

ADMINISTRATIVE JUSTICE IN AUSTRALIAN ADMINISTRATIVE LAW

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Administrative justice was the theme of the 1999 AIAL annual conference. The speakers at that conference adopted a novel approach to the different possible definitions or conceptions of administrative justice. They side stepped them. No speaker offered a detailed or perhaps even working definition of administrative justice.¹ With that in mind, this paper begins by providing a brief history of administrative justice in Australian administrative law. The paper also considers the values of administrative law with particular reference to judicial review and attempts to explain some of the difficulties that Australian administrative law faces in any attempt to foster normative values. It will be argued that constitutional considerations appear to deny a role for normative and other concepts such as administrative justice in judicial review but a closer inspection reveals that judges tacitly support some concepts that shed light on how they conceive administrative justice.

Early writings on administrative justice

The precise meaning or content of administrative justice are arguably not yet settled. This may be partly because the normative and other values which must surely lie at the heart of any form of justice will inevitably be contested to some extent. If so, there may never be a well settled or widely agreed definition of administrative justice, but the uncertainty is also due to the evolution of the concept. The early conceptions of administrative justice can be conveniently divided into two camps – the practical and the theoretical.

The most influential Australian expression of the practical approach to administrative justice was the Kerr Committee, whose report led to the establishment of much of the current federal administrative law system and which also exerted great influence on the reforms to State and Territory administrative law which followed reforms at the federal level. The Kerr Committee explained that its recommendations to reform federal administrative law were intended to „ensure the establishment and encouragement of modern administrative institutions able to reconcile the requirements of efficiency and administration and justice to the citizen.“² This explanation of the ultimate rationale of the Kerr reforms edged towards a notion of administrative justice but, notably, did not either use that specific term or explain a conception of justice more generally.³ The Kerr Committee similarly avoided any explanation of how issues of administrative efficiency and administrative justice might be balanced, even though it clearly identified a tension between the two through its suggestion that the two should be reconciled. Creyke has noted that this apparent tension has remained unresolved and suggested most scholars of Australian administrative law adhere to one of the two approaches to administrative justice favoured by the Kerr Committee, namely a focus on „balancing the distributive justice focus of public administration against individual interests“ or a focus on delivering a form of justice to individuals (and also, presumably, wider society) who are affected by the administrative process.⁴

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The most influential exponent of the early theoretical conception of administrative justice was Jerry Mashaw. His analysis of American disability welfare insurance decision making defined administrative justice as „the qualities of a decision process that provide arguments for the acceptability of its decisions.“⁶ Mashaw used his own research and the wider body of literature on social security research to devise three categories or models for administrative justice for the work of the particular welfare agencies he examined and public agencies more generally.⁶ Mashaw’s models, which foreshadowed much of the subsequent writing about public administration, were: bureaucratic rationality, a model that was essentially anchored upon efficiency, particularly cost effectiveness but also correct or accurate decision making; professional treatment, which emphasised what is now commonly known as service delivery standards; and moral judgment which, despite its title, was more a legal than moral category because it drew upon established principles of decision making used in the courts to determine issues, especially ones in dispute. This model essentially conceived a claimant for welfare, or indeed any other benefit that might be granted by government, as a party to a claim or dispute about entitlement. Mashaw explained that „the “justice” in this model inheres in its promise of a full and equal opportunity to obtain one’s entitlements.“⁷

Although these three models are not necessarily inconsistent, Mashaw argued that one would normally operate to exclude or marginalise the others because „the internal logic of any one of them tends to drive out the characteristics of the others from the field as it works itself out in concrete situations.“⁸ An interesting feature of this approach is the implication that bureaucratic rationality and its emphasis on efficiency, which one could broadly equate with the public sector managerialism that rose in the late 1980s, would essentially operate to the exclusion of other models. One can draw a longer bow and suggest that managerialism might also operate to exclude or marginalise approaches that place more focus on values, as any conception of administrative justice must do.

Mashaw’s seminal work is not easy to summarise but it had three important related features. The first was a focus on process, particularly processes that generated decisions.⁹ Secondly, it examined what Mashaw called the administrative adjudication of agencies, social security being his case study, and how this adjudication was carried out on behalf of the modern welfare state. In other words, Mashaw focussed on one narrow aspect of the wider administrative process – the adjudication of issues – which excluded what we would now term the accountability or integrity agencies of government. Thirdly, Mashaw’s work was an exercise in „bottom up” rather than „top down” thinking.¹⁰ Robert Thomas explained this distinction in the following terms:

a top down perspective...focuses on the external accountability mechanisms by which individuals dissatisfied with initial administrative decisions may challenge them. From this perspective, the role of the courts and judicial review in particular often take centre stage as the principal means of articulating general standards of legality that apply across the disparate range of individual administrative processes. A contrasting approach is labelled as a bottom-up conception of administrative justice. From this perspective, administrative justice concerns the justice inherent in administrative-legal decision-making and the focus is, therefore, the mass of front-line initial decisions and the processes necessary to ensure quality within such processes.¹¹

Mashaw provided the classic example of the bottom up approach. He drew on his decades of empirical work in disability welfare decision making, which meant that his theories were largely informed by what happened in the offices of bureaucrats rather than in the courtrooms where judicial review applications were determined and also, to a large extent, the tribunal hearing rooms where administrative review applications were determined. Mashaw’s raw material was gathered by observations of bureaucrats which grounded his theory in findings made at the typical site of most administrative activity, namely the office of bureaucrats where the vast majority of non-controversial applications are decided, rather than the relatively small numbers of disputed cases that find their way to the courts or tribunals.¹² A leading English scholar of administrative justice has suggested that the great strength of Mashaw’s focus on ground level

administrative activity was its „focus on the myriad of first-instance decisions rather than the much smaller number of decisions that are the subject of an appeal or complaint and that it analyses them directly rather than at one remove and through a “legal prism”“.¹³

Mashaw’s focus on decisions made at the ground level of administrative activity was echoed during the 1990s when scholarship on administrative justice assumed a greater focus on providing justice to individuals. In their introduction to the volume of papers from the 1999 AIAL conference, Creyke and McMillan suggested that administrative justice was a „philosophy” which required that „in administrative decision-making, the rights and interests of individuals should be properly safeguarded.”¹⁴ This approach echoed many other administrative law scholars of that time. Galligan, for example, suggested that the „main concern” of administrative justice was:

to treat each person fairly by upholding the standards of fair treatment expressed in the statutory scheme, together with standards derived from other sources ... and proper application of authoritative standards ... [with] emphasis ... on accuracy and propriety in each case, not just in the aggregate.¹⁵

Some commentators suggested that a right of administrative justice may constitute a new and distinct human right. An influential early proponent of this was Bradley, who suggested that the right to administrative justice was composed of a number of elements of administrative law, particularly the right of an individual to seek review of an administrative decision before an independent forum. Bradley suggested that other aspects of this right included the existence of some form of appeal from a decision of first instance (to a tribunal or a judicial body), and the availability of some form of judicial scrutiny of the merits and legality of particularly important decisions.¹⁶ Bradley’s approach was almost one for lawyers to reclaim administrative justice from the bureaucrats who Mashaw considered were its authors and rightful owners because it implies that the full import of administrative justice lies in the role of agencies outside the bureaucracy, such as courts and tribunals. The human right identified by Bradley was, therefore, arguably a very legal one.

Around the same time that administrative justice was drawn closer to the idea of delivering justice to individuals, scholars of judicial review sought to align administrative law with administrative justice. Sir William Wade was an early proponent of this view, though not in any great detail. During the 1990s Wade described the constituent elements of administrative law as the „machinery of administrative justice” which „drives” the quest for good administration.¹⁷ More recently, Wade’s co-author Forsyth suggested that „the quest for administrative justice” was the „connecting thread which runs throughout” administrative law.¹⁸ Forsyth offered no more detail than Wade had on his conception of administrative justice, though the explanation that follows the remarks just quoted indicates that Forsyth sees the pursuit of administrative justice as a co-operative exercise by which the law might „contribute to the improvement of the technique of government.”¹⁹ It is not clear whether the improvement Forsyth aspires to is the efficient operation of government, the capacity of government to deliver fairness to individuals or both.

On one view, any attempt to identify and align the values of administrative law with administrative justice may be doomed. The reason, which was recently offered by an American scholar, is that administrative law is a body of doctrine „built around a series of open-ended standards or adjustable parameters.”²⁰ In other words, the central principles of administrative law, particularly those of judicial review, are so protean that they might be incapable of yielding a cohesive statement of principles or values. There is something to that argument. Most of the core values or aims of administrative law which appear to have gained wide acceptance, particularly those of judicial review, are quite vague. These values include transparency, participation and accountability, which Harlow argues have gained wide acceptance as goals or guiding principles of administrative law.²¹ The Administrative Review Council adopted a similar but slightly larger set of „public law values”, which are fairness, lawfulness, rationality,

openness (or transparency) and efficiency.²² More recently, the Chief Justice of New Zealand suggested that another value of administrative law might be „human rights, and in so far as it is not a separate human right, the notion of equality before the law.“²³ The list of administrative law values to which I am a party includes transparency (in the sense that the processes of government are open to external scrutiny), accountability, consistency, rationality, impartiality, participation, procedural fairness and reasonable access to judicial and non-judicial grievance mechanisms.²⁴

These and other expressions of the values or purposes of administrative law might seem removed from the concept of administrative justice but they are not unlike the definition of administrative justice offered by Creyke and McMillan because they seek to provide a philosophy about the nature and purpose of administrative decision making. The key difference with the various formulae of administrative law values is that they express what their authors want from the administrative process as a whole, which may be different to what the administrative process should deliver to the people who encounter it.

The values of Australian judicial review as an example

The role that values play in administrative law must take account of the primary vehicle by which the courts can express or transmit values, which is through judicial review. For Australians, however, this presents a paradox because judicial review of administrative action has long proceeded without clear recourse to values. More particularly, Australian judicial review has largely evolved without reference to a grand or overarching theory.²⁵ While it is now clear that constitutional principles provide the ultimate explanation for judicial review of administrative action, they have assumed this role fairly late in the day. There is arguably therefore an obvious gap in judicial review which precludes it from guiding or fortifying an understanding of administrative justice. A closer inspection suggests that constitutional doctrines are not the only obstacles that prevent judicial review principles from informing our understanding of administrative justice.

The values of the Administrative Decisions (Judicial Review) Act 1977 (Cth) ('ADJR Act')

One little noticed feature of the *ADJR Act* and its subsequent copies in the States and Territories is the absence of a statutory statement of objectives or some form of guiding principle. Aronson has suggested that this apparent gap in the *ADJR Act* reflects the absence of any wider philosophy in the Act itself.²⁶ He noted that both the *ADJR Act* and its many grounds of review:

say nothing about the rule of law, the separation of powers, fundamental rights and freedoms, principles of good government or (if it be different) good administration, transparency of government, fairness, participation, accountability, consistency of administrative standards, rationality, legality, impartiality, political neutrality or legitimate expectations. Nor does ADJR mention the Thatcher era's over-arching goals of efficiency, effectiveness and economy ... ADJR's grounds are totally silent on the relatively recent discovery of universal human rights to autonomy, dignity, respect, status and security. Nowhere does ADJR commit to liberal democratic principles, pluralism, or civic republicanism.²⁷

Aronson did not believe the *ADJR Act* should be amended to include a guiding or overarching principle. He also doubted whether such principles were possible or desirable, largely because of the difficulty of devising guiding principles that are coherent, workable and also of significant value.²⁸ Even if such guiding principles were drafted, any attempt to devise a general or guiding principle to the *ADJR Act*, or any other statutory vehicle for judicial review, would face an uncertain fate in the courts. The history of Australia's migration legislation in recent years indicates that legislation designed to limit or control judicial review will rarely have its desired effect and may even achieve the opposite of its intended result.²⁹ A legislative statement of principle to guide the *ADJR Act* could easily meet the same fate if it was perceived by the

courts as an attempt to limit or control judicial review. If so, the important question would not be what the judicial response to a legislative attempt to introduce a guiding principle to statutory judicial review might be, but rather how quickly that legislation might be judicially eviscerated as has been done by the High Court with successive privative clauses of recent times.³⁰

Aronson doubted whether the courts might do any better if they sought to openly fashion overarching principles to guide judicial review.³¹ This problem is a specific instance of the more general one of whether judges can or should articulate moral values.³² The more obvious problem with any attempt by the courts to engage in devising or answering significant moral questions is the suitability of the judicial model of decision making for such an exercise.³³ In the context of judicial review of administrative action, Aronson questioned whether judges can and should explore this „much deeper level of public law theory“ and also whether the results of such an exploration might properly be regarded as conclusions of law. Aronson reasoned that any conclusions the courts might reach on the grand ideals of judicial review „would necessarily be piecemeal, fairly vague, and subject to legislative reversal, unless of course, it were sought to embed these theories in the *Constitution*“.³⁴ That possibility assumes a level of certainty in the constitutional principles that attend judicial review of administrative action which is yet to appear.

One might also question the extent to which the development of guiding principles for the *ADJR Act* might enhance administrative justice more generally. This possibility arises from the arguments of Thomas about how we might assess quality within administrative systems. Thomas notes that the various parts of the administrative system are „comprised of many different individual decision processes each of which operates within their own particular political and administrative context. What works in one system may not necessarily work elsewhere.“³⁵ The same point can be made about values. Why should we think that any values devised for a judicial review statute can and should guide other parts of the administrative system? Even if values in a judicial review statute could „work“, what is there to suggest that those values should colonise other parts of the administrative process? Perhaps it is more likely that any explicit values devised in judicial review would be useful for that limited area only.

What of amending the ADJR Act to take account of human rights considerations?

The final report of the recent national consultation on human rights at the federal level („the Brennan Report“) recommended that the *ADJR Act* be amended „in such a way as to make the definitive list of Australia’s international human rights obligations a relevant consideration in government decision making.“³⁶ When the government announced that it would not enact a Bill or Charter of Rights and would instead introduce a limited set of reforms to promote greater compliance with human rights, the proposal to amend the *ADJR Act* was not adopted. Although the government gave no clear reason for its rejection of this proposal, the contradictions in the proposal are easy to identify.

The main benefit of amendment to the *ADJR Act* is that it would provide a clear legislative basis for human rights obligations to be considered as part of the administrative process. On close inspection, such an amendment would not necessarily reach that goal because it would, at best, enable the failure to take proper account of human rights considerations to be a ground of review under the *ADJR Act*. This extension of human rights obligations would be limited in several ways. It would not cover the wide range of decisions that fall outside the *ADJR Act*, which includes those decisions included in the first schedule of the Act and also those decisions which for some reason do not meet the ADJR jurisdictional formula of „decisions“ or „conduct“ that is „of an administrative character“ and is „made under an enactment.“ Both forms of exclusions are important. The class of decisions excluded in the first schedule of the *ADJR Act* includes many migration decisions. A useful example of a

decision that would fall outside the jurisdictional formula of the *ADJR Act* is the *Tampa case*,³⁷ the key decisions of which were held to be made under prerogative rather than statutory powers.³⁸ These limitations highlight an important problem with the amendment proposed by the Brennan Report – its incomplete application. It would not touch the increasing number of decisions that fall outside the scope of the *ADJR Act*. A separate but closely related point is that an amendment of this nature to the *ADJR Act* would create a gap between judicial review under the *ADJR Act* and under the constitutional writs and the *Judiciary Act 1901* (Cth). In theory, the obligations of administrative officials would vary according to the avenue of review they might face challenge under. That sort of disparity lends no credit to either enhance human rights or public administration.

The proposed amendment to the *ADJR Act* is also in conflict with key elements of *Teoh's case*. The supporters of *Teoh's case* have noted that it was not actually overruled in *Lam*.³⁹ If that is true, why is an amendment to the *ADJR Act* that would essentially replicate the effect of *Teoh* required? A deeper contradiction with the proposed amendment to the *ADJR Act* is that it continues and arguably amplifies a key flaw in *Teoh's case*, namely that the legitimate expectation constructed by the High Court in *Teoh* had a limited application. The members of the majority in *Teoh's case* accepted that it would apply to certain treaties, which they felt no need to enumerate, that dealt with fundamental rights.⁴⁰ This aspect of *Teoh* arguably undercuts the moral legitimacy of the case that its many supporters have suggested lies underneath the reasoning of the High Court. How are we supposed to know what is and is not fundamental for these purposes? What makes a treaty or parts of a treaty worthy of such judicial protection? Upon what basis can the High Court claim the expertise and authority to decide which treaties, or parts of treaties, should and should not support a legitimate expectation?⁴¹

An amendment to the *ADJR Act* would transfer those questions to the legislature but in turn would raise the difficult question of what to include and exclude. The debate could be divisive. It would also raise the awkward question of the status of human rights obligations not included in any statutory list for the purposes of review under the *ADJR Act*. Those human rights obligations would not be relevant considerations and could presumably be disregarded by administrators. The alternative is to amend the *ADJR Act* to require the consideration of every possible human rights obligation Australia might have. That large ambit claim was not expressly advanced by the Brennan Report and one can understand why.

Perhaps the most important reason to hesitate over the recommendation of the Brennan Report to amend the *ADJR Act* is the *ADJR Act* itself. It was explained above that the *ADJR Act* lacks any clear or guiding philosophy. Perhaps that is intentional but it is more likely to be an oversight. Whatever the reason for this gap in the *ADJR Act* it seems odd to undertake a major reform such as shoe horn human rights issues into the administrative process via statutory judicial review without a wider consideration of the shape and purpose of the vehicle by which that is to be achieved. That in turn requires some analysis of purpose of judicial review itself, whether under the *Constitution* or the *ADJR Act*. The current approach of the High Court suggests that the main roles of this aspect of the administrative law system are to keep administrative officials within the statutory authority they are given by parliaments. That relatively narrow aim does not appear to easily lend itself to the promotion of either human rights or administrative justice.

The values of the constitutional writs

The constitutional writs emerged with vigour from the litigation caused by strong privative clauses in migration legislation,⁴² but the potential problems any judicial recognition of broad based or normative concepts such as administrative justice were foreshadowed much earlier in *Quin's case*.⁴³ *Quin* was a State case commenced under the common law but the principles

expounded by Brennan J were moulded with close attention to the separation of powers doctrine embodied in the Constitution and the consequential limits that doctrine places on judicial power. Brennan J proceeded from the principle of *Marbury v Madison*,⁴⁴ where the United States Supreme Court famously ruled that it was „the province and duty of the judicial“ branch to declare the law. Brennan J reasoned that this principle simultaneously defined and confined judicial power because it protected a core of judicial power but also imposed a barrier beyond that terrain which prevented the courts from assuming control over the merits of administrative action. Brennan J explained:

The duty and jurisdiction of the court to review administrative action do not go beyond the declaration and enforcing of the law which determines the limits and governs the exercise of the repository’s power. If, in doing so, the court avoids administrative injustice or error, so be it; but the court has no jurisdiction simply to cure administrative injustice error. The merits of administrative action, to the extent that they can be distinguished from legality,⁴⁵ are for the repository of the relevant power and, subject to political control, for the repository alone.

This conception of judicial power led Brennan J to identify an important limit on the scope of judicial review, which he explained should be directed to the „protection of individual interests but in terms of the extent of power and the legality of its exercise.“⁴⁶ Brennan J acknowledged that the judicial role adopted in *Marbury v Madison* left the court to determine the law but cautioned against any judicial assumption of other expertise. His Honour reasoned that the courts should be mindful that „the judicature is but one of the three co-ordinate branches of government and that the authority of the judicature is not derived from a superior capacity to balance the interests of the community against the interests of an individual.“⁴⁷ It followed, according to this view, that the evaluation of „policy considerations“ would also present an obstacle to „the doing of administrative justice“ in the courts.⁴⁸

The concern Brennan J held about the ability of courts to navigate policy issues does not lend itself to the rights based conception of administrative justice favoured by Bradley. It also reflects the „limited conception of the content of judicial power“ that Sir Anthony Mason has traced to Owen Dixon.⁴⁹ That conception of judicial power sought to remove the courts from controversial issues which had a strong „policy“ or „political“ content.⁵⁰ This vision of judicial power limits the judicial function ostensibly as a consequence of the separation of powers doctrine but like many doctrines of constitutional law a closer inspection provokes further questions. It may, for example, be accepted that the adversarial proceedings in the courts cannot and should not descend into wide ranging investigations of public policy but does it follow that courts are inherently unsuited to take a more holistic approach to justice in a case before them? Judicial suggestions that courts should or cannot consider questions of policy or justice beg the question of exactly what those concepts entail in administrative law. Brennan J did not clearly define that which he was so sure lay beyond his judicial reach.

Any criticism that could be made of the central propositions expounded by Brennan J did not preclude their adoption by a majority of the High Court in the *Enfield* case.⁵¹ In that case the Court held that the American principle that grants considerable deference to administrators in the adjudication of jurisdictional facts was incompatible with the limited role that Australia’s constitutional arrangements impose upon the functions of the executive.⁵² The High Court reasoned that administrators could not determine authoritatively legal questions such as jurisdictional facts because such matters were the constitutional province of the courts. The High Court also affirmed that corresponding restrictions applied to the power of the courts to undertake judicial review of administrative action. More particularly, the judicial function did not and could not extend to issues which formed part of the merits of a decision.⁵³ The stark possibility is that the principles upon which the High Court has secured the constitutionally entrenched power of the courts to undertake judicial review are ones that also keep the courts firmly away from the merits or justness of a case.

That reasoning reached a predictable conclusion in *Lam's* case,⁵⁴ where the High Court strongly doubted whether Australia's constitutional framework could permit the acceptance of the English doctrine of substantive unfairness.⁵⁵ Gleeson CJ reasoned that substantive unfairness raised „large questions as to the relations between the executive and judicial branches of government“. His Honour did not decide those questions but signalled his likely view when he explained that the jurisdiction vested in the High Court by s 75(v) of the Constitution „does not exist for the purpose of enabling the judicial branch of government to impose upon the executive branch its ideas of good administration“. ⁵⁶ McHugh and Gummow JJ, with whom Callinan J agreed on this issue,⁵⁷ reached a similar conclusion. Their Honours did, however, concede that the normative values devised in recent English cases on abuse of power, which substantive unfairness is commonly invoked to prevent, bore some similarity to the „values concerned in general terms with abuse of power by the executive and legislative branches of government“ in Australian constitutional law. However, they concluded „it would be going much further to give those values an immediate normative operation in applying the Constitution“. ⁵⁸ This reasoning suggests that the current Australian conception of the separation of powers precludes judges from giving effect to the normative values that have been favoured in recent English cases, such as the notion of good administration or the concept of abuse of power.

McHugh and Gummow JJ also reasoned that the constitutional frameworks of Australia and England meant that Australian developments in judicial review required careful attention to s 75(v) of the Constitution.⁵⁹ They explained:

Considerations of the nature and scope of judicial review, whether by this Court under s 75 of the Constitution or otherwise, inevitably involves attention to the text and structure of the document in which s 75 appears. An aspect of the rule of law under the Constitution is that the role or function of Ch III courts does not extend to the performance of the legislative function of translating policy into statutory form or the executive function of administration.⁶⁰

Lam gave rise to three obstacles to the location of the broad normative concepts associated with administrative justice within the language of judicial review. The first was its strong disapproval of the procedural legitimate expectation, which was used in *Teoh's* case to found a legitimate expectation that the principles of an incorporated treaty would be given weight in administrative decision making unless a decision maker provided notice to the contrary and a chance to argue against this course. While that possibility was, like *Teoh* itself, not formally overruled in *Lam*, it was so strongly doubted that it has naturally begun to fall into disuse in Australian law.⁶¹ A separate but related point is that the doctrine of substantive unfairness appears foreclosed in Australian law. This is not simply an example of the „tectonic shifts in English public law“ of recent decades,⁶² which has opened a rift between Australian and English public law. Instead it confirms that Australian and English judicial review are often informed by quite different values.⁶³ For the time being at least, Australian public law must look inward rather than outward for doctrinal inspiration. That does not necessarily mean that *Lam* signals a conclusive divorce from normative concepts which have gained currency in English law in recent years, but it does mean that they must be approached with great care. It also means that such normative concepts must also be expressed in a manner compatible with Australia's constitutional arrangements if they stand any hope of adoption in Australian law.

These constitutional issues would surely preclude adoption of the tentative views of Kirby J in *S20* which might have been intended to offer some sort of holistic approach that might bridge the divide between judicial review and administrative justice erected by Brennan J in *Quin*. Kirby J acknowledged this conceptual divide but suggested a court „should not shut its eyes and compound the potential for serious administrative injustice ... It should always take into account the potential impact of the decision upon the life, liberty and means of the person affected.“⁶⁴ This reasoning echoes English cases which have granted relief in judicial review by reference to a requirement of „good administration“⁶⁵ or to overcome „conspicuous unfairness.“⁶⁶ According to the reasoning in *Lam* these concepts could be disclaimed as

doomed attempts to import normative principles into a constitutional framework that is unable to support them. The equally serious and non-constitutional obstacle to such general concepts is their absence of clear meaning. Principles such as good administration or conspicuous unfairness arguably do little more than convey serious or conspicuous judicial disagreement with the result of the case at hand. They may show „that the law’s heart is in the right place“⁶⁷ but they do not provide theoretical coherence.

The choice between these competing alternatives appears stark. On the one hand, the approach in *Lam* seems to preclude the use of normative concepts which would surely include any substantive notion of administrative justice. That possibility seems to sanction judicial review without a moral anchor. On the other hand, judicial attempts to articulate those wider normative concepts appear so vague and subjective that one might question whether they could provide a useful and workable way to understand or apply a notion of administrative justice. Neither option is attractive. The better solution may be to decipher some of the underlying concepts of judicial review.

Does jurisdictional error contain values that might lead to administrative justice?

The importance of jurisdictional error in Australian administrative law has risen in tandem with the constitutional writs.⁶⁸ Jurisdictional error now occupies a central place in Australian law by virtue of cases such as *Plaintiff S157/2002 v Commonwealth*⁶⁹ and more recently *Kirk v Industrial Relations Commission of NSW*.⁷⁰ Those and other cases have made clear that jurisdictional error provides the touchstone to determine those errors of law which a legislature may and may not enact legislation to limit or exclude supervisory review by the courts. It is now clear that no Australian parliament has the power to legislate to exclude judicial review for jurisdictional error. Although the High Court has given primacy to jurisdictional error, it has given much less attention to providing a coherent explanation of the doctrine. It remains difficult to understand the doctrine, let alone divine what drives it. While it is clear jurisdictional error may encompass errors that fall within many of the traditional grounds of judicial review, such as a denial of natural justice or acting in bad faith,⁷¹ other forms of conduct that may or may not give rise to a jurisdictional error are much less clear.⁷² Examples include a decision-maker failing to discharge an imperative duty or observe an inviolable limitation or restraint upon a statutory power,⁷³ misapprehending or disregarding the nature or limits of their functions or powers,⁷⁴ or a constructive failure to exercise jurisdiction.⁷⁵

One common theme in these expressions of the conduct which the High Court has to date accepted may give rise to jurisdictional error is obscurity. Judges have acknowledged this problem by variously conceding that the concept of jurisdictional error is conclusory,⁷⁶ circular,⁷⁷ or simply one with which reasonably minded judges may easily reach different results.⁷⁸ The irony that judges simultaneously champion jurisdictional error and complain of its difficulties at least provides a tacit admission that the concept, as it is currently applied, typically gives little or no real guidance on when and why a statutory provision may be interpreted as one that will give rise to jurisdictional error if breached.⁷⁹ The mantra of jurisdictional error is not unlike the legalism of Owen Dixon in its heyday. Both are, or was in the case of legalism, accepted without much question. Jurisdictional error can be charged with the same crime of which legalism is now widely accepted to be guilty, namely that the concept is inherently vague and its use „conceals rather than reveals judicial reasoning.“⁸⁰

Why such a shield is thought necessary is a complex question. The important point for present purposes is that even the most obscure legal doctrines can provide a convenient shield for judicial values. Gageler has acknowledged that the uncertainty of jurisdictional error makes it a malleable concept, though he does not see it as a necessarily empty one.⁸¹ He called for more explicit reference to the values that surely underpin jurisdictional error and its invocation in particular cases. An example can be drawn from the decision of French J, as his Honour then

was, in the Full Court of the Federal Court in *Minister for Immigration and Citizenship v SZFDE*.⁸² His Honour explained that:

Procedural fairness lies at the heart of administrative justice. It is a long standing requirement of the common law and reflects, in this country as in other common law jurisdictions, ordinary concepts of justice.⁸³

While there is some attractiveness in the suggestion that administrative justice may be broadly equated with natural justice, the enormous volume of case law and scholarship on natural justice makes it clear that natural justice is neither simple nor settled. It is also curious that his Honour equated natural justice with administrative and ordinary justice when the particularly Australian procedural conception of natural justice imbues it with a quite different quality than those other forms of justice.

After the passage just quoted, French J then drew the role of procedural fairness within that of jurisdictional error when his Honour added that procedural fairness

..is often regarded as an implication, albeit judge-made, in the grant of statutory power to make decisions affecting the interests of individuals, unless excluded expressly or by contrary implication. Where the requirement applies its breach can amount to jurisdictional error. A decision affected by such error is liable to be quashed by a writ of certiorari.⁸⁴

This connection between jurisdictional error and the preceding equation drawn between various forms of justice is a revealing one because it provides a relatively open admission of interrelated concepts, namely that the requirement to observe procedural fairness is judicially imposed and, once imposed, can provide the basis for jurisdictional error if breached. Basic notions of fairness may, therefore, be one driver of jurisdictional error.

Another example can be drawn from *Minister for Immigration and Multicultural and Indigenous Affairs v SCAR* ('SCAR').⁸⁵ In that case the Full Court of the Federal Court drew a novel principle from the statutory obligation imposed upon the Refugee Review Tribunal („RRT“) by s 425 to „invite“ applicants to appear before it „to give evidence and present arguments relating“ to their applications.⁸⁶ The Court accepted that this statutory obligation did not require the RRT to „actively assist“ applicants in putting their case but that it did require the RRT to provide a „real and meaningful“ hearing.⁸⁷ While this reasoning is consistent with the more general rule requiring that a hearing or similar chance to put a claim must be real or genuine,⁸⁸ the judicial creation of an implied obligation to provide a real and meaningful hearing places a gloss upon the obligations of the RRT for which the text of s 425 provides no obvious support.⁸⁹ Another difficulty with SCAR is determining what exactly “real and meaningful” means. The concept is inherently vague and may simply be a local variant of the equally nebulous terms offered in recent English cases.

The SCAR principle has attracted mixed views in the Federal Court itself. It has been applied without difficulty in some cases.⁹⁰ It was described by Graham J as „plainly wrong“ in *SZFDE*,⁹¹ to the obvious disagreement of French J.⁹² The Full Court of the Federal Court recently acknowledged the uncertainty of the SCAR principle but gave no indication how it might be resolved.⁹³ This judicial quibbling over the correctness of SCAR has not led to useful discussion of why the „real and meaningful“ requirement was devised. The reason may be that some judges believe observance of procedural detail is not itself enough to satisfy the requirements of fairness. Perhaps they believe that natural justice has a holistic element that cannot be impliedly excluded by the enactment of procedural detail. Perhaps it is because the sum of natural justice is greater than its individual parts. Perhaps there is a judicial belief that those affected by government action are entitled to a basic level of fairness and fair treatment that is hard to define. Importantly, the benefit of this possibility is that that which is difficult to define is even more difficult to exclude by legislation. If so, SCAR may signal a basic right to a „fair go“ which is beyond easy judicial definition or legislative reach.

Is there a way forward for judicial review?

The analysis so far suggests that the values of judicial review are vague, ad hoc and often not stated clearly. Gageler has suggested that we should consider drawing out the values that appear to underpin jurisdictional error. He also suggested that a good starting point was the factors that Gleeson CJ marshalled in *Plaintiff S157/2002*⁹⁴ as principles for statutory construction to guide the process of „reconciliation“ that privative clauses would often require. Those principles were that: where legislation is enacted pursuant to or in contemplation of international obligations and an ambiguity arises in that legislation, courts should favour an interpretation that accords with Australia’s international obligations; an intention to abrogate or limit fundamental rights or freedoms should not be imputed unless manifested in clear and unmistakable language; the Constitution is framed upon an assumption of the rule of law;⁹⁵ privative clauses should be construed in accordance with the presumption that parliaments did not intend to deprive citizens of their right of access to the courts unless this was done in clear terms; and the whole of an Act should be examined in order to reach a reconciliation between a privative clause and the wider scheme in which a clause was located.⁹⁶ In the wake of *Saeed*, this list must now surely include a strong presumption that any exercise of statutory power is intended to be governed by common law principles of natural justice unless there is legislation of „irresistible clearness“ stating otherwise.⁹⁷

Although these various principles have proved useful in the interpretation of privative clauses, they provide little concrete guidance beyond that. They are tailored to maintaining the right of access to the courts in the face of legislation that might suggest otherwise, so that people aggrieved by administrative behaviour can seek redress in the courts, but they say very little about what people can expect from administrative officials outside the court system. Gleeson CJ’s principles are in effect designed by a judge for the benefit of other judges. Gageler also queried whether parliament should take the lead by providing guidance to administrative officials, and one might also hope tribunals, in the form of a „code or charter of administrative rights and responsibilities, or appropriate additions to the *Acts Interpretation Act 1901* (Cth).⁹⁸ A code of administrative procedure or values might simply transpose the seemingly endless interpretive problems that have arisen with successive attempts at procedural codification in migration legislation to a wider sphere. It should therefore be approached with great caution. This is broadly similar to many of the recommendations of the Brennan Report.

In my view, the next steps in fashioning standards for administrative action should be fashioned in the classic incremental fashion of the common law. One reason to leave the task to the courts, at least in the short term, is the dismal precedent successive legislatures have set in the procedural codes for the Refugee and Migration Review tribunals. The flaws in those codes are too numerous and well known to recount, though their relevant features for present purposes are the narrow and exclusionary nature of those codes. Their exclusionary quality arises from the painstaking attempts to introduce nominated procedures to the exclusion of all others. These codes are narrow because they rarely, if ever, confer discretion to manage unexpected situations or provide a normative framework that might equip tribunal members to identify and manage such problems. Legislative prescription of administrative standards seems unlikely given the unwillingness of legislatures to take even small steps in this direction. If legislatures are unwilling to take small steps, such as enacting a modest duty to inquire into tribunal proceedings or expand the grounds of judicial review that were first codified in the *ADJR Act* over thirty years ago, they are unlikely for the time being to take larger steps to enact more malleable concepts, such as a code of administrative rights and responsibilities. It is at this juncture that the courts may take an instructive lead. If the courts can take modest steps which set sensible standards for decision making that might, in the longer term, encourage legislatures to consider wider reaching codes for administrative conduct that, in turn, would enable us to reach a better understanding of what administrative justice is and should be.

Endnotes

- 1 The keynote speaker and the editors of the conference papers all conceded the existence of divergent views on the concept: Robin Creyke and John McMillan, „Introduction: Administrative Justice – the Concept Emerges”, p3 and Paul Craig, „Three Perspectives on the Relationship Between Administrative Justice and Administrative Law”, p28. Both papers are published in Robin Creyke and John McMillan (eds), *Administrative Justice – The Core and the Fringe* (2000).
- 2 Commonwealth Administrative Review Committee, *Report* (1971) para 389.
- 3 Robin Creyke has noted that the silence of the Kerr Report on what administrative justice might be and how it could be measured left it as an obvious one for commentators to explore: Robin Creyke, „Administrative Justice – Towards Integrity in Government” (2007) 31 *Melbourne University Law Review* 705, 708.
- 4 *Ibid*, 708-9.
- 5 Jerry Mashaw, *Bureaucratic Justice: Managing Social Security Disability Claims* (1983) 16.
- 6 *Ibid* 22-6.
- 7 *Ibid* 31.
- 8 *Ibid* 23.
- 9 Adherence to process remains a prime concern of judicial review: Greg Weeks, „The Expanding Role of Process in Judicial Review” (2008) 15 *Australian Journal of Administrative Law* 100.
- 10 Top down reasoning refers to theories devised by reference to grand or overarching principles. Bottom up reasoning refers to theories devised by reference to experience. On the use of this distinction in Australian public law, see Keith Mason, „What is Wrong With Top-Down Reasoning?” (2004) 78 *Australian Law Journal* 574 and Stephen Gageler, „The Underpinnings of Judicial Review of Administrative Action: Common Law or Constitution?” (2000) 28 *Federal Law Review* 303.
- 11 Robert Thomas, *Administrative Justice and Asylum Appeals* (2011) 3.
- 12 A point made in Michael Adler, „Fairness in Context” (2006) 33 *Journal of Law and Society* 615, 635-6.
- 13 *Ibid* 619.
- 14 Creyke and McMillan, above n1, 3-4.
- 15 D Galligan, *Due Process and Fair Procedures* (Clarendon Press, 1996) 237.
- 16 AW Bradley, „Administrative Justice: A Developing Human Right?” (1995) 1 *European Public Law* 347. Bradley places the greatest emphasis on the first of the factors mentioned in the text. An Australian assessment of Bradley’s views is given in John McMillan & Neil Williams, „Administrative Law and Human Rights” in David Kinley (ed), *Human Rights in Australian Law* (1998) 63, at 64-9.
- 17 William Wade and Christopher Forsyth, *Administrative Law* (7th ed, 1994) 7.
- 18 William Wade and Christopher Forsyth, *Administrative Law* (10th ed, 2009) 7.
- 19 *Ibid*.
- 20 Adrian Vermeule, „Our Schmittian Administrative Law” (2009) 122 *Harvard Law Review* 1096, 1097.
- 21 Carol Harlow, „Global Administrative Law: The Quest for Values” (2006) 17 *European Journal of International Law* 187.
- 22 Administrative Review Council, *The Scope of Judicial Review* (Report No 47, 2006) 30 (fn76).
- 23 Sian Elias, „Administrative Law for “Living People”” (2009) 68 *Cambridge Law Journal* 47, 59.
- 24 Mark Aronson, Bruce Dyer and Matthew Groves, *Judicial Review of Administrative Action* (4th ed, 2009) 1.
- 25 The current Commonwealth Solicitor-General has long argued that judicial review in Australia developed without reference to a clear guiding theory, at least until the recent rise of the Constitution as the dominant influence. See Stephen Gageler, „The Underpinnings of Judicial Review of Administrative Action: Common Law or Constitution?” (2000) 28 *Federal Law Review* 303 and „Impact of Migration Law on the Development of Australian Administrative Law” (2010) 17 *Australian Journal of Administrative Law* 92.
- 26 If Gageler’s argument that Australian judicial review of administrative action is largely an example of „bottom up” reasoning is accepted, the lack of a guiding principle in the *ADJR Act* is an example of a wider problem.
- 27 Mark Aronson, „Is the *ADJR Act* Hampering the Development of Australian Administrative Law?” (2005) 12 *Australian Journal of Administrative Law* 79, 94.
- 28 *Ibid*. Aronson does not state whether he believes this problem is due to the particular constitutional framework or the nature of judicial review more generally, though the scope of his analysis suggests he favours the latter.
- 29 The High Court has made clear that the legislature cannot predict the precise meaning and effect of its legislation, however much it may try to do so by the invocation of previous decisions of the Court: *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 [60] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).
- 30 The description of the High Court’s interpretation of privative clauses is taken from David Dyzenhaus, *Constitution of Law – Legality in a Time of Emergency* (2006) 113.
- 31 Aronson, above n27, 95-6. If English experience is any guide, this caution is well justified. Recent English cases which have tried to articulate normative or overarching principles to guide judicial review have been strongly criticised by some commentators. See, e.g. Matthew Groves, „The Surrogacy Principle and Motherhood Statements in Administrative Law” in Linda Pearson, Carole Harlow and Michael Taggart, *Administrative Law in a Changing State* (2008) 90-93; Tom Hickman, „The Substance and Structure of Proportionality” [2008] *Public Law* 694, 701-14. The so-called common law constitutionalism that underpins many English cases is examined by Thomas Poole: „Back to the Future? Unearthing the Theory of Common Law Constitutionalism” (2003) 23 *Oxford Journal of Legal Studies* 453; „Questioning Common Law Constitutionalism” (2005) 25 *Legal Studies* 142; „Legitimacy, Rights and Judicial Review” (2005) 25 *Oxford Journal of Legal Studies* 697.

- 32 These questions are far less problematic if moral or normative values are accepted as being objective rather than subjective, though that possibility itself is a difficult one. An argument to this effect is made in Michael Moore, „Law as a Functional Kind“ in Robert George (ed), *Natural Law Theory: Contemporary Essays* (1992). A useful response is given in Jeremy Waldron, „Moral Truth and Judicial Review“ (1998) 43 *American Journal of Jurisprudence* 75, 83-4.
- 33 Jeremy Waldron, „Judges as Moral Reasoners“ (2009) 7 *International Journal of Constitutional Law* 2. Waldron argues that the legislative model of decision making may provide a more suitable forum for considering moral issues than the judicial model.
- 34 Aronson, above n27, 96.
- 35 Thomas, above n11, 12.
- 36 National Human Rights Consultation, *Report* (2010) recommendation 11.
- 37 *Ruddock v Vadarlis* (2001) 110 FCR 491.
- 38 It is useful to note that a somewhat similar argument, based upon the supposed use of the executive power, was rejected in *Plaintiff M61/2010E v Commonwealth* (2010) 85 ALJR 133.
- 39 A point made in Alison Duxbury, „The Impact and Significance of *Teoh* and *Lam*“ in Matthew Groves & HP Lee (eds), *Australian Administrative Law – Fundamentals, Principles and Doctrines* (2007) 312-5.
- 40 *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 291 (Mason CJ and Deane J).
- 41 The separate question of whether treaties dealing with fundamental rights enjoy a special status, particularly in domestic law, is cogently criticised in Philip Sales and J Clement, „International Law in Domestic Courts“ (2008) 124 *Law Quarterly Review* 388, 388-9.
- 42 The turning point in High Court jurisprudence on the constitutional writs came in *Abebe v Commonwealth* (1999) 197 CLR 510; *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611; *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82.
- 43 *Attorney-General (NSW) v Quin* (1990) 170 CLR 1.
- 44 (1803) 1 Cranch 137, 177; 5 US 87, 111 (Marshall CJ).
- 45 (1990) 170 CLR 1, 35-6. A similar statement was made by Gleeson CJ in *NEAT Domestic Trading Pty Ltd v AWB Ltd* (2003) 216 CLR 277, 288 [20] where the Chief Justice explained that „[J]udicial review is not an invitation to judges to decide what they would consider fair or reasonable if they were given the function“ that is subject to judicial review.
- 46 *Ibid*, 36.
- 47 (1990) 170 CLR 1, 37. This reasoning echoes that of Marshall CJ in *Marbury v Madison* (1803) 1 Cranch 137, 170; 5 US 87, 107.
- 48 *Ibid*, 37.
- 49 Anthony Mason, „Procedural Fairness: Its Development and Continuing Role of the Legitimate Expectation“ (2005) 12 *Australian Journal of Administrative Law* 103, 109.
- 50 Though courts rarely accept that the political content of a decision itself provides a reason for them to refrain from review. They are more likely to accept that decisions with a strong political content raise issues outside their particular expertise. See, e.g. *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* (2006) 154 FCR 425, 430 (Black CJ and Finkelstein J).
- 51 *Corporation of the City of Enfield v Development Assessment Commission* (2000) 199 CLR 135.
- 52 This is the so-called „Chevron doctrine“, taken from *Chevron USA Inc v Natural Resources Council Inc* 467 US 837 (1984). The doctrine is explained in Richard Pierce, *Administrative Law Treatise* (4th ed, 2004) 139-191.
- 53 *Corporation of the City of Enfield v Development Assessment Commission* (2000) 199 CLR 135, 152-4 (Gleeson CJ, Gummow, Kirby and Hayne JJ), citing *Attorney-General (NSW) v Quin* (1990) 170 CLR 1, 35-6 (Brennan J).
- 54 *Minister for Immigration and Multicultural Affairs; Ex parte Lam* (2003) 214 CLR 1.
- 55 The leading English case on the issue remains *R v North and East Devon Health Authority; Ex parte Coughlan* [2001] QB 213. The doctrine of substantive unfairness and its likely reception in Australia are discussed in Matthew Groves, „Substantive Legitimate Expectations in Australian Administrative Law“ (2008) 32 *Melbourne University Law Review* 470.
- 56 (2003) 214 CLR 1, 10 [28].
- 57 Callinan J accepted that the legitimate expectation could „on no view...give rise to substantive rights rather than procedural rights“. (2003) 214 CLR 1, 48 [148].
- 58 *Ibid*, 23 [72].
- 59 Their Honours also suggested that much of the reasoning in *Coughlan* appeared directed to the English assimilation of European public law values: *ibid* 23-4 [73]-[75]. There is some irony in the situation that English public law has finally shaken off its longstanding scepticism of European concepts but that scepticism is now deeply embedded in some of the colonies.
- 60 *Ibid*, 24-5 [76].
- 61 On the standing of *Teoh's* case, see Matthew Groves, „Unincorporated Treaties and Expectations: The Rise and Fall of *Teoh* in Australia“ (2010) 12 *Judicial Review* 323.
- 62 A phrase used by Gummow ACJ and Keifel J in *Minister for Immigration and Citizenship v SZMDS* (2010) 240 CLR 611, 620 [21].
- 63 *Teoh* was recently cited with approval by the United Kingdom Supreme Court: *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4, [26]. It is important to note, however, that the broader propositions adopted by the majority in *Teoh* were not discussed by the Supreme Court.
- 64 *Re Minister for Immigration and Multicultural Affairs; Ex parte S/20* (2003) 198 ALR 59, [170].

- 65 *R (on the application of Nadarajah & Abdi) v Secretary of State for the Home Department* [2005] EWCA Civ 1363, [68] (Laws LJ, Thomas LJ and Nelson J agreeing).
- 66 The first such English case was *R v Inland Revenue Commissioners; Ex parte Unilever plc* [1996] STC 681, 695. The best known recent case is *R (Rashid) v Secretary of State for the Home Department* [2005] EWCA Civ 744.
- 67 This explanation is taken from *R (Bhatt Murphy) v Independent Costs Assessor* [2008] EWCA Civ 755, [28] (Laws LJ).
- 68 The nomenclature of jurisdictional error is not exclusive to the constitutional writs. Gageler has noted that the concept is implicit in cases where its terminology is not openly used: Stephen Gageler, „Impact of Migration Law on the Development of Australian Administrative Law“ (2010) 17 *Australian Journal of Administrative Law* 92, 97.
- 69 (2003) 211 CLR 476.
- 70 (2010) 239 CLR 531.
- 71 Aronson has catalogued eight different forms of error that have been recognised as jurisdictional to date: „Jurisdictional Error Without the Tears“ in Matthew Groves and HP Lee (eds), *Australian Administrative Law; Fundamentals, Principles and Doctrines* (2007) 330, 335-6. This assessment was cited with apparent approval in *Kirk v Industrial Relations Commission of NSW* (2010) 239 CLR 531, 573 [71] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).
- 72 A point the High Court recently acknowledged when it stated that the „metes and boundaries“ of jurisdictional error were unsettled: *Kirk v Industrial Relations Commission (NSW)* (2010) 239 CLR 531, 573 [71].
- 73 Examples mentioned in *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 503-4 [76]-[77] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).
- 74 An instance given in *Craig v South Australia* (1995) 184 CLR 163, 177 (Brennan, Deane, Toohey, Gaudron and McHugh JJ).
- 75 An instance given in *SZIAI v Minister for Immigration and Citizenship* (2009) 83 ALJR 1123, [25] (French CJ, Gummow, Hayne, Crennan, Keifel and Bell JJ).
- 76 *SDAV v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 197 ALR 43, [27] (Hill, Branson, and Stone JJ).
- 77 *WAJZ (No 2) v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 84 ALD 655, [70] (French J).
- 78 JJ Spigelman, „The Centrality of Jurisdictional Error“ (2010) 21 *Public Law Review* 77, 85.
- 79 The problem is compounded by the fact that many of the limitations or imperative duties which may give rise to jurisdictional error are implied by a process of judicial interpretation that usually raises as many questions as it answers.
- 80 Anthony Mason, „The Centenary of the High Court of Australia“ (2003) 5 *Constitutional Law and Policy Review* 41, 45. Legalism has defenders. See, e.g. Kenneth Hayne, „Concerning Judicial Method“ – Fifty Years On“ (2006) 32 *Melbourne University Law Review* 223; Dyson Heydon, „Judicial Activism and the Death of the Rule of Law“ (2003) 23 *Australian Bar Review* 110.
- 81 Stephen Gageler, „Impact of Migration Law on the Development of Australian Administrative Law“ (2010) 17 *Australian Journal of Administrative Law* 92, 104.
- 82 (2006) 154 FCR 364.
- 83 *Ibid* [76]. His Honour made exactly the same statement in *NAAV v Minister for Immigration and Multicultural and Indigenous Affairs v NAAV* (2002) 123 FCR 447 [535], though this earlier case was not cited when his Honour repeated the statement in *SAFDE*.
- 84 *Ibid*. This approach was broadly endorsed in *Saeed v Minister for Immigration and Citizenship* (2010) 214 CLR 252, [11]-[15] where French CJ, Gummow, Hayne, Crennan, and Kiefel JJ confirmed that the observance of the requirements of natural justice was a precondition to the valid exercise of a statutory power.
- 85 (2003) 128 FCR 553.
- 86 *Migration Act 1958* (Cth) s 425(1).
- 87 (2003) 128 FCR 533, [37] (Gray, Cooper and Selway JJ).
- 88 See, e.g. *Minster for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597, [40] (Gaudron and Gummow JJ).
- 89 A point made forcefully by Graham J in *SZFDE* (2006) 154 FCR 365, [212]. It should also be noted that this judicial gloss on the text of s 425 of the *Migration Act 1958* (Cth) is at odds with repeated emphasis of the High Court upon the text of legislation in many recent migration cases.
- 90 See, e.g. *P119/2002 v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCAFC 130, [16] (Mansfield and Selway JJ) and *NALQ v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCAFC 121; *SZHK v Minister for Immigration and Citizenship* [2008] FCAFC 138, [5] (Gray J).
- 91 (2006) 154 FCR 365, 417 [212].
- 92 (2006) 154 FCR 365, 389 [93]-[94].
- 93 *SZNVV v Minister for Immigration and Citizenship* [2010] FCAFC 41, [31]-[33] (Keane CJ), [47]-[48] (Emmett J), [73]-[78] (Perram J). An application for special leave to appeal to the High Court was dismissed: *SZNVV v Minister for Immigration and Citizenship* [2011] HCASL 26. The standing of *SCAR* will remain uncertain until placed squarely before the High Court. *SCAR* was cited with apparent approval for a separate point by the High Court in *SZFDE v Minister for Immigration and Multicultural Affairs* (2007) 232 CLR 189 [35]. It was mentioned in the hearing of *Minister for Immigration and Citizenship v SZGUR* [2010] HCA Trans 250 but not in the subsequent decision. The standing of *SCAR* has been complicated by subsequent amendments to

migration legislation which pull in different directions. Section 425, upon which SCAR is based, is in a division subject to a provision that states it is taken to be an exhaustive statement of the requirements of the hearing rule „in relation to the matters it deals with“: *Migration Act* 1958 (Cth) s 422B(1). A separate amendment obliges the RRT to „... act in a way that is fair and just“: *Migration Act* 1958 (Cth) s 422B(3). There is a clear tension in these provisions. The former implies a limited and specific approach to procedural requirements, while the latter implies a holistic one that invites reference to principles of fairness that are contained outside the legislation. The solution may lie in a process of statutory reconciliation, which I leave aside for present purposes.

94 *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476.

95 A point for which Gleeson CJ drew a connection to the remarks of Brennan J in *Quin’s* which were discussed above.

96 *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 491-3 [27]-[32].

97 The quoted phrase is taken from *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252, [15] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ) citing *Potter v Minahan* (1908) 98 CLR 383, 396.

98 Gageler, above n68, 104-5.