes of the decision maker. Such a conclusion does not challenge the critical premise that the task of finding facts is for the decision maker. It simply requires that his or her or its conclusions based on those facts have some logical connection. Requiring that a tribunal's decisions have some rational connection to the facts would not seem to place the bar for review too low.

In all other judicial contexts disagreement as emphatic as that expressed by Rares J would provide an adequate explanation of why a decision (for example that of an inferior court) should be set aside on appeal. And as the decision of Gilmour J in *Adamas v O'Connor (No 2)*[43] and others of that kind suggest, despite Rares J's understanding of what is required by *SZMDS* absurd decisions based on flawed logic continue to be set aside. It may be doubted that the law truly is as suggested such as to require a reviewing court to leave stand a decision that a red headed applicant for a visa should have his claim rejected because he is has red hair and a liar.

Australian constitutional law has rejected the US *Chevron* doctrine of deference – but even in the United States the deference doctrine does not go so far as to save an administrative decision where there is no rational basis for the decision maker's conclusions.

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42 (1990) 170 CLR 1, 35-36.
43 (2012) 291 ALR 77, [83]-[89].

From an applicant's perspective, learning that a judge who can be persuaded that the facts found or assumed by a decision maker logically cannot support the decision an administrator had reached, but yet must uphold that decision, would doubtless be perceived as the judge having to yield to executive whim. There would seem to be a plausible argument that requiring a judge to do so itself offends the separation of powers doctrine that Australian courts have rightly been careful to uphold.

Wednesbury and its common-law cousins, irrationality and illogicality, both may be due for rehabilitation.

C *Private Form and Public Functions*

My final speculation is that, notwithstanding the seeming fixed impediment of the decision in *NEAT Domestic Trading v AWB Ltd*,[44] there may be renewed attention over the coming decade to the question of whether public powers conferred on private bodies can be subject to ordinary judicial review. Any renewed trend to acknowledge the reality rather than form of such regulatory functions would support the contention that the doctrine in *R v Panel on Takeovers and Mergers; ex parte Datafin plc*[45] should be held to apply in Australia so as to extend judicial review to private bodies exercising regulatory functions of government.

In *Plaintiff M61/2010E v Commonwealth*,[46] the High Court held that it had jurisdiction in respect of decisions of government contractors so long as the Commonwealth was one of the parties. However, it is yet unsettled as to how the outsourcing of regulatory functions of the Commonwealth can be accommodated in Australia's system of judicial review.

Recently, in *Mickovski v Financial Ombudsman Service*,[47] the Victorian Court of Appeal, regarding itself constrained by the authority of *NEAT*, held that the Financial Ombudsman Service was not exercising government functions because the source of power was contractual.[48] Despite the Court stating that increasing privatisations of government functions demonstrated a need for the wider availability of judicial review the Court found that decisions of the Financial Ombudsman Service were not subject to judicial review.

It would not be surprising to see the working through of the tensions between public functions and private or contractual forms of administration continuing to evolve through case by case decisions, and ultimately by the High Court, over the next decade.

V CONCLUSION

Administrative law is likely to remain an exciting field. Confirmation that State Supreme Courts have constitutionally entrenched judicial review jurisdictions is likely to have a similarly large impact on the kind of matters that come before those courts as has become evident at the Commonwealth level since *Plaintiff S157*. That will be the product of the third administrative law revolution which collectively have transformed the face of public law in Australia in the course of less than half a century.

With all the excitement surrounding judicial review it is understandable that there has been some loss of focus in academic and professional writing about the more

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44 (2003) 216 CLR 277.
45 [1987] QB 815.
46 (2010) 243 CLR 319.
47 [2012] VSCA 185 (17 August 2012).
48 Ibid [32].

mundane role of merits review. But while thousands, perhaps tens of thousands of Australians seek judicial review each year, hundreds of thousands, perhaps millions of Australians apply for one form or another of merits review. It is a home grown product warranting at least as much ongoing attention.