

PERFECTED JUDGMENTS AND INHERENTLY ANGELICAL ADMINISTRATIVE DECISIONS: THE POWERS OF COURTS AND ADMINISTRATORS TO RE-OPEN OR RECONSIDER THEIR DECISIONS

Professor Margaret Allars*

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1 Introduction

The title of my paper is drawn partly from the realm of practice and procedure. A judgment or order is said to be perfected when it has been entered. Generally a judge who recognises his or her decision is affected by a serious error may on the basis of narrowly defined principles reopen the judgment or order prior to entry, but is unlikely to have jurisdiction to do so after entry. Thus, unperfected judgments which are recognised to be imperfect may be reopened, but perfected judgments which are recognised to be imperfect may not. It is somewhat ironic that a judgment recognised to be less than perfect is persistently described in this context as perfected. In her thorough review of the principles in 1996, Enid Campbell adopted the language of unperfected and perfected judgments.¹ However I shall abandon it for the remainder of this discussion, preferring instead the less misleading language of judgments which have not been entered and those which have. As for inherently angelical administrative decisions, I have borrowed not the rhetoric of a defensive bureaucrat but a passage in the judgment of French J in *Sloane v Minister for Immigration, Local Government and Ethnic Affairs*.² While French J reached the conclusion in that case that a primary decision-maker did not have implied power to reconsider a decision, he certainly did not assume that administrative decisions are inherently angelical. Far from it.

Neither courts nor administrators are perfect or inherently angelical. They can make mistakes. Should they have power to reconsider or revoke their decisions when affected by mistakes? The answer to this question in the case of judges demands reference to inherent jurisdiction, rules of court, and perhaps even constitutional law. The answer in the case of administrators is often not expressly provided by the legislature and becomes a matter of statutory interpretation. Can the power be implied? This paper considers firstly the reopening of judgments and orders, secondly the powers of administrators generally to reconsider or revoke their decisions, and thirdly the position of merits review tribunals as a particular kind of administrative decision-maker. The competing policy considerations suggesting answers to the question are then assessed.

* Faculty of Law, University of Sydney.

1 E Campbell "Revocation and Variation of Administrative Decisions" (1996) 22 *Monash UL Rev* 30 at 31-36.

2 (1992) 28 ALD 480. See discussion at text accompanying nn 72-5.

2 Courts

The general rule is that a court has no power to set aside or vary a final judgment which has been passed and entered, because of the public interest in the finality of litigation. This was recently re-affirmed by the High Court in *DJL v Central Authority*,³ which concerned an attempt to re-open a decision of the Full Court of the Family Court.

However there are cases where exceptions have been made to the general rule. Some exceptions are confined and not controversial. Then there is the question of a more general exception where the interests of justice or procedural fairness requires it. When this exception is considered we need to bear in mind whether the court's judgment or order has been entered. The outline of case-law which follows is accordingly ordered under the headings of judgment not entered, and judgment entered. Some of the exceptions to finality apply both where the decision is entered and where it is not entered. These exceptions are discussed under the heading of judgments entered. I reserve for later discussion whether the dichotomy of judgments entered and not entered provides a logical approach to the issue of whether a judgment should be reopened.

Judgment not entered

A court may set aside or vary a judgment or order where notice of motion for the setting aside or variation is filed before entry of the judgment.⁴ For example where reasons for judgment are delivered orally, the judge may edit or correct the text before the judgment is entered. This power of a court to review, correct or alter its judgment prior to entry of a judgment, is exercisable within certain clearly defined exceptions to the general rule about the finality of judgments. Most are also available after entry of the order: setting aside of default judgments, variation of interlocutory orders, absence of a party, the slip rule, consent orders and judgments obtained by fraud, each of which is considered below. It remains to consider here an additional exception applying before entry of a judgment or order, namely reservation of further consideration of proceedings and a more general exception, capable of catering for a wide range of circumstances where a decision should be reopened in the interests of justice.⁵

Reservation of further consideration of proceedings

An order reserving further consideration of proceedings may be made where proceedings or some part are referred to a Master, or not all matters in dispute have been dealt with. In exceptional cases proceedings may be so urgent there is a possibility some matter has been overlooked, such as the taking of partnership accounts. But this exception does not permit either party to re-litigate the matter.⁶

³ (2000) 170 ALR 659.

⁴ Federal Court Rules (FCR) O 35 r 7(1); NSW Supreme Court Rules (SCR) Pt 40 r 9(1).

⁵ Some cases refer to a jurisdiction to reopen a judgment which was "irregularly obtained": *Ritchie's Supreme Court Procedure* (looseleaf, Butterworths) para 40.9.11. This group contains a great variety of circumstances, some being cases involving fraud, some cases where the applicant seeking reopening is in default, some concerned with entry of default judgments, and others with the availability of the slip rule. In the light of the general exception to the general rule, it is not considered further here as a separate exception.

⁶ Compare liberty to apply, when granted in relation to a final order. This is limited to ancillary matters concerning the implementation of the earlier order, such as costs, and does not extend to variation or amendment of the judgment or orders: *Wentworth v Woollahara Municipal Council* (unreported, Court of Appeal of NSW, 31 March 1983); *Abigroup Ltd v Abignano* (1992) 39 FCR 74 at 87-8.

General exception

The leading judgment setting out the principles governing the exercise of a court's inherent jurisdiction to re-open a judgment which has not been entered, is that of Mason CJ in *Autodesk Inc v Dyason (No 2)*.⁷ The public interest in maintaining the finality of litigation requires great caution in the court's exercise of this inherent jurisdiction.⁸ Yet when the orders have not been entered the jurisdiction to re-open a judgment is a wide one, arising where:

a judgment ... has apparently miscarried for other reason ... a misapprehension as to the facts or the law.⁹

Mason CJ approved existing authorities for the re-opening of a judgment when orders have not been entered on the grounds that:

- the orders were made on the basis of authorities which were overruled by the House of Lords¹⁰
- the court mistakenly assumed that particular evidence had not been given at earlier hearings¹¹
- the judge the next day determined that he or she had erred in a material matter in his or her approach to the case.¹²

In *Autodesk* Brennan J appeared to accept that a judgment could be re-opened in a case of ignorance or forgetfulness of some statutory provision or some critical fact, in other words in cases decided per incuriam.¹³ Gaudron J also affirmed that the jurisdiction arises where the interests of justice require it because the court misunderstood the facts or misapplied the law in relation to one or more issues.¹⁴

The boundaries of the inherent jurisdiction are expressed in terms of:

- the importance of the public interest in the finality of litigation¹⁵
- exercise of the jurisdiction with great caution¹⁶
- there being no neglect or default on the applicant's part that he or she has not been heard on the issue¹⁷

⁷ (1993) 176 CLR 300.

⁸ Ibid, p 302.

⁹ Id.

¹⁰ *In re Harrison's Share under a Settlement* [1955] Ch 260.

¹¹ *New South Wales Bar Association v Smith* (1992) 176 CLR 256.

¹² *Pittalis v Sherefettin* [1986] QB 868.

¹³ *Autodesk* (1992) 176 CLR 300 at 310, relying upon *Morelle Ltd v Wakeling* [1955] 2 QB 379.

¹⁴ *Autodesk* (1992) 176 CLR 300 at 328.

¹⁵ *State Rail Authority of NSW v Codelfa Construction Pty Ltd* (1982) 150 CLR 29 at 38, 45-6; *Autodesk* (1992) 176 CLR 300 at 302, 310, 317.

¹⁶ *Wentworth v Woollahra Municipal Council* (1982) 149 CLR 672 at 684; *State Rail Authority of NSW v Codelfa Construction Pty Ltd* (1982) 150 CLR 29 at 38; *Autodesk* (1992) 176 CLR 300 at 302, 322.

¹⁷ *Autodesk* (1992) 176 CLR 300 at 303.

- not exercising the jurisdiction for the purpose of re-agitating arguments already considered by the court, providing a backdoor method by which unsuccessful litigants can seek to re-argue their cases¹⁸
- not exercising the jurisdiction simply because the party seeking a rehearing failed to present the argument in all its aspects or as well as it might have been put.¹⁹

Three factors about *Autodesk* should be noted. Firstly, the rationales provided by the judges for the jurisdiction differed. Without making the rationale explicit, Mason CJ appeared to present the principle as an aspect of the court's inherent jurisdiction to correct a miscarriage of justice. Similarly, Gaudron J stated the principle by reference to the requirements of the interests of justice, as a rationale which stood independently of the question whether a party was afforded an opportunity to be heard.²⁰ This was because a judgment could be re-opened if the court misunderstood the facts or misapplied the law in relation to one or more issues. The jurisdiction was not confined to the circumstances where a hearing on all issues was denied. By contrast, Brennan J characterised the jurisdiction as an aspect of the court's duty to afford procedural fairness.²¹ If procedural fairness has been denied, the court's jurisdiction to hear and determine the matter is not exhausted. Deane J also regarded the rationale for the jurisdiction to re-open a judgment as part of the doctrine of procedural fairness, for the party concerned has never been given a clear and adequate opportunity to place before the court the full submissions about a proposition which forms the basis for the court's decision.²² Dawson J stated the principle briefly without explicitly linking it with either inherent jurisdiction to ensure justice is done, or procedural fairness.

Secondly, while the judges on the basis of these varying rationales agreed that in principle the High Court had jurisdiction to re-open its judgment and vacate its orders, they divided 3:2 on whether the circumstances of the present case warranted exercise of this jurisdiction. The Court had held the respondents infringed the appellant's copyright. After argument was concluded, at the direction of the court the registrar wrote to the parties inviting written submissions on whether it was common ground, as stated in one of the Federal Court judgments, that the respondents had not reproduced part of the "Widget C program". Although both parties made supplementary written submissions in response, prior to delivery of the judgment, the respondents now sought to re-open the judgment on the ground that the letter was equivocal and they were denied an opportunity to address the court on a matter which was critical to what became the central issue for the court. Brennan, Dawson and Gaudron JJ held that the respondents had enjoyed an opportunity to address the issue, while Mason CJ and Deane J in dissent held they had not.

Thirdly, though this was a case where judgment had not yet been entered, little emphasis is given to this in the exposition of the legal principles about reopening judgments. Certainly Mason CJ's fuller exposition of the principles accepts that the scope for reopening a judgment which has been entered is much more restricted. This aspect of his judgment is discussed below. But in many respects in the other judgments in *Autodesk* the principles are stated without express restriction to the circumstances where the judgment has not been

¹⁸ Ibid, p 303. For a recent example see *Community & Public Sector Union v Telstra Corporation* [2000] FCA 872, where Finkelstein J declined to reopen his order to enable the applicant unions to reargue their case on a question of law he acknowledged was decided in error. The substantive decision was then reversed by the Full Court: *Community & Public Sector Union v Telstra Corporation Ltd* [2001] FCA 267.

¹⁹ *Metwally v University of Wollongong* (1985) 60 ALR 68 at 71; *Autodesk* (1992) 176 CLR 300 at 303, 309-10, 322.

²⁰ *Autodesk* (1992) 176 CLR 300 at 322, 328.

²¹ Ibid, p 308-9, relying upon *Wentworth v Woollahra Municipal Council* (1982) 149 CLR 672 at 684 and *State Rail Authority of NSW v Codelfa Construction Pty Ltd* (1982) 150 CLR 29.

²² *Autodesk* (1992) 176 CLR 300 at 314.

entered. The stricter approach taken where judgment has been entered is, however, evident in the very recent decision of the High Court in *DJL v Central Authority*, discussed below.

High Court judgments

Do these principles apply without qualification to judgments of the High Court? In *Autodesk* the High Court accepted that it could re-open its own decision. Although members of the Court differed as to the rationale for the principle, and were divided on its application to the facts of the case, with the majority holding that the judgment should not be re-opened, there was agreement with regard to the principle. Indeed Mason CJ noted that the fact that the court was a final court of appeal provided:

no reason for it to confine the exercise of the jurisdiction so as to inhibit its capacity to rectify what it perceives to be an apparent error arising from some miscarriage in its judgment.²³

Since *Autodesk* was decided, the High Court has re-affirmed its own jurisdiction to reopen its judgments or orders. In *De L v Director-General, NSW Department of Community Services (No 2)*,²⁴ the Director-General of the New South Wales Department of Community Services sought to reopen a costs order made against him in the High Court in a case concerning international child abduction and his exercise of functions in his capacity as the Commonwealth Central Authority. The High Court's order had not yet been entered. The issue concerned the validity of a regulation which provided that a person performing such functions shall not be made subject to any order to pay costs.²⁵

The High Court did not doubt its own power to re-open its judgment. This was a case where its oversight of the regulation was accidental and the court had not invited oral submissions on the question of costs. It was important that the orders had not been entered, and the court made it clear that different considerations apply when the orders have been entered.²⁶ Having re-opened its judgment, the Court upheld the validity of the regulation and interpreted it as not confining the general discretionary power of the court pursuant to the Judiciary Act 1903 (Cth) s 26 to make costs orders. In the exercise of its discretion, the court concluded that the costs order should stand. Perhaps inconsistently with its reasoning on whether it should re-open its judgment, the Court observed in relation to relief that the fact that the Director-General had not raised the point when it was appropriate to do so weighed against his present claim to immunity from costs.

*De L*²⁷ suggests a broad test for the general exception to the finality of judgments which have not been entered for the joint judgment leaves open the question whether the rationale for the principle is a miscarriage of justice or a denial of procedural fairness. The proceedings may be reopened and the Court's order vacated if it proceeds on a misapprehension of the facts or the law; or there is matter calling for review; or, to use the test of Gaudron J, that the interests of justice so require.²⁸

Judgment or order entered

Limited exceptions have been made to the finality of a judgment or order which has been entered. However the list of exceptions is surprisingly long. The exceptions permit reopening

²³ Ibid, p 302.

²⁴ (1997) 190 CLR 207.

²⁵ Family Law (Child Abduction Convention) Regulations (Cth) reg 7.

²⁶ (1997) 190 CLR 207 at 216. None of the judgments contains reference to the High Court Rules.

²⁷ (1997) 190 CLR 207.

²⁸ Ibid, p 215 per Toohey, Gaudron, McHugh, Gummow and Kirby JJ. Brennan CJ and Dawson J in a separate joint judgment reached a similar conclusion based on the proposition, accepted without discussion, that the court had jurisdiction to re-open its judgment: *ibid* at 210.

of a default judgment, variation of interlocutory orders, reopening where an order was made in the absence of a party, the slip rule, consent of the parties, judgments affected by fraud and a stay of execution. After outlining these well defined exceptions, the discussion focusses upon the scope of the more controversial general exception permitting a court in exercise of its inherent jurisdiction to re-open a judgment which has been entered.

Default judgment

A court may set aside or vary a judgment where it has been entered as a default judgment.²⁹ The court balances the competing interests of the parties to determine whether the interests of justice require that the defendant should be permitted to contest the claim. Factors to be taken into account are the reasons for default, delay by the defendant in taking steps to have the judgment set aside, the defendant's prospects of success in the action, and whether the judgment was obtained irregularly or in breach of good faith.

Order is interlocutory

As a general principle interlocutory orders may be varied or set aside in appropriate circumstances, even where made by consent and entered.³⁰ The court has wide powers to alter an interlocutory order concerning matters of practice and procedure. The description interlocutory covers a wide range of different types of orders and distinctions may have to be drawn between those relating to purely procedural matters and other interlocutory orders.³¹ Where an interlocutory order finally determines the parties' rights an attempt to alter it may amount to an attempt to appeal which is inconsistent with legislative intention.³² If an interlocutory order is intended to govern rights of parties until final hearing, it should not be altered unless there is a material change in circumstances.

Absence of party

A court may set aside or vary a judgment or order which has been entered after judgment has been given in the absence of a party, whether or not the absent party had notice of trial or of any motion for the judgment.³³ Particular provision may be made for setting aside or varying a judgment in proceedings for possession of land. The court may do so if the judgment was given in the absence of a person and the court decides to make an order that the person be added as a defendant.³⁴ Any interested party may apply, not just the absent person.

Slip rule

Where there is a clerical mistake or an error arising from an accidental slip or omission, in a minute of a judgment or order, or in a certificate, the court on the application of any party or of its own motion, may at any time correct the mistake or error.³⁵ This is a common law rule which is reflected in rules of court and which encompasses errors of a mechanical nature as

²⁹ Rules of court deal with default judgments, for example, NSW SCR Pt 17. See NSW SCR Pt 40 r 9(2)(a).

³⁰ FCR O 35 r 7(2)(c),(d); NSW SCR Pt 40 r 9; and the inherent powers of the courts to control their proceedings.

³¹ *Wentworth v Woollahara Municipal Council* (unreported, CA, 31 March 1983) per Mahoney JA.

³² Thus, a restraining order made by the Supreme Court under the Proceeds of Crime Act 1987 (Cth) could not be reopened. The existence of a statutory appeal by leave to the Court of Appeal indicated a legislative intention that an inherent jurisdiction under NSW SCR Pt 40 r 9(5) to reopen the order should not be exercised so as to set at naught the requirement that an appeal be brought only with leave: *Woodcroft v DPP (Cth)* (2000) 174 ALR 60 at 70.

³³ For example, FCR O 35 r 7(2)(a); NSW SCR Pt 40 r 9(2)(b), 9(3)(a).

³⁴ NSW SCR Pt 40 r 9(2)(c).

³⁵ FCR O 35 r 7(3); NSW SCR Pt 20 r 10(1).

well as situations where the court's order does not correctly reflect its decision, as contained in its reasons.³⁶

The slip need not be that of the judge, but could have been introduced by a clerical mistake of legal representatives. The rule does not apply to errors which are the result of a deliberate decision rather than a slip.³⁷ Nor does it extend to supplementing orders on a point not argued, considered or decided at the hearing. Further, a court will not make an order for amendment when rights of third parties are affected or it would otherwise be inexpedient or inequitable. In determining whether the mistake is accidental it is appropriate to ask whether if it had been drawn to the attention of the court or the parties at the relevant time, the error would have been corrected as a matter of course.

Examples include clarification of a costs order, amendment of a wrong figure or date, insertion of an order made by the judge but omitted from the minute, insertion of a date for compliance with an order, insertion of a wrongly named or mis-described party, or a party shown to have died or to be non-existent.³⁸

Consent judgments

Where both parties consent and the rights of third parties are unaffected the court may set aside a final judgment. For example, it may be that the client did not in fact authorise the compromise. In obiter in *DJL v Central Authority*,³⁹ the High Court affirmed this jurisdiction.

Setting aside judgment for fraud

An application may be made to set aside a judgment obtained by fraud.⁴⁰ This ought to be done in separate proceedings where the applicant clearly establishes the fraud, that the information would probably have affected the judgment of the court and that the fraud was discovered after the judgment. This approach, set out by Barwick CJ in 1965,⁴¹ was re-affirmed by the High Court in obiter in 2000 in *DJL v Central Authority*.⁴² However, if fresh evidence is discovered, the applicant should proceed by way of appeal, not separate proceedings.

Stay of execution

A person bound by a judgment may move the court for a stay of execution of the judgment, or for some other order, on the ground of matters occurring after the date on which the judgment takes effect and the court may, on terms, make such order as the nature of the case requires.⁴³ The order may be supplementary to the earlier final judgment or order. For example, an order for specific performance may be supplemented by an order for an inquiry as to damages. There is even power under this rule to stay or set aside an earlier order where exceptional circumstances have removed the basis for the original judgment or would render further compliance with it futile.

³⁶ *DJL v Central Authority* (2000) 170 ALR 659 at 685 per Kirby J.

³⁷ *Elyard Corporation Pty Ltd v DDB Needham Sydney Pty Ltd* (1995) 61 FCR 385 at 391, 404-5.

³⁸ *DJL v Central Authority* (2000) 170 ALR 659 at 685.

³⁹ *Ibid*, p 670, 685.

⁴⁰ FCR O 35 r 7(2)(b).

⁴¹ *McDonald v McDonald* (1965) 113 CLR 529 at 532-3.

⁴² (2000) 170 ALR 659 at 670, 685, referring to *Permanent Trustee Co (Canberra) Ltd v Stocks & Holdings (Canberra) Pty Ltd* (1976) 15 ACTR 45 at 50.

⁴³ FCR O 37 r 6, 10; NSW SCR Pt 42 r 12(1).

Thus, in *Permewan Wright Consolidated Ltd v Attorney-General (ex rel) Franklin's Stores*⁴⁴ the New South Wales Court of Appeal suspended a permanent injunction it had just granted. The order was based on the court's interpretation of an interim development order and restricted the manner in which a Permewan's store carried on business at particular premises. Three weeks after the Court granted the stay, the High Court refused an application for special leave. Within hours, the minister exercised a power to vary the order so that it permitted Permewan's to carry on business free of the restrictions. Mahoney JA held that the court had an inherent power to make an order suspending the stay to ensure that its order did not operate after the statutory basis upon which it was made had ceased to operate.⁴⁵ While Mahoney JA preferred to rely upon the inherent power of the Court, Reynolds JA relied upon Pt 42 r 12 of the Rules of Supreme Court which empowers the Court to stay the execution of a judgment on the ground of matters occurring after the judgment takes effect.⁴⁶

General exception: courts with inherent or limited jurisdiction

In practice the jurisdiction of courts to re-open decisions after entry of the order, is exercised rarely, in a much narrower class of cases than the jurisdiction prior to entry of the order. This was apparent in 1971 in *Bailey v Marinoff*,⁴⁷ where the High Court held, Gibbs J dissenting, that once an order made by the New South Wales Court of Appeal disposing of a proceeding had been entered, the Court had no further power in relation to that proceeding. The principle was applied again in *Gamser v Nominal Defendant*.⁴⁸

However, according to Mason CJ in *Autodesk Inc v Dyason (No. 2)*, the jurisdiction to re-open a judgment when orders have been entered and grant a re-hearing arises:

where the applicant can show that by accident and without fault on the applicant's part, he or she has not been heard.⁴⁹

In 2000 in *DJL v Central Authority*⁵⁰ the High Court made clear the position of courts of limited jurisdiction with regard to judgments which have been entered. Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ in a joint judgment held that even if such a court be a superior court, since it has no inherent jurisdiction, any power to re-open its judgments must be found in express or implied statutory power. The Full Court of the Family Court did not have power to re-open its decision to enable it to respond to a recent decision of the High Court on the issue before it. No power to re-open was derived from the Court's position in the appellate hierarchy or from Ch III of the Commonwealth Constitution. Callinan J reached a similar conclusion on this issue in a separate judgment. Kirby J dissented, preferring the dissenting judgment of Gibbs J in the cases concerning the New South Wales Court of Appeal, that certain appellate courts have jurisdiction to correct even an order which has been entered, in wholly exceptional circumstances where a mistake has occurred which unrepaired would cause a serious injustice.⁵¹ While they had no inherent power such courts

⁴⁴ (1994) 35 NSWLR 365.

⁴⁵ Ibid, p 374. See also *QDSV Holdings Pty Ltd v Trade Practices Commission* (1995) 59 FCR 301 at 316.

⁴⁶ Ibid, p 367. Both judges described this power as analogous to the power under NSW SCR Pt 44 r 5 to stay the execution of an order: ibid, p 367, 374. Hutley JA did not decide the point, holding that the court should not entertain the application until the applicant had purged its contempt of disobeying the stay order in the intervening period.

⁴⁷ (1971) 125 CLR 529 at 530.

⁴⁸ (1977) 136 CLR 145.

⁴⁹ (1993) 176 CLR 300 at 301-2.

⁵⁰ (2000) 170 ALR 659.

⁵¹ Ibid, p 687, 689.

by implication from their empowering statutes had jurisdiction to re-open their judgment after its entry.

One decision not yet discussed is intriguing in terms of its place in this discussion. It is *Fox v Commissioner for Superannuation*.⁵² The Full Federal Court had not had drawn to its attention a particular provision of the Superannuation Act 1922 (Cth), whose effect was that the appellant was entitled to a pension at the higher rate for which he had unsuccessfully contended. The Court, Black CJ dissenting, reopened its own decision. The majority set aside its own order, and the decision of the Administrative Appeals Tribunal (AAT), and remitted the matter to the AAT for further consideration. Unfortunately it is not clear whether the judgment had been entered. It is clear that the first judgment was delivered on 20 August 1997, the motion to reopen the decision was brought three months later, and that the decision had been reported in Federal Court Reports by the time of the second decision on 8 April 1999.⁵³

Black CJ discussed the principle regarding reopening very briefly, saying that the court should be very reluctant to reopen a case in such circumstances but could do so if it was persuaded that it would have reached a different conclusion on the issues had it been referred to the provision.⁵⁴ In the event, Black CJ concluded that the Court had not erred in law.

The majority judges, Branson and Sackville JJ, applied *Autodesk*, holding the Court had jurisdiction to reopen the judgment on account of a misapprehension by the Court of the relevant law.⁵⁵ It is not clear whether the motion was allowed under Federal Court Rules O 35 r 7(1) and (3) which respectively provide for reopening a decision before entry of the judgment and for the slip rule. While these rules are reproduced in the majority's joint judgment, it also contains reference to the inherent jurisdiction of the court and indeed asserts that the approach taken by Mason CJ in *Autodesk* is applicable not only to the High Court but also to an intermediate court of appeal. In the event counsel for the respondent conceded that the judgment could be reopened, and the question of the basis for doing so was left undecided.

While the court was concerned about the public interest in correcting its erroneous decision, it could not acquire jurisdiction simply via a concession made by counsel. If the judgment reopened in *Fox's* case had been entered, then the later High Court decision in *DJL* indicates *Fox's* case is no longer good law on the issue of reopening of a judgment.

The rationale for this general exception, recognising a jurisdiction to reopen a judgment after its entry, remains unclear. Mason CJ in *Autodesk* described it as denial of procedural fairness, thus posing a rationale different from that applying to reopening of a judgment prior to its entry. *DJL* leaves unanswered the question of the rationale. Indeed *DJL* tends to introduce a separation of the issue of jurisdiction and the basis for its exercise. A court of limited jurisdiction has no inherent jurisdiction to reopen its judgments and in the absence of any express or implied jurisdiction to do so, there is no occasion for considering on what basis. The only definite position taken with regard to the rationale for exercise of the jurisdiction was the view of Kirby J in dissent, opting for a rationale of miscarriage of justice.

⁵² (1999) 56 ALD 618.

⁵³ *Fox v Commissioner for Superannuation* (1997) 78 FCR 151.

⁵⁴ (1999) 56 ALD 618 at 619.

⁵⁵ *Ibid*, p 630.

High Court judgments

As noted in the joint judgment in *DJL*, there is no direct authority as to whether the High Court may re-open its judgments after entry of final orders.⁵⁶ In obiter in *Autodesk* Mason CJ held that the High Court had jurisdiction to reopen its own judgment after entry on the ground that, through no fault of his or her own, a party had not been heard. If constitutional arguments are excluded, as in the joint judgment in *DJL*, the High Court should have no greater powers than a court with inherent jurisdiction. I return to this question later.

Assistance might be sought by referring to the jurisdiction of the highest appellate court in the United Kingdom to reopen its judgments. In *R v Bow Street Metropolitan Stipendiary Magistrate; Ex parte Pinochet Ugarte (No 2)*⁵⁷ the House of Lords re-opened its own decision in an action challenging the validity of warrants for the extradition of Senator Pinochet. The House of Lords held that Lord Hoffmann was disqualified by operation of law from hearing the matter on account of an appearance of bias arising from his position as a director of a company operating as the charitable wing of Amnesty International, which had been joined as a party in the proceedings. Referring to an earlier decision where an order for costs was varied because the parties had not had a fair opportunity to address argument on the point,⁵⁸ the House of Lords briskly rejected a submission that it did not have jurisdiction to re-open its decision:

There is no relevant statutory limitation on the jurisdiction of the House in this regard and therefore its inherent jurisdiction remains unfettered. ...

However, it should be made clear that the House will not reopen any appeal save in circumstances where, through no fault of the party, he or she has been subjected to an unfair procedure. Where an order has been made by the House in a particular case there can be no question of that decision being varied or rescinded by a later order made in the same case just because it is thought that the first order is wrong.⁵⁹

The House of Lords did not advert to the question whether the order had been entered.

The High Court came close to deciding an issue similar to that in *Pinochet*, in proceedings challenging the constitutional validity of legislation amending the Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Cth), culminating in the High Court's decision in *Kartinyeri v The Commonwealth*.⁶⁰ At an early stage of the hearing the plaintiffs sought recusal by Callinan J from hearing the case as a member of the High Court on the ground of an appearance of bias. The plaintiffs' submissions focused almost entirely on the question whether the High Court had jurisdiction to hear the issue, including constitutional arguments.⁶¹ After initially declining to recuse, in the event Callinan J withdrew from hearing the matter.

At the stage when the issue was raised, jurisdiction would not have presented a problem. There is no doubt that the full High Court may hear an appeal from a ruling made by a single High Court judge. If the recusal request were raised at a later stage, *Autodesk* and *De L* make it clear that prior to entry of its judgment the court has an inherent power to re-open its

⁵⁶ *DJL v Central Authority* (2000) 170 ALR 659 at 672.

⁵⁷ [1999] 1 All ER 577.

⁵⁸ *Cassell & Co Ltd v Broome (No 2)* [1972] AC 1136.

⁵⁹ [1999] 1 All ER 577 at 585-6.

⁶⁰ (1998) 195 CLR 337.

⁶¹ S Tilmouth and G Williams "The High Court and the Disqualification of One of its Own" (1999) 73 ALJ 72.

decision if the judgment has miscarried due to a misapprehension as to the facts or the law, there is a matter calling for review, or the interests of justice require it.⁶²

What is unclear is whether the High Court would have had power to re-open the decision after entry of its orders. If the rationale for the jurisdiction to reopen a decision after entry is procedural fairness as suggested by Mason CJ in *Autodesk*, rather than the interests of justice, then the argument for reopening of the decision of the High Court is clearly supported. The basis for the application to reopen would not have been just any error of law, but a denial of procedural fairness resulting from the failure to recuse.

In *DJL*⁶³ the Court was concerned with whether a federal court of limited jurisdiction has jurisdiction to reopen its judgment after entry, rather than with the basis on which such a jurisdiction might be exercised. Two passing references are made to procedural fairness. Kirby J referred to procedural fairness as a means for collateral attack on a judgment.⁶⁴ Callinan J himself in *DJL* went furthest in this regard, referring to a jurisdiction to reopen orders which have been entered, where there is a correction under the slip rule, fraud, or failure to give a party a hearing.⁶⁵

The joint judgment in *DJL* put to one side constitutional arguments based upon Ch III of the Commonwealth Constitution, as a basis for reopening a decision of the Full Family Court. In the case of the High Court, at the apex of the system of courts, the position is arguably different. Constitutional requirements under Ch III may indicate that in a case of denial of procedural fairness the court has failed to exercise its constitutional jurisdiction and therefore the proceeding remains on foot even after entry of the order. On this basis then if a judge of the High Court with an appearance of bias failed to disclose the matter warranting disqualification or declined to recuse from a proceeding, the Court would have jurisdiction to reopen its decision after entry of the orders.

3 Primary Decision-makers in Executive Branch

In determining whether administrators have implied power to reconsider or revoke their decisions the courts do not engage in arguments by analogy with courts, but engage in a process of statutory interpretation. Most important among the principles of statutory interpretation applied are s 33(1) and (3) of the Acts Interpretation Act 1901 (Cth) (and their equivalent in other jurisdictions), which provide:

(1) Where an Act confers a power or imposes a duty, then, unless the contrary intention appears, the power may be exercised and the duty shall be performed from time to time as occasion requires.

(3) Where an Act confers a power to make, grant or issue any instrument (including rules, regulations or by-laws) the power shall, unless the contrary intention applies, be construed as including a power exercisable in the like manner and subject to the like conditions (if any) to repeal, rescind, revoke, amend, or vary any such instrument.

⁶² See text accompanying nn 23-28 above. See also Sir Anthony Mason "Judicial Disqualification for Bias or Apprehended Bias and the Problem of Appellate Review" (1998) 1 *Constitutional Law and Policy Review* 21.

⁶³ (2000) 170 ALR 659 at 686.

⁶⁴ *Ibid*, p 686. See note 144 in Kirby J's judgment, the only reference made in *DJL* to *Pinochet*.

⁶⁵ (2000) 170 ALR 659 at 707.

Power exercised from time to time

The leading case on powers of primary decision-makers to re-exercise their powers is *Minister for Immigration and Ethnic Affairs v Kurtovic*.⁶⁶ Neaves, Ryan and Gummow JJ held that the criminal deportation power of the Minister for Immigration, Local Government and Ethnic Affairs was by implication exercisable from time to time, rather than on only one occasion.⁶⁷ In this case the Minister's delegate had refrained from exercising the power when the conditions for its exercise arose, but could exercise the power later, even on the basis of the same facts. If a deportation order had previously been made, it could for the same reason be revoked or revived, whether or not the facts had changed or indeed simply because of a change of ministerial policy.⁶⁸ This conclusion was reached as a matter of statutory interpretation. There was no intention in the Migration Act contrary to s 33(1) of the Acts Interpretation Act, which was applicable in this case. As Gummow J described it, the purpose of s 33(1) is to overcome "an inconvenient common law doctrine of somewhat uncertain extent to the effect that a power conferred by statute was exhausted by its first exercise".⁶⁹

Section 33(1) and *Kurtovic* do not of course rule out the possibility of cases where a legislative intention contrary to s 33(1) indicates that a power is spent once it is exercised rather than available to be exercised from time to time. The decision-maker is then described as *functus officio*, and any attempt to re-exercise the power is ultra vires.⁷⁰ Further s 33(1) does not support an exercise of power to revoke which is bad for other reasons, such as its exercise for an improper purpose.⁷¹

*Sloane v Minister for Immigration, Local Government and Ethnic Affairs*⁷² provides an example of such a case. The Minister's delegate declined to reconsider a decision refusing a temporary entry permit under the "remaining relative" category, as it then stood, when additional medical reports were sent to him. The delegate took the view that having already made a decision that the applicant did not qualify for the permit his power was spent. In this case French J did not refer to s 33(1) of the Acts Interpretation Act but did refer to its general counterpart at common law, the principle of statutory interpretation which permits implication of a power on the basis that it is necessary, or implied in a more general way by reason of construction of the statute. The implication of incidental powers of statutory courts was based upon the same principle of interpretation which was now relied upon as a basis for generally implied powers of administrators.⁷³

French J considered the competing policy considerations. On one hand to imply into an express statutory power a power to reconsider:

would be capable, if not subject to limitation, of generating endless requests for reconsideration on new material or changed circumstances⁷⁴

⁶⁶ (1990) 21 FCR 193.

⁶⁷ Ibid, p 195, 201, 211, 218.

⁶⁸ Ibid, p 218-9 per Gummow J.

⁶⁹ Ibid, p 211 per Gummow J, quoting from a description in *Halsbury's Laws of England* (1st ed) Vol 27, p 127 of the purpose of the counterpart provision in the United Kingdom Interpretation Act upon which s 33(1) was based.

⁷⁰ *Minister for Immigration, Local Government and Ethnic Affairs v Kurtovic* (1990) 21 FCR 193 at 211 per Gummow J.

⁷¹ *Vella v Grey* (1985) 9 FCR 81.

⁷² (1992) 28 ALD 480.

⁷³ Ibid, p 486-7, referring to *Jackson v Sterling Industries Ltd* (1987) 162 CLR 612 at 623.

⁷⁴ (1992) 28 ALD 480 at 486.

On the other there was:

the convenience and flexibility of a process by which a primary decision-maker may be persuaded on appropriate and cogent material that a decision taken ought to be re-opened without the necessity of invoking the full panoply of judicial or express statutory review procedures. There is nothing inherently angelical about administrative decision-making under the grant of a statutory power that requires the mind that engages in it to be unrepentantly set upon each decision taken.⁷⁵

The competing policies affected the application of the principle of statutory interpretation. French J concluded that in the context of the Migration Act 1958 (Cth) and Migration Regulations which made detailed provision for the powers of review of decisions, suggesting statutory codification of review functions, it was not possible to imply by necessity a legislative intention to confer a power to reconsider a decision to refuse an entry permit. It was true that the medical reports would not receive consideration by the Immigration Review Tribunal, which in this case had no jurisdiction to review the initial decision. However, if the delegate had power to reconsider, the reconsideration decision would be justiciable under the Administrative Decisions (Judicial Review) Act 1977 (Cth) (ADJR Act), triggering potentially endless judicial review applications.

Power to revoke

It is well established that s 33(3) of the Acts Interpretation Act has a narrower operation than s 33(1). In *Collector of Customs v Brian Lawlor Automotive Pty Ltd*,⁷⁶ the Full Federal Court declined to imply a power of the Collector of Customs to revoke a warehouse licence. The Customs Act 1901 (Cth) conferred an express power to grant a licence but no express power to revoke it. Section 33(3) did not assist in implying a power to revoke. Section 33(3) applies where an Act confers a power to make, grant or issue any instrument (including rules, regulations or by-laws). The power to grant a licence did not fall within this category of powers. The Comptroller may happen to exercise the power to grant the licence in written form, but it was still not a power to grant or issue an instrument.⁷⁷ This, as Smithers J said, was a distinction between a transaction and an instrument implementing it.⁷⁸

By contrast, in *Nashua Australia Pty Ltd v Channon*⁷⁹ s 33(3) of the Acts Interpretation Act did operate to imply a power of revocation in relation to a power by instrument to determine that an item of the customs tariff applied to goods. In *Edenmead Pty Ltd v Commonwealth of Australia*⁸⁰ a power by notice published in the gazette to prohibit fishing in certain waters was a power to make, grant or issue an instrument and hence by reason of s 33(3), included a power to repeal, rescind, revoke amend or vary the prohibition by notice. Also belonging to this group of cases is *Comptroller-General of Customs v Kawasaki Motors Pty Ltd*⁸¹ although it contains no explicit reference to s 33(3). The Full Federal Court held that the Comptroller-General of Customs had an implied power to revoke a tariff concession order. This was so irrespective of the fact that the order was already under challenge as being invalid and that the ground for revocation was its doubtful validity. In this case the Comptroller-General and his delegate had an express power to make, and an express power to revoke, such an order. The only issue was whether the express power to revoke carried as a necessary incident an implied power to revoke where a doubt had been raised as to the

⁷⁵ Id.

⁷⁶ (1979) 2 ALD 1.

⁷⁷ Ibid, p 3.

⁷⁸ Ibid, p 13.

⁷⁹ (1981) 58 FLR 325 at 331-2.

⁸⁰ (1984) 4 FCR 348.

⁸¹ (1991) 25 ALD 418.

validity of the order. Without relying on s 33(3), Beaumont J held that the power to revoke could be implied. An older English case to the contrary could be confined to its own particular statutory circumstances.⁸²

These decisions are consistent, turning upon the requirement of a power “to make, grant or issue any instrument (including rules, regulations or by-laws)” which narrows the ambit of operation of s 33(3). The power in *Brian Lawlor* did not satisfy this requirement. The power to grant the warehouse licence was of an adjudicative nature rather than of a rule making nature like the powers in issue in *Nashua*, *Edenmead* and *Kawasaki*. A distinction between adjudicative and rule making powers as the limitation upon the ambit of s 33(3) underlies the later decision of Lee J in *Australian Capital Equity Pty Ltd v Beale*.⁸³ The publication of a notice that tenders were invited for multipoint distribution station (MDS) licences was not a decision of a legislative character despite its formality, nor did it even have continuing effect which would render it appropriate for revocation.⁸⁴ Lee J held that even if the term “instrument” in s 33(3) is to be interpreted as covering a wider class of document than those which are made by an exercise of legislative power, the provisions of the statutory scheme indicated a contrary intention precluding implication of a power to revoke.⁸⁵

A decision issued in a formal document may, however, amount to an “instrument” for the purpose of s 33(3) though it is not issued as an exercise of rule making power. Thus, in *Leung v Minister for Immigration and Multicultural Affairs*⁸⁶ it was argued that the Minister had an implied power to revoke an individual’s certificate of citizenship prior to the ceremony where the pledge of commitment to Australia is made and the individual becomes an Australian citizen. On the basis of information contained in an anonymous letter the minister’s delegate purportedly revoked the applicants’ certificates on the ground of failure to meet residency requirements. The AAT affirmed the revocation decision but the question for the Federal Court was whether the delegate had power to revoke. The applicants argued that once the delegate had made a decision to approve the issue of the certificates, he was *functus officio* and could not reconsider. The Australian Citizenship Act 1948 (Cth) ss 21 and 50 contained part of a code with regard to loss of citizenship, covering only the situation of deprivation of citizenship after the pledge has been taken, on the grounds of conviction for certain offences, including making false or misleading representations for the purpose of obtaining citizenship. Following the approach of Beaumont J in *Kawasaki*, Marshall J held that at the stage prior to the pledge of citizenship the delegate had implied power to revoke the certificate. Section 33(3) of the Acts Interpretation Act supported this conclusion of implication of a power to revoke.⁸⁷ Further, policy considerations supported this conclusion for it “made good administrative sense”⁸⁸ to allow revocation rather than require the minister to instigate a prosecution under s 50 for giving false or misleading information.

The Full Federal Court dismissed an appeal from Marshall J’s decision.⁸⁹ The reasons of Heerey J were similar to those of Marshall J. However Finkelstein J, with whom Beaumont J concurred, held that a primary decision-maker may ignore an invalid decision, irrespective of whether he or she has power to reconsider or revoke a decision.⁹⁰

⁸² Ibid, p 667-8. The case was *Re 56 Denton Road, Twickenham* [1953] Ch 51. A similar approach was taken to the case in *Rootkin v Kent County Council* [1981] 1 WLR 1186.

⁸³ (1993) 114 ALR 50 at 62-65.

⁸⁴ Ibid, p 64.

⁸⁵ Ibid, p 64-5.

⁸⁶ (1997) 46 ALD 519.

⁸⁷ Ibid, p 524-5.

⁸⁸ Ibid, p 524.

⁸⁹ (1997) 79 FCR 400.

⁹⁰ Ibid, p 414.

The latter approach is, with respect, out of step with the requirement, evident in the case-law discussed, to establish a source of power to reconsider or revoke, whether the decision is made by a court, tribunal or primary decision-maker. When an administrator ignores a decision, so as to set it at naught, he or she as a matter of fact re-exercises the power and must have express or implied power to do so. If the previous decision was made by another officer, questions of delegation and hence power arise. If the previous decision has already been conveyed to the individual affected, expectations may be disappointed. While a pure policy decision may be changed with relative ease, ignoring a policy when making an adjudicative decision, or ignoring a previous adjudicative decision, has implications in administrative law. Irrespective of its validity, once conveyed to the individual affected, the previous decision normally generates a legitimate expectation entitling the individual to a hearing before it is ignored; is itself one relevant consideration which the administrator is bound to take into account on the subsequent occasion; and, being made at the operational level, may raise an estoppel against the decision-maker. An existing decision which is invalid cannot therefore be entirely ignored but has practical and legal consequences.

4 Merits Review Tribunals

No distinction appears to have been drawn between primary decision-makers and merits review tribunals for the purposes of application of the principles relating to reconsideration or revocation. In both cases it is a question of statutory interpretation. However, it is arguable that in the case of merits review tribunals which often bear a close resemblance to courts, there is greater scope to draw upon arguments by analogy with the implied incidental powers of courts, hence suggesting a more cautious approach to implication of a power to reconsider or revoke a decision which has been rendered formal in some way or notified to the parties. However with the exception of the brief reference made by French J in *Sloane*, such analogies have not been attempted.⁹¹

The discussion which follows examines the powers of merits review tribunals to reopen or re-consider decisions, their powers to revoke their decisions, and then turns to a recent case which raises both issues.

Reconsideration

In the case of migration tribunals the complex provisions for review in the Migration Act and regulations made under it militate strongly against the implication of additional powers of the tribunals, such as a reconsideration or re-exercise of power. Thus, the reasoning in *Sloane* was applied to the Refugee Review Tribunal (RRT) in *Jayasinghe v Minister for Immigration and Ethnic Affairs*.⁹² Goldberg J rejected a submission that the RRT had power to reconsider its decision to affirm a refusal of a protection visa when new evidence of country information came to light. While the statutory scheme had changed since *Sloane* was decided, it still indicated a comprehensive system for further review by the RRT and limited judicial review of the RRT's decision. No further function of the RRT remained to be performed. The RRT was *functus officio*.⁹³

⁹¹ See text accompanying n 73. In *Broken Hill Pty Company Ltd v Finestone* (1997) 49 ALD 62 Einfeld J referred to *Autodesk* in an appeal from the AAT on the ground of denial of procedural fairness. No significance attaches to the reference since this was not even a case raising the issue of reconsideration, reopening or revocation.

⁹² (1997) 48 ALD 265.

⁹³ Statutory provisions may not only preclude the re-exercise of power, they may also preclude the making of a second application for an exercise of the power. Thus, in *Dranichnikov v Minister for Immigration and Multicultural Affairs* [2001] FCA 18 (unreported, Federal Court, Dowsett J, 29 January 2001) s 48A of the

Associated with the idea of a power which may be exercised from time to time, as conveyed in s 33(1) of the Acts Interpretation Act, is the idea of a continuing duty of a merits review tribunal to give a fair hearing, whether expressly conferred in the statute or at common law. In *Minister for Immigration and Multicultural Affairs v Capitley*,⁹⁴ the applicant telephoned the RRT an hour before the hearing, and spoke to an unknown person at the RRT to advise that he was sick and could not travel to attend the hearing in the severe weather conditions. When at the request of the officer the applicant called back ten minutes later, he was told that it was too late for him to obtain a postponement of the hearing. Without reference to s 33(1) of the Acts Interpretation Act, Wilcox and Hill JJ, with whom Madgwick J agreed, held that the duty of the RRT under s 425(1)(a) of the Migration Act to afford the applicant an opportunity to give evidence is a continuing one, as the circumstances exist from time to time, until the applicant either does or does not make use of the opportunity. The duty did not end when the RRT notified the applicant of the hearing date. The RRT's apparent refusal to grant an adjournment to an applicant who was sick and could not attend a hearing in circumstances where there was no real opportunity to appear and give evidence constituted a failure to comply with the duty.

Capitley is concerned with the manner in which the hearing is afforded until the decision is made. Probably the registry staff responding to the telephone call made enquiries of a member of the RRT who refused the adjournment, prior to dismissal of the application. In the absence of direct High Court authority that failure to comply with s 425 is not reviewable on the ground of failure to observe a procedure required by the Act, within s 476(1)(a) of the Migration Act, the Federal Court could set aside the RRT's decision.⁹⁵ *Capitley* has nothing to say about implication of power to re-exercise a power, reconsider a decision or revoke it where that decision-making process has already been completed, say by dismissal of an application. *Capitley* does not assist in resolving the question when a tribunal's process of decision-making has been completed. Yet the Full Federal Court placed significant reliance upon *Capitley* in reaching its decision in *Minister for Immigration and Multicultural Affairs v Bhardwaj*,⁹⁶ considered below, which recognised a power of the Immigration Review Tribunal (IRT) to reopen its decisions.

Revocation

The scant authority on the second issue, of revocation of decisions, is probably explained by the presence in most empowering statutes of merits review tribunals of express powers to reopen decisions, similar to the powers of courts. A decision of the Administrative Appeals Tribunal (AAT) which varies, or is made in substitution for, the decision of the primary decision-maker is deemed to be the decision of the primary decision-maker, but is not a decision which is itself subject to review by the AAT.⁹⁷ However, the AAT has defined powers to reconsider and reopen its decisions. When the AAT dismisses an application on the ground that the applicant failed to appear, it has express power to reinstate the application upon application by the applicant within 28 days.⁹⁸ The AAT may also reinstate an application which it has dismissed in error.⁹⁹ This power was recently considered in

Migration Act expressly precluded the making of a second application for a protection visa. This provision was equivalent to a partial prohibition upon reconsideration.

94 (1999) 55 ALD 365.

95 See however *Minister for Immigration and Ethnic Affairs v Eshetu* (1999) 197 CLR 611, which provides oblique authority that review on this ground in the Federal Court may be excluded by s 476(2)(a) of the Act.

96 (2000) FCA 789.

97 Administrative Appeals Tribunal Act 1975 (Cth) s 43(6).

98 Ibid, s 42A(8),(9).

99 Ibid, s 42A(10).

Brehoi v Minister for Immigration and Multicultural Affairs,¹⁰⁰ where the Full Federal Court observed that when an application is made within the time limit, the AAT continues to have power to determine the reinstated application and determine it on its merits.¹⁰¹

A slip rule empowers the AAT where it is satisfied there is an obvious error in the text of a decision it has made, or in a written statement of reasons for the decision, to direct the registrar to alter the text of the decision or statement.¹⁰²

The AAT has accepted for itself that it does not have a general power to reopen its decisions.¹⁰³ In *Re Sanchez and Comcare*¹⁰⁴ the AAT declined a request that it relist a matter in which it had already made a decision, setting aside the decision of Comcare and ordering it to pay the applicant's costs.¹⁰⁵ Comcare wished to argue the issue of costs. The AAT determined that the parties had been afforded an opportunity to argue costs and the decision could not be reopened. Since an AAT decision could not properly be characterised as an "instrument" for the purpose of s 33(3) of the Acts Interpretation Act, no power to revoke its decision could be implied. Nor could a power to revoke or vary its decision be implied on some more general basis. The express statutory provision for a slip rule and for reinstatement of a dismissed matter militated against implication of a more general power to reopen a decision.

Like the AAT, the Administrative Decisions Tribunal (ADT) in New South Wales may not review again a decision deemed to be that of the primary decision-maker, where as a result of its review the ADT has varied or substituted its decision for the decision-maker's original decision. Like the AAT the ADT has a slip rule, expressed in terms very similar to that of the AAT.¹⁰⁶ Unlike the AAT the ADT does not have express power to reinstate an application which has been dismissed when the applicant fails to appear. The availability of an appeal from a decision within a Division of the ADT to the Appeal Panel as of right on questions of law, and by leave on the merits, also provides a facility for reconsideration which has no counterpart in the AAT.¹⁰⁷ Decisions of the Victorian Civil and Administrative Tribunal (VCAT) affirming, varying or substituting the decision for that of the primary decision-maker, are deemed decisions of the decision-maker and are not themselves reviewable by the VCAT.¹⁰⁸ The VCAT may however reopen an order made when a person did not appear, and has a slip rule.¹⁰⁹

¹⁰⁰ (1999) 58 ALD 385.

¹⁰¹ The court referred to *Leung v Minister for Immigration and Multicultural Affairs* (1997) 79 FCR 400; *Brehoi*, *ibid*, p 392. See also *Kouieder v Commissioner of Taxation* (2000) 60 ALD 320.

¹⁰² Administrative Appeals Tribunal Act 1975 (Cth) s 43AA.

¹⁰³ Cf *Re Gourvelos and Telstra Corp Ltd* (AAT No 9158A, 28 July 1994); *Re O'Halloran and Comcare* (AAT, No 10198A, 8 August 1995).

¹⁰⁴ (1997) 48 ALD 785.

¹⁰⁵ Pursuant to the Safety, Rehabilitation and Compensation Act 1988 (Cth) s 67.

¹⁰⁶ Administrative Decisions Tribunal Act 1997 (NSW) s 87. In the AAT the slip rule is expressed to apply where there is an obvious clerical or typographical error in the text of the decision or statement of reasons, or there is an inconsistency between the decision and the statement of reasons: Administrative Appeals Tribunal Act 1975 (Cth) s 43AA(5). By contrast in the ADT the rule applies where these grounds are established or where there is an error arising from an accidental slip or omission or a defect of form: Administrative Decisions Tribunal Act 1997 (NSW) s 87(3).

¹⁰⁷ *Ibid*, ss 114-116.

¹⁰⁸ Victorian Civil and Administrative Tribunal Act 1998 (Vic) s 51(4).

¹⁰⁹ *Ibid*, ss 120, 119, respectively.

Bhardwaj's case

Issues of reconsideration and revocation were important in *Minister for Immigration and Multicultural Affairs v Bhardwaj*,¹¹⁰ a majority decision of the Full Federal Court holding that the IRT had implied power to reconsider its decision to affirm the cancellation of a student visa. The decision is surprising in the light of the compelling reasoning in *Jayasinghe*, but draws upon the associated line of reasoning in *Capitly*.

The applicant was notified of the hearing date. He sent a facsimile to the IRT on the evening prior to that date to advise that he was sick but would still like to appear at a later date to give evidence and present arguments. The facsimile was filed in the correct file but behind the letter notifying the applicant. It was not brought to the attention of the tribunal member who consequently proceeded to make a decision affirming the cancellation of his visa. On learning of the error, the IRT was prepared to reconsider its decision. The matter was reopened and in the light of evidence presented by the applicant indicating he had been attending a course of studies, the IRT purported to revoke its earlier decision. The Minister sought review.

Beaumont and Carr JJ held that the IRT had to discharge its duty under s 360(1)(a) of the Migration Act to afford the applicant an opportunity to appear before it. This was a continuing duty like the duty of the RRT under s 425(1)(a) of the Act, considered in *Capitly*. The judges observed that mandamus could be issued against the IRT for failure to comply with this duty. Since the introduction of Part 8 of the Migration Act, under which the proceedings in *Bhardwaj* were brought, this remedy is no longer available in the Federal Court for a denial of procedural fairness. However the judges would have had in mind the ground of procedural ultra vires under s 476(1)(a) of the Act, which was the ground established in *Capitly*.

The majority in *Bhardwaj* relied upon *Kurtovic* as establishing that the IRT had power to consider the application from time to time. The majority distinguished *Sloane* on the ground that it was concerned with the issue of reconsideration by the Minister's delegate while the present case was concerned with whether the applicant had received an opportunity to present his case at the hearing. Further, in *Sloane* no reliance was placed on s 33(1) of the Acts Interpretation Act. *Jayasinghe* was distinguished on the basis that in the present case there was no suggestion of endless requests for reconsideration on new material or in changed circumstances. This case was concerned with a single request for an oral hearing, which had not been provided because of the IRT's oversight of the facsimile in the file.

Lehane J dissented, holding that the IRT did not have implied power to reconsider its decision, Section 33(1) of the Acts Interpretation Act did not assist in implying such a power because the Act showed a contrary intention. The strict time limits for seeking review, detailed provision for the procedure of the IRT, recording of its decision and reasons, publication of the decision and limitation of judicial review, established a scheme which indicated the IRT did not have a power which could be exercised as occasion required it from time to time. *Sloane* and *Jayasinghe* applied. The approach of Finkelstein J in *Leung* was rejected. The IRT could not at a later stage disregard or ignore its decision because it believed it was void for denial of procedural fairness. In particular in this case review by the Federal Court on the ground of procedural fairness would not have been available under Part 8 of the Act. According to Lehane J the IRT lacked jurisdiction to reconsider the cancellation decision.

The High Court has granted special leave to appeal in *Bhardwaj*.¹¹¹

¹¹⁰ (2000) 99 FCR 251.

¹¹¹ *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2001) 22(4) Leg Rep SL2b.

A serious problem in the scheme of merits review of migration decisions, exposed by *Bhardwaj*, is that unlike the AAT, the IRT apparently had no procedural rule permitting it to reinstate a proceeding dismissed on the ground that the applicant failed to appear, where that failure occurred through no fault of the applicant.

A second feature of *Bhardwaj*, of central importance to the reasoning process of the majority, is that the Full Federal Court considered only s 33(1) of the Acts Interpretation Act. This provides, in the absence of a statutory indication to the contrary, for an implication that a power may be exercised or a duty performed, from time to time as occasion requires. Could the IRT reconsider without first revoking its earlier decision? Was not s 33(3) of the Acts Interpretation Act the interpretive provision in issue? A situation where a power has been exercised is different from a situation like that in *Kurtovic*, where the power to deport had not been exercised and remained available for re-exercise at a later date. In contrast to *Kurtovic*, in *Bhardwaj* the power was exercised twice. Before the power could be re-exercised, favourably to *Bhardwaj*, the cancellation decision had to be revoked. So an implied power to revoke had to be established. This meant that s 33(3) of the Acts Interpretation Act needed to be considered. On the authority of *Brian Lawler*, s 33(3) does not assist in implying a power to revoke in the case of a power to make a decision rather than to make, grant or issue an instrument. Section 33(3) generally applies where the instrument is issued as a result of rule-making, not an adjudicative decision. If it applies in relation to an adjudicative decision it must consist in the issue of a formal instrument like the certificate of citizenship considered in *Leung*. Like the AAT's decision in *Re Sanchez and Comcare*, the IRT's decision cannot properly be described as an instrument.

A third variable to be taken into account is the nature of the power. The power in *Sloane* was a power to confer a benefit. The benefit was denied on the first occasion. The powers in issue in *Kurtovic* and in *Bhardwaj* were powers to impose penalties, the former a criminal deportation order and the latter the cancellation of a student visa. In *Kurtovic* the decision-maker refrained from imposing the penalty on the first occasion then later imposed it. In *Bhardwaj* on the first occasion the IRT, in affirming the cancellation decision while standing in the shoes of the Minister's delegate, imposed the penalty. The IRT later sought to re-exercise the power to set aside the primary decision to cancel the visa and substitute a decision to refrain from imposing such a penalty. The delegate's decision in *Kurtovic* is readily described as a re-exercise of power, and cannot sensibly be described as a decision to reopen or revoke its decision. The decision in *Bhardwaj* cannot be described as a re-exercise of power in the face of the cancellation decision.

Fourthly, the reconsideration issue is much more complex in the context of merits review where the tribunal stands in the shoes of the primary decision-maker, exercising in the review the same powers and discretions. When reconsideration of a decision of a merits tribunal is sought, is it the tribunal's decision or the primary decision which must be revoked? In *Bhardwaj* the applicant approached the IRT with a request that it reconsider its own decision. However when it reconsidered, the IRT employed the language of revocation of the cancellation decision, apparently referring to revocation of the delegate's cancellation decision rather than revocation of its own decision affirming the cancellation.

When a merits review tribunal's decision is to vary or substitute its decision for that of the primary decision-maker, it is deemed to be the decision of the primary decision-maker. A second opportunity for review of that deemed decision is generally expressly excluded. The susceptibility of primary decisions to re-exercise or revocation varies from one decision to another. For example, the earlier discussion indicated that some migration powers may be exercised from time to time, while the exercise of others is expressly limited to a single

occasion.¹¹² The answer to the question whether it is the tribunal's decision or the primary decision which must be revoked may also depend in part on whether the power to revoke is express or implied, and the appropriate approach to interpretation of the provision which confers jurisdiction upon the tribunal. Where a tribunal has an express or implied statutory power to reconsider or revoke its decision in certain circumstances, it may be argued to have a second layer of power to reconsider or revoke flowing from its earlier exercise of review jurisdiction.

5 Policy Considerations

The policy considerations applying to reopening of judicial decisions have been clearly articulated in the case-law. In its recent decisions the High Court has given most emphasis to the public interest in the finality of litigation. However in *Fox* the Full Federal Court was more concerned with the public interest in a major decision relating to interpretation of superannuation legislation being correct in law.

The ambiguity of *Fox* with regard to whether the order was entered prompts a question about the dichotomy posed by the case-law between judgments and orders which are entered and those which are not. In *Pinochet* the House of Lords reopened its judgment without advert to the question whether the judgment was entered or not. There is a live question as to why the entry of a judgment has been identified in Australian case-law as the magical point at which reopening of the judgment renders the adverse impact upon the public interest in finality of litigation more severe. It seems a fair proposition that the public would be more surprised or even affronted at uncertainty in the law if a judgment which had stood for a year were reopened, than if a judgment which had been made the previous day were reopened. On the other hand there are also circumstances where reopening a judgment made long ago safeguards public confidence in the legal process, as where a settled procedure is followed for reviewing a criminal conviction which appears to involve a miscarriage of justice. If the entry of judgments is in the present context nothing more than a handy device for indicating how much time has passed since the judgment was delivered then perhaps the dichotomy is due for careful review. This raises issues of the appropriate time for entry of a judgment, *res judicata*, issue estoppel, and pursuit of appeals or judicial review, which are too large to be pursued further here.

Should the policy considerations and the law applying to primary decision-makers in the executive branch differ from that applying to courts? The competing policy considerations applying to primary decision-makers are articulated well by French J in *Sloane*. Why is the public interest in finality of litigation not equally compelling in the case of primary decision-making?

As expressed in relation to courts, the policy consideration cannot readily be applied according to its terms. At what point is an administrative decision "final" in a sense parallel to an entered judgment?¹¹³ Some primary decisions are made in a tripartite context with the administrator determining contested rights of two or more parties, which may be interest groups. Most often, decision-making involves an administrator allocating a benefit to, or imposing a penalty upon, an individual and would not be described as "litigation". Nor is litigation necessarily dampened by bureaucratic resistance to correcting obvious errors.

In *Sloane* French J referred specifically to the fact that the delegate's decision had been "formally made and notified to the applicant". In *Leung* the time at which the power to revoke

¹¹² See text accompanying nn 66-75.

¹¹³ The idea of a "final" or "operative" decision has been central to defining the test of justiciability of administrative action under the Administrative Decisions (Judicial Review) Act 1977 (Cth) s 3(1). See *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321.

was claimed to arise was parallel to the position of reopening a judgment which had not been entered. Yet the argument for finality may be stronger in a case like *Leung* because the context is citizenship rights. However in many other fields of public administration the argument for flexibility and capacity of government to rectify errors is a much stronger policy consideration than is finality. The fundamental doctrine in administrative law that government should not be shackled in its capacity to make and change policy in the future in the public interest reflects this policy consideration.

What of merits review tribunals? In many respects merits review tribunals resemble courts for they adjudicate individual rights and obligations. Usually the tribunal has the role of umpire in a tripartite contest but in some cases, notably the RRT, only the applicant appears before the tribunal. A resemblance to courts suggests that there is more scope to argue for a restrictive approach to reopening of decisions, fostering the public interest in finality of litigation. On the other hand, merits review tribunals are part of the executive branch, generally have a role in policy review where they are in principle as unfettered as a primary decision-maker, and generally are required to operate in a manner which is non-technical, speedy and informal. Speediness cannot be assumed to secure finality of decisions. The pressures placed on tribunals to make speedy decisions, handling a high volume of cases, increases the risk of errors and with it the practical need for a power to reopen decisions. The very informality of tribunals tends to obscure the point at which their decisions are indeed final. A majority of the Full Federal Court has recently identified a decision of the RRT as being final when a signed copy is delivered to and recorded in the registry of the RRT.¹¹⁴ This is an issue which deserves further discussion, but cannot be pursued here. Nor is it possible to examine the linked questions as to whether the notion of *functus officio* is no more than a label applied to a conclusion reached after interpretation of the statute, and the modification of the doctrine of issue estoppel in the case of tribunals.

Most often the inclusion in a tribunal's empowering statute of an express power to reinstate an application which was dismissed on the ground of non-appearance of an applicant, and a slip rule, covers the categories of cases where a need to reopen a decision may be perceived. In the absence of such provision the position of the merits review tribunal depends upon implied power and may be assessed by analogy with the position of courts.

If the rationale of the general exception to finality of judgments and orders which have been entered is procedural fairness, as suggested by Mason CJ in *Autodesk*, procedural fairness may also be argued to support an implied power of a merits review tribunal to reopen its decision. However the issue of jurisdiction needs to be resolved before the basis for its exercise is considered. In *DJL* even a superior court whose jurisdiction was limited and sourced in statute, had no express or implied power to reopen a judgment after its entry. If parallels are to be made with courts, the argument for a power of a tribunal to reopen its decision so as to perform its duty to afford procedural fairness cannot succeed in cases where the statutory scheme precludes the implication of a power to reopen.

The migration context is special by virtue of the statutory scheme. If, as in *Bhardwaj*, an applicant could simply return to the IRT, or its successor the Migration Review Tribunal, to argue the denial of procedural fairness then this would ameliorate the exclusion of the Federal Court from hearing such arguments. Viewed in its particular context of the migration review scheme, *Bhardwaj* thus subverts the clear intention of Part 8 of excluding accountability of the MRT and RRT for denials of procedural fairness, except accountability to the High Court. The policy behind the legislation is clear: to confine litigation so far as possible to the level of the tribunals and leave them free, but for the constitutional constraint of the High Court's original judicial review jurisdiction, to deny procedural fairness.

¹¹⁴ *Semunigus v Minister for Immigration and Multicultural Affairs* (2000) 96 FCR 533.

To conclude, judgments are not always without error. Prior to “perfection” of an imperfect judgment a court has available to it a wide range of exceptions to the general rule of finality of judgments, enabling it to reopen the judgment. An imperfect judgment which has been “perfected” may also be reopened on the basis of a list of exceptions almost as extensive. However a “perfected” judgment may not be reopened in exercise of a general exception based on a rationale of procedural fairness, unless the court has inherent jurisdiction. There are real questions whether so much should turn upon the fact that the judgment has been entered and upon the vesting of inherent jurisdiction, particularly in a legal system which despite drawing upon an ancient history, itself has relatively modern statutory origins. The questions are more pressing when no appeal or judicial review is available to correct the imperfect judgment. Indeed, the High Court is likely to accept that it may reopen its own judgment even after it is entered in order to ensure there is no denial of procedural fairness.

Administrators are not inherently angelical. If no appeal or judicial review is available with respect to a tribunal decision which is made in error, it is highly desirable that the statutory scheme should include a reinstatement rule and slip rule. Unfortunately that is not the environment within which we find ourselves. In the absence of such power can the duty to afford procedural fairness in relation to the decision already made, a duty the tribunal recognises it has breached, in some sense keep the decision-making process alive? Difficult as it may be to identify when an administrative process ends, there is an endpoint which is more readily identified in the case of a merits review tribunal, as in the case of a court. Where there is no express or implied power to reopen or revoke a decision which has been made, as in the scheme of migration review, the tribunal may not purport to exercise such power. Regrettably we live in a very imperfect world. It is likely for this reason that the appeal to the High Court in *Bhardwaj* will be successful.