

THE ROLE OF JUDICIAL REVIEW IN AUSTRALIAN ADMINISTRATIVE LAW

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This address broadly covers trends in judicial review of administrative action in Australia. I will elaborate on concerns that I have expressed elsewhere concerning the direction taken by judicial review in Australia and its impact on public administration.¹ The topic is addressed in two stages: first, I outline some broad thematic concerns with judicial review trends; and secondly, I then undertake a more particular and critical analysis of aspects of administrative law doctrine. I trust that the second part of the address will illustrate and substantiate the points that are covered rather elliptically in the first part.

May I preface these remarks with an observation concerning the difficulty of undertaking administrative law analysis. Administrative law doctrine is an accumulation - a wilderness almost - of single instances, most cases turning ultimately on fine and often unique points of statutory interpretation or factual analysis. In the different arena of constitutional law one can often define trends by pointing to a few key decisions. That is rarely so in administrative law, where one is driven more commonly to making general observations and, in doing so, running the risk of over-generalisation and over-simplification.

Overarching Thematic Concerns

1 The standards for defining unlawful decision-making are increasingly more onerous, but at the same time more ambiguous and elastic

An apt example of this point is the obligation of a decision-maker to consider relevant matters, adorned as it now is by an expectation that the decision-maker will give "proper, genuine and realistic consideration" to all relevant matters, display an "active intellectual process" in considering those matters, and on occasions undertake a self-initiated inquiry into matters that are "credible, relevant and significant". The procedural demands imposed by the doctrine of natural justice have similarly become more elastic and uncertain, while at the same time becoming more onerous.

Uncertainty in the scope of legal standards has also crept in by the resurrection of orthodox administrative law concepts that are as likely to obscure as to illuminate what an administrator is required to do. In vogue is the judicial resurrection of prerogative writ concepts, such as "jurisdictional error", "jurisdictional fact" and "asking the wrong question". To add to the difficulty, it has been suggested in cases such as *Bateman's Bay Local Aboriginal v Aboriginal Community Benefit Fund*² that the operation of substantive

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¹ Eg, "Recent Themes in Judicial Review of Federal Executive Action" (1996) 24 *FL Rev* 347; "Federal Court v Minister for Immigration" (1999) 22 *AIAL Forum* 1. I have also addressed the other side of the coin, namely, executive misunderstanding of the requirements of administrative law – eg, "Law and Administration – Conflicting Values" (2000) *Canb Bulletin of Pub Admin* ; and a series of pamphlets on "Good Decision-Making for Government" published by Clayton Utz.

² (1998) 194 CLR 247.

requirements of administrative law can interact with and hinge on the equitable remedy chosen by the plaintiff to challenge the validity of a decision.

The broad concern I have with those trends is that not only do they involve constant movement of the goalposts for legal validity, but the posts are often hard to see through the mist. My present experience in legal practice is that, with the benefit of nearly thirty years experience in the field of administrative law, it is increasingly difficult to give definitive advice to a government agency as to whether a decision it has made and the process it has followed is lawful or unlawful. Another sign of the difficulty is the fact that nearly every major administrative law decision of the last two decades in Australia has involved a full bench or an appeal court reversing the decision of the court below. Understandably we would all entertain different views on the merits of decisions that are being reviewed, but if we lack common understanding as to what is lawful or unlawful, we place at risk other philosophical public law objectives deriving from the rule of law and the separation of powers.

2 The standards for measuring the validity of administrative decision-making should be based less on the lawyer's perspective as to what constitutes good decision-making, and should be more a blend of executive and legal practice

There are minimum standards that are expected of all decision-makers, whether in the judiciary or the executive – good faith and lack of bias are obvious examples. But equally there are important differences between the context for judicial adjudication and executive decision-making, as the High Court emphasised recently in *Minister for Immigration and Multicultural Affairs v Jia*.³ Standards for *lawful* decision-making necessarily play a role in defining what is *good* decision-making, but the latter concept should have room to move independently of legal prescription

My general concern is that there is a creeping tendency in administrative law for lawyers to reconstitute their own experience in the law as the legal standard for good administration, and to lay down criteria for administrative validity that are inappropriate in an executive context. An example I develop later in this address is the supposition, now entrenched in administrative law, that decision-making is discharged at the individual level rather than by collective or institutional process. Other tension points in administrative law – such as the scope of natural justice, the status that can be accorded to executive policy, and the operating procedures to be followed by public service promotion and disciplinary committees – are, in my view, less a dispute about fundamental standards of good administrative behaviour, and more a contest between competing legal and executive philosophies as to how decisions should be made.

3 A disproportionate importance is now ascribed to judicial review in establishing a framework of principles and procedures for administrative justice

A core objective of the administrative law reforms of the 1970s in Australia was the development of methods of administrative review that would be both a supplement and an alternative to judicial review, notably tribunals and Ombudsman. Those mechanisms were thereafter to play a major role in developing standards of administrative propriety and in delivering administrative justice.

This balance has been upset by a number of factors. I referred earlier to trends that have given undue emphasis to the judicial role, specifically the progressive judicial extension of the criteria for invalidity, including the revival of orthodox but imprecise legal concepts.

³ (2001) 178 ALR 421.

Another influential trend has been the domination of Australian administrative law by immigration litigation – a trend that has coloured the formulation of legal doctrine generally, at the same time creating a relationship between courts and tribunals that at times has pitted them almost as antagonists of each other. Numerous cases illustrate a judicial reluctance to accept the independent role and function of tribunals and Ombudsman. One such example is the High Court decision in *Craig v South Australia*,⁴ which draws a disparaging contrast between courts and tribunals. Of equal worry (if I may restate a criticism I have made elsewhere⁵) has been the raft of Federal Court decisions that subtly sent a message that tribunals are error prone, do not accord substantial justice, do not know how to write reasons, and are more susceptible than other adjudicators to actual bias. Doubtless it is true that administrators and tribunals commit errors that need to be corrected from time to time, but implicit in what I have said is a belief that Ombudsmen, tribunals and administrators generally achieve a higher standard of justice and good decision-making than is sometimes acknowledged.

4 There is an imbalance in the jurisprudence defining the legality/merits distinction in Australian administrative law

Nearly all discussion of Australian administrative law begins with the observation that it is firmly based on a legality/merits dichotomy. It has been described recently in an article by Justice Sackville⁶ as one of the twin pillars of Australian administrative law. Yet, if a dichotomy is to have practical or theoretical merit, it is important to understand the range of matters that lie distinctively in each component of the dichotomy, and how broad or narrow is the borderland between the two areas.

In Australian administrative law, nearly all discussion of the legality/merits distinction proceeds from the court-side of the equation - defining what comes within the concept of legality (rationality, illegality, proportionality, and so on) and where those notions begin and end as viewed from the courthouse. There is very little said about the values and aspects of administrative decision-making that are intrinsically the province of executive determination and re-evaluation by merit review processes – the room that must exist, for example, for unprovable skills such as executive sagacity, intuition and wisdom to play a part; for scepticism to be sustained, but within boundaries; for decision-making profiles to play a legitimate but restrained role; for tough decision-making to be undertaken; or for public policy objectives to imbue individual case management. Unless there is an understanding of the skill and insights that lie on either side of the legality/merits divide, the concept of legality will mean nothing as a limiting concept.

An example I will give later is that the statutory conferral of a function upon an officer such as a Minister is often viewed from the legality end of the dichotomy as a bestowal of significant legal obligations on the Minister. By contrast, from the executive citadel the conferral of the function could be viewed quite differently as a mechanism for drawing administrative decision-making into the arena of political accountability.

5 There is an insufficient recognition of the knock-on effects of a judicial finding of administrative invalidity

The ripple effect of a declaration of administrative invalidity can be marked, more so than the ripple effect of most private law decisions. There are particular incidents that illustrate this

⁴ (1995) 184 CLR 163.

⁵ "Commentary: Recent Developments in Refugee Law" (2000) 25 *AIAL Forum* 26.

⁶ "The Limits of Judicial Review of Executive Action – Some Comparisons Between Australia and the United States" (2000) *Federal Law Review* 315 at 316.

point – such as the Hindmarsh Bridge episode, and the suspension of many of the functions of the Superannuation Complaints Tribunal for roughly 18 months after the initial finding in *Wilkinson v CARE*⁷ (later reversed by the High Court) that the Tribunal was invalidly constituted. In less obvious ways, when the spectre of invalidity hangs tentatively over agency operations, one will observe executive agencies engaging in administrative second-guessing that is nervous, unproductive, sterile and wasteful. I see this particularly in relation to personnel management decisions proposing to discipline or take other adverse action against a non-performing employee: agencies sometimes become so fearful that the administrative action will be invalidated by a technical flaw that they make and re-make the decision, eventually reaching a point where the agency's focus on the employee looks from the outside to be an obsessive persecution of the employee.

The implication of this point is that there should in my view be a limited conception of the role that judicial review is expected to play in delivering administrative justice. The criteria for legal validity or invalidity should be developed with an air of restraint and not, as I think they increasingly are, as a remedy for perceived procedural unfairness. We should similarly be wary about travelling down the open path of allowing indistinct concepts such as rationality and proportionality to be the beacon lights of judicial review.

Particular Doctrinal Concerns

In this section I propose to offer a critical perspective on four aspects of administrative law doctrine. The purpose in doing so is twofold: to illustrate some of the overarching themes I have already touched on; and to examine areas where legal principle does not, in my view, adequately take account of executive practicalities. In each area of criticism I shall briefly outline an alternative approach, though I acknowledge that the issues run more deeply than an introductory presentation of this depth can illustrate and that reform is a more complex matter than simply waving the judicial wand.

1 Administrative law downplays too much the role that executive policy plays in good administration

One of administrative law's greatest successes has been the distinction it forged between legislation and administrative policy, a trend which in the modern era is traced to *Green v Daniels* (1977). I do not underestimate the importance of this success: it has driven home to administrators that they must consult the law, that they do not themselves make law, and that an open mind and a preparedness to look at the justice of the individual case are the hallmarks of good administration.

That said, I think the law goes too far at times in downplaying, even disparaging the role that executive policy plays in good administration. The law in this area is not, I acknowledge, single-tracked and my criticisms are directed at a doctrinal thread embodied in some but not all cases. They include the Full Court decision in *Howells v Nagrad Nominees Pty Ltd*,⁸ stating that an administrator, in deciding an individual case, must display always “a readiness to depart from policy”; *Sacharowitz v Minister for Immigration*⁹ (one of many similar immigration cases), holding that the departmental view that a discretion should be exercised favourably only if there were “compelling reasons” was an impermissible fetter on the statutory discretion; *Perder Investments Pty Ltd v Elmer*,¹⁰ in which a temporary freeze on fishing licences was likewise held to be an impermissible fetter; *Riddell v Secretary*,

⁷ (1998) 152 ALR 332; reversed *Attorney-General (Commonwealth) v Breckler* (1999) 163 ALR 576.

⁸ (1992) 43 ALR 283 at 307.

⁹ (1992) 33 FCR 480.

¹⁰ (1991) 31 FCR 201.

Department of Social Security,¹¹ holding that a Ministerial directive could not bind the Secretary, even though the directive had statutory backing, was tabled in Parliament as a disallowable instrument, and the statute declared the directives to be binding. I would criticise also the recent Full Court decision in the *Government Employees' Health Fund Ltd v Private Health Insurance Administration Council*,¹² holding that the Council, exercising a statutory power to make rules, could validly make a rule that confined a statutory discretion, but could not go the further mile of devising a policy to define prescriptively a term employed in the rule which the Council had itself just made.

My criticism of this line of judicial reasoning is twofold. First, I do not agree with it as the only feasible interpretation of the statute. The orthodox legal view is that if Parliament has by statute conferred a discretion, it is contradictory of Parliament's scheme for the Executive to introduce rigidity by forecasting when and how the discretion will be exercised. The alternative view to which I hold is that a major purpose of legislation is to establish a framework of rules, which are then filled up or elaborated by the policies of the elected government. To take a simple example, if a statute says "the Minister may deport a person who is unlawfully in Australia", it does not mean in my view that "a person unlawfully in the country has a conditional right to stay and the Minister must have an open mind about whether or not to deport any individual". Rather, it is quite consistent with that framework for the Minister to say, "the policy of my democratically elected government is that we will be deporting in the following three situations ...".

My second line of criticism is that orthodox legal principle understates the importance of directive policy to good administration. It is generally acknowledged that policies can provide guidance on how discretions should be exercised. Yet they do much more. They can elaborate government thinking, by forecasting in a public and accountable way the view of the government of the day as to how statutory discretions should be exercised for the time being. They provide decision-making models for dealing with commonly occurring facts. They draw a prior balance between competing interests, thus regarding justice as a distributive as much as a one-dimensional concept. They achieve coherency where otherwise there would be a world of individual bargaining and unguided decision-making. They also offer a rational basis for explaining to angry clients why harsh (but consistent) decisions have been made.

My view as to what the law should be saying in this area lies midway between the competing views I have outlined. The accommodation of law and policy should be reflected in three principles:

- It should not be unlawful for an administrator to give presumptive weight to or to automatically apply a government policy which specifies how a discretion should be exercised and which is intra vires the legislation that is being administered. The main proviso is that the executive policy should be clearly defined and have been adopted by a person such as the Minister or governing board that is linked to the chain of political accountability of the agency. By contrast, so-called policy which is nothing more than the temporary whim of an individual decision-maker should have no status beyond that of a relevant consideration. In effect, the Executive should have the option of attributing importance to policies by clearly spelling them out so that non-legal accountability mechanisms can come into play.

¹¹ (1993) 42 FCR 443.

¹² [2001] FCA 322.

- It would still be open to a court to examine whether an executive policy was *Wednesbury* unreasonable or irrational – for example, a policy which said that a discretion to issue licences or permits had been closed down indefinitely.
- If the discretionary decision in question is appellable to an administrative tribunal, the tribunal would have an independent duty, as explained in *Drake v Minister for Immigration*,¹³ to evaluate whether the application of the policy in any individual case resulted in a correct or preferable decision. It would similarly be open to an Ombudsman to recommend that a decision reached by the automatic application of an executive policy was wrong.

2 Many principles of administrative law are inappropriately based on the premise that decision-making should be an individual rather than an institutional process

There is a strong presumption in Australian law that an officer upon whom a function is conferred by statute has an independent and personal legal duty as decision-maker to consider all relevant matters, ensure that natural justice was observed, sign off personally on the decision, and so on.

Numerous decisions illustrate how strictly this concept of a decision-maker, as individual officer rather than institutional actor, is applied. They include *Re Reference under the Ombudsman Act*,¹⁴ holding that a decision was invalid because the decision-maker signed it “on behalf of” the statutory nominee rather than in his own name; *Din v Minister for Immigration*,¹⁵ declaring invalid some English language tests, because the Minister as the statutory nominee had not personally approved for second-round testing the test paper, or the time and place of testing; *Norvill v Chapman*,¹⁶ holding that the Minister for Aboriginal Affairs had to go further than merely adopting an independent inquiry report and had to display an active intellectual involvement in considering the 400 or so submissions and attachments. In a host of other instances decisions have been declared invalid because of a relatively technical flaw in an instrument of delegation or appointment.

It is undeniable that those rulings achieve some important public law goals. They give literal effect to the words in the statute that nominate who the decision-maker is. They identify a clear locus of responsibility and, correspondingly, a chain of accountability. They require management to turn its mind to the allocation of decision-making responsibility within the agency. They also make it more likely that relevant considerations, particularly the impact of decisions on individuals, will be taken into account.

Again, however, I think that other public sector goals are imperilled by a doctrinal view that is so strictly defined and applied. A hypothetical example will illustrate my concern. Many statutes nominate the Minister as the formal decision-maker for awarding financial grants for matters such as industry and educational research. Thousands of applications are received each year and then processed by specialist assessment panels and peer review boards. Their recommendations are formally adopted and signed (or “rubber stamped”) by the Minister. From a public policy perspective it would be undesirable for the Minister to be more actively involved, because of the fear that political bias and other irrelevant factors would intrude in the process. On the other hand, it is desirable that the Minister formally has the status of decision-maker and signs off, because that links the whole process to the arena of

¹³ (1979) 24 ALR 577.

¹⁴ (1979) 2 ALD 86.

¹⁵ (1997) 147 ALR 673.

¹⁶ (1995) 133 ALR 226.

public and political accountability: if there are complaints about the process the Minister has to do more than shrug the shoulders and say “it was a decision of an independent statutory body”.

The point to be drawn from that example is that our concept of how decisions should be made needs to be more sophisticated to take account of a greater range of factors than, I think, are presently reflected in legal doctrine. Again, without having the opportunity in this address to elaborate a comprehensive new theory, I would point to a few themes that are lacking at present:

- The central issue should be whether core administrative law obligations – such as observing natural justice, considering relevant matters, and implementing the statute – have been observed *within the agency* and as part of the decision-making process, rather than having been discharged personally by the statutory nominee.
- The statutory nomination of a Minister, Secretary or other agency head as the decision-maker should presumptively be an indication only of who has political and managerial responsibility for the function. A discharge of the decision-making function by another officer should ordinarily be acceptable, provided there is a clearly defined administrative structure for allocation of decision-making responsibilities, including procedures for internal or external review of decisions.
- Some categories of decision should nevertheless be made personally by the statutory nominee, the clear example being decisions that involve an exercise of the coercive or punitive powers of the state, such as search warrant powers and dismissal and revocation decisions.

I will finish this point by noting that the current rules, with their strict emphasis on decisions being made by properly-authorised individuals, produce some artificial legal conundrums that could be avoided if there was greater acceptance of an institutional concept of decision-making. For example, it is increasingly a problem, stemming from personnel mobility and other factors, that the actual decision-maker is not around at the time that a statement of reasons has to be written. Yet legal doctrine (and, to some extent, statutory procedures) require that the statement of reasons be prepared by the actual decision-maker on the assumption that that person alone is responsible for and has insight into the detail of the decision. The difficulty of the absent decision-maker could largely be avoided if it was accepted that decisions are frequently made by officers in an institutional role on behalf of their agency, and that the agency is as capable of constructing and signing off on a statement of reasons in the absence of the decision-maker on the record. (The practical reality, in any case, is that reasons statements are usually written after the event by someone else, often a person from the legal section.)

The complexities that can arise under present doctrine were similarly illustrated by the decision of the Federal Court in *Royal Queensland Aero Club v Civil Aviation Safety Authority*.¹⁷ The case dealt with the question of whether numerous pilot licences and flight ratings were invalid as a consequential result of a hiatus in the validity of the appointment of an approved testing officer. Had there been a differently-constructed framework of legal doctrine, it would have been much easier for CASA, as the regulatory agency and delegator, to take subsequent overriding action to correct a technical break in the chain of validity.

¹⁷ (2000) 99 FCR 301.

3 The concept of procedural fairness as a legal obligation has been extended too far and applied too rigorously

The history of Australian administrative law over the last decade has, as much as anything, been a history of the incremental extension of the doctrine of natural justice. A doctrine that, three decades ago, applied mostly to decisions that took away property, personal liberty or occupational licences, now pervades nearly all aspects of decision-making. And the forward march has not stopped.

A foundational case for contemporary doctrine was the 1985 decision of the High Court in *Kioa v West*,¹⁸ which illustrated both the breadth of interests that would henceforth attract a natural justice obligation, and the extent of disclosure that would be required to comply with that obligation. Since *Kioa*, many other decisions have shown just how demanding the obligation to comply with natural justice can be. *Haoucher v Minister for Immigration*¹⁹ effectively required that three hearings be given to the plaintiff – by the Department, the Administrative Appeals Tribunal, and then the Minister. *Minister for Immigration v Teoh*²⁰ placed a practical onus on the executive to assist a person to formulate their submission, by specifically inviting them to present argument addressed to compliance with an international convention standard of which the person was either unaware or had overlooked. Cases such as *Johns v Australian Securities Commission*,²¹ *Consolidated Press Holdings Ltd v Federal Commissioner of Taxation*²² and *Oates v Attorney-General (Cth)*²³ held that independent natural justice rights can arise at the earliest procedural stages of a process, before any substantive decision has been made. *Re Minister for Immigration; Ex parte Miah*²⁴ applied natural justice rigorously to a primary decision for which there was a full right of merit review by an administrative tribunal. *Pfizer Pty Ltd v Birkett*²⁵ held that natural justice rights arise at the application stage of a commercial accreditation process, requiring disclosure of information that was independently acquired by the decision-maker. A recent decision of the ACT Supreme Court in *MBA Land Holdings Pty Ltd v Gungahlin Development Authority*²⁶ held that the acceptance by a land development authority of an amended tender proposal constituted a breach of procedural fairness towards the other tenderer. Together, those and similar cases are steadily fulfilling the prediction of Mason CJ and Deane & McHugh JJ in *Annetts v McCann* (1990)²⁷ that procedural fairness should be recognised “as applying generally to governmental executive decision-making”.

My own view is that the concept of procedural fairness as a legal obligation has been extended too far; to regard it as a universal decision-making obligation would not, in my view, be the conceptually more satisfying position. To fashion the doctrine as a legal antidote for any perceived procedural unfairness overlooks too many other considerations. The reality is that there is procedural unfairness in most decision-making, sometimes unforgivably, but as often for reasons of practical judgment at the time, resource restrictions, administrative practicality, and the like. For instance, nearly every personnel selection or promotion committee on which I have ever sat has undertaken a frank evaluation of candidates, using

18 (1985) 159 CLR 550.

19 (1990) 169 CLR 648.

20 (1995) 183 CLR 273.

21 (1993) 178 CLR 408.

22 (1995) 129 ALR 443.

23 (1998) 156 ALR 1; appeal allowed on other grounds (1999) 164 ALR 393.

24 (2001) 179 ALR 238.

25 [2001] FCA 828.

26 [2000] ACTSC 89.

27 (1990) 170 CLR 596 at 598.

prejudicial information and ideas that are never known to the candidate. The procedural unfairness in that situation is frequently more serious than that which led to the decisions being declared invalid in *Kioa v West*²⁸ and *Re Refugee Tribunal; Ex parte Aala*.²⁹ And yet, it seems to me that most observers would balk at the consequences of so rigorously applying natural justice doctrine to all personnel selection and promotion procedures.

Lawyers need to acknowledge frankly that administrative law criteria cannot and should not address all instances or types of procedural unfairness. If we expect the law to perform that role, we broach all the dangers I referred to earlier – the introduction of uncertainty into decision-making, the imposition of legal cultural paradigms on executive processes, and the disregard of the knock-on effects and disruption caused by findings of legal invalidity. The harsh reality is that legal principle can play only a limited role in securing administrative justice. Greater reliance has to be placed on other aspects of the system of law and government, such as internal training, personal integrity, Ombudsman investigations, internal review, tribunal review, ministerial control, and public pressure.

4 The judicial discretion to refuse relief notwithstanding a breach of an administrative law ground of review should play a more active role in judicial review

It is an entrenched principle of Australian administrative law that relief should ordinarily be granted if a breach of a ground of review is established. The principle became firmly established in cases such as *Kioa v West*³⁰ and *Minister for Aboriginal Affairs v Peko-Wallsend Ltd*,³¹ and has prevailed ever since. It was reiterated recently and firmly in *Re Refugee Tribunal; Ex parte Aala*,³² the majority of the High Court (Justice McHugh dissenting) expressing the view that every breach of natural justice should lead to a decision being overturned, unless the breach is insignificant and the result would inevitably have been the same. This parallels the view earlier taken in *Peko-Wallsend*, that a breach of the relevant/irrelevant consideration rules should result in a new decision being made unless the consideration that was considered or overlooked was insignificant or insubstantial.

The first observation to make about this thread of principle is that it does not emanate textually from the scheme for judicial review codified in the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (or the State equivalents). Indeed, the ADJR Act arguably points in an opposing direction. The Act says no more than that a person can seek an order of review if there is a breach of one of the criteria listed in s 5 of the Act, with s 16 then conferring a general discretion on the Court as to the granting of relief. Importantly, s 5 does not explicitly say – as it is sometimes assumed or represented as saying – that a decision-maker who is in breach of a criterion in s 5 is assumed to have acted invalidly. A tenable construction of the ADJR Act is that s 5 outlines the first step to be taken by a person in establishing that there has been unlawful conduct of a kind that entitles the person to seek an order of review from the Court.

The power vested in courts to grant relief on a discretionary basis provides the courts with the opportunity to take appropriate account of the practical context for administrative decision-making, importantly the individual skill level of administrators and the resource constraints that often necessitate a streamlined decision-making process in which time for inquiry and reflection can be a scarce commodity. Courts have often observed that

28 (1985) 159 CLR 550.

29 (2000) 176 ALR 219.

30 (1985) 159 CLR 550.

31 (1986) 162 24.

32 (2000) 176 ALR 219.

administrative practicalities are irrelevant to any determination as to whether, for example, a decision-maker failed to consider a relevant matter or failed to undertake a proper natural justice hearing. Accepting that to be the case, the practical and resource dimension could nevertheless be relevant to the grant of discretionary relief, if the probable outcome is relatively clear and the merits have been substantially considered by the decision-maker.

It is my view that discretion should have played a more significant role in the grant or refusal of relief by the Federal Court in its immigration review jurisdiction (though I note that there has been a refusal of relief on discretionary grounds in some recent cases – for example, *Paul v Minister for Immigration*³³). The legal defect that was exposed in many of the immigration cases was the omission of a “material fact” or the reliance on a disproved factual assumption in the reasons for decision of an administrator or tribunal. In many such cases the mistake may have been a product of the lack of formal legal training of the decision-maker, or of the contextual difficulty faced by the decision-maker in not being able to spell out in writing why assertions of fact by a claimant either were not accepted or were not decisive. At any rate, if one stood back from the situation and took account fully of the steps taken in the decision-making process and the justification given by the decision-maker for the final decision, it was hard to see in many cases that the mistake in the statement of reasons had the significance that a finding of invalidity presupposed.

I am not suggesting that defective decision-making can be justified on the basis that it was the best that could be expected in the circumstances. Nor am I suggesting that “near enough is good enough” should be the prevailing standard. I simply reiterate the point that administrative law, by paying more regard to the context for executive decision-making and to the disruptive consequences of a finding of invalidity, should undertake a more pragmatic assessment of the significance of a legal error. The prevailing notion that the entire administrative process should be restarted merely because a question mark has been introduced by one mistake in the process or in the reasoning is unbalanced. The *Aala* case is an interesting case in point. Prior to the High Court’s decision, Mr Aala’s case had been heard twice by the Refugee Review Tribunal, his application being rejected both times. The error which caused the High Court to grant relief and to order a new hearing before the RRT stemmed from the failure of the Tribunal in the second hearing to consider a supplementary submission by Mr Aala which some judges noted was unsworn, irrelevant in part and of uncertain evidentiary value. Mr Aala’s case has since been back to the RRT, where his application has now been rejected for the third time.

Conclusion

I will draw the threads of this together. I have given examples of legal principles that in my view promote an inappropriate and unrealistic model for administrative decision-making. That is not to condemn all or even a majority of judicial decisions, most of which collectively contribute to a system of law and government that appropriately demands high standards of the administration and, appropriately too, embodies a sensitivity to the rights of individuals that is laudable.

That said, I do think that there are deep-seated issues that need to be addressed. While society rightly expects increasingly higher standards of decision-making in government, that should not necessarily mean a corresponding elevation in legal standards or in the role of courts. To expect the law to provide a guarantee that a wrong or inappropriate decision was not made with the bureaucracy is to expect too much of the law. To secure the promise of higher standards we must rely principally on other mechanisms, such as the Public Service Commission, the Ombudsman, tribunals, parliamentary committees, and democratic control.

³³ [2001] FCA 1196; see also *Minister for Immigration v Al Sham* [2001] FCA 919.

I will end with two examples to illustrate this point. The first concerns the recent Presidential election in the United States that was beset with electoral counting problems in Florida. One school of legal thought, which held sway in the early stages of the dispute, was that every individual who had a legal right to vote had a correlative right to ensure by legal process that that vote was counted correctly. The logical and practical ramifications of that individual right/individual justice theory soon became apparent: as the majority of the Supreme Court realised, unless there was a judicial back-off an electoral result would never be declared. Legal claims had to accommodate other practicalities.

The same principle perforce governs the area of administrative decision-making in which I am mostly involved as an academic, namely, assessment of student essays and exams. The decisions that I and colleagues make have a dramatic effect on the interests, expectations and careers of students. The individual decisions that academics routinely make on the assessment of student papers would, in many instances, be questionable on standard administrative law grounds. Nor do I have any doubt that administrative law review of individual assessment decisions would bring some needed improvements to the assessment process. Yet to travel too far down that path, and to give singular importance to the administrative law rights of any aggrieved student, would inevitably distort the overall assessment process and unfairly advantage some students over others on grounds that would have less rational or objective appeal. For better or worse, the major procedural and legal guarantees for students have to rest on the appointment of skilled staff, the introduction of procedures for monitoring assessment patterns, and the creation of grievance procedures for students. Rights have to be secured in the system overall, not by objective proof of the integrity of individual decisions made within that system. The same lesson should apply to most other areas of decision-making.