

DON'T THINK TWICE? CAN ADMINISTRATIVE DECISION MAKERS¹ CHANGE THEIR MIND?

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Introduction

Can administrative decision makers vary or revoke a decision they have made? This is a question of some significance to many administrators. It is a question that has traditionally received little judicial or academic attention, but has recently been the subject of a High Court decision, in *Minister for Immigration and Multicultural Affairs v Bhardwaj*,² a number of Federal Court decisions,³ and a range of broader discussion.⁴ As many of these cases and articles recognise, it is a question which appears to have a practical focus, but in fact leads to some of the most basic questions in public law.

Decision makers may wish to revoke or vary their decision in a range of circumstances. These can include:

- where the document recording or communicating the decision contains clerical errors, or other accidental errors or omissions;
- where the decision has been procured by fraud or misrepresentation;
- where the decision maker realises they have made a significant legal error;
- where it is based on mistaken facts, new facts have come to light or the circumstances of the person affected by the decision have changed;
- where there has been a change in law or policy or the decision maker's interpretation of that law or policy;
- where the decision has been criticised because it is seen to be inconsistent with other decisions in similar cases or for other reasons; or
- where the decision maker thinks that it was simply not the right decision, and wants to make it again.

The issue as to whether the decision should be reconsidered may arise on the motion of the decision maker, or be prompted by a complaint of the person affected by the initial

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determination.⁵ The reconsideration may be with the agreement of the person affected, or in the face of their objection. The reconsideration might improve the position of the person affected, by reconsidering a benefit denied or detriment imposed, or worsen their position, by reconsidering a benefit granted or detriment not imposed. The decision and reconsideration may affect no-one, or only one person or a range of persons.

The issue of reconsideration can arise therefore for a range of reasons, and in a range of circumstances. This paper looks at the various questions which a Commonwealth decision maker needs to ask in order to decide whether they can vary or revoke their decision.

1 Has a decision been made? The first part of this paper considers the question of when a decision becomes operative.

2 Can the decision be treated as invalid, and made again? The paper then looks at the effect of invalid decisions, and whether and on what terms a decision maker can ignore a decision and make it again. This is the issue which was recently considered by the High Court in *Bhardwaj*.

3 Is there an express statutory power to vary or revoke in the statute, and if so how can that power be exercised? Is there an implied power to vary or revoke in the statute, or do subsections 33(1) and 33(3) of the *Acts Interpretation Act 1901*(Cth) provide the power to do so. The next part of the paper discusses how general principles of statutory interpretation affect the existence and extent of a power to vary or revoke. We ask what are the factors which suggest an implied power, or rebut the presumptions in subsections 33(1) and (3) of the *Acts Interpretation Act*?

4 Is the decision maker estopped from exercising a power to vary or revoke? Finally, the paper briefly notes the relevance of whether the remedy of estoppel is available, in public law, to prevent the exercise of a power to revoke or vary.

Underlying issues

A number of underlying tensions run through this area of law, and give rise to difficult issues. It is useful to introduce these in a general non-technical way.

Flexibility v finality

The principles of administrative law should promote “good” decisions. There will be a range of views as to what this means, but it clearly involves considered, rational, fair decisions. The easy ability to reconsider a decision can promote such good decisions. Decision makers, at least on occasions, make decisions which could have been more considered, or more rational, or fairer. To allow them to return to the decision and improve it can mean a better decision. It can also avoid the expense and effort of review mechanisms.⁶ But “good decisions” are also those which are certain and timely. The easy ability to reconsider a decision can result in significant uncertainty as to the legal position; decisions may be seen as simply provisional, since they may be subject to change; and the final decision may be delayed. A significant tension arises from the fact that whilst flexibility may promote better decisions, finality promotes certainty and timeliness.

Judicial v administrative

A second issue is whether administrative decisions should be treated in the same way as judicial decisions, or differently. The Australian Constitution enshrines a strict separation between judicial decision making and administrative decision making. This suggests that judicial decisions and administrative decisions are fundamentally different. But in many cases the principles which the courts apply in reviewing administrative decisions are derived from judicial decision making; a prime example of this is the rules of procedural fairness which are

derived from the conduct of judicial proceedings, but then applied, at times quite stringently, to administrative proceedings. An underlying issue in this area is in what respects should the legal principles for administrative decisions follow those for judicial decisions, and in what respects should they be different.

Invalidity v other remedies

A third issue concerns the appropriate result of legal error in administrative decision making. Is invalidity generally the most appropriate result and remedy? And when we talk of invalidity, what do we mean? Given that administrative decisions are generally made under power derived from the Constitution, or legislation made under the Constitution, it is easy to assume perhaps too quickly that error means invalidity. The increasing emphasis by Australian courts on the concept of jurisdictional error has further entrenched this thinking, as we shall see. But the *Administrative Decisions (Judicial Review) Act 1977* (Cth) provided for a broader range of remedies for good public policy reasons. There is a significant question of legal policy in relation to administrative decisions as to whether invalidity should be the primary remedy for illegality.⁷

We return to these broader issues throughout the paper.

Functus officio

An important comment needs to be made about the term *functus officio*. The question of whether a decision maker can vary or revoke their decision is sometimes described as determining whether or not the decision maker is *functus officio*.

The concept of *functus officio* has its origin in the judicial system, where once the formal judgment of a court has been passed and entered, it cannot be reopened. This is subject to a court's inherent power to prevent injustice and to correct clerical errors, as well as the existence of any statutory powers to re-open.⁸ The concept of *functus officio* in this judicial context can refer to the principle that courts generally cannot reopen their decisions and to the conclusion reached by the application of the principle.

The concept of *functus officio* has been used in relation to administrative decision-making. It is sometimes suggested that this means that there is a principle, or presumption, that once an administrative decision is made it cannot be reopened, varied or revoked. There may once have been relevant common law presumptions⁹ but in our view, there is generally no such overarching principle. Rather in each case it is necessary to consider what the powers of the decision maker are in this regard. This generally requires the application of administrative law and statutory interpretation principles.

As we discuss below, the High Court in *Bhardwaj* has rejected any blanket principle that once a power to make an administrative decision is purportedly exercised it is necessarily spent. That is the Court rejected a principle of *functus officio*, analogous to that for courts, in relation to administrative decisions. Further, Chief Justice Gleeson in *Bhardwaj* formulated the basic legal issue in relation to whether a decision maker has a power to vary or revoke in a broad manner, which focussed on statutory power¹⁰:

The question is whether the statute pursuant to which the decision maker was acting manifests an intention to permit or prohibit reconsideration in the circumstances that have arisen.

This statement is in line with the weight of Federal Court thinking, in a range of contexts. Justice Gummow in *Minister for Immigration, Local Government and Ethnic Affairs v. Kurtovic*¹¹ stated:

The matter is one of interpretation of the statute conferring the particular power in issue.

Justice French similarly stated in *Sloane v Minister for Immigration, Local Government and Ethnic Affairs*¹²:

... reconsideration of a statutory decision may itself be a course contemplated or authorised by the statute. The question is one of statutory construction.

Justice Goldberg J stated in *Jayasinghe v Minister for Immigration and Multicultural Affairs*,¹³ that the doctrine of *functus officio*:

... is a description or consequence of the performance of a function having regard to the statutory power or obligation to perform that function. The effect of the application of the doctrine is that, once the statutory function is performed, there is no further function for the person authorised under the statute to perform.

Whilst Justice Goldberg uses the term doctrine, it is clear that he is referring to the result of a finding that a decision maker does not have a power to revoke based on a consideration of the statutory power.

In our view these comments suggest that the central task in each case is to interpret the extent of the statutory power conferred on the administrator to determine whether this includes a power to vary or revoke. Such an analysis will reveal that in some cases a decision maker cannot vary or revoke, and is in that sense *functus officio*. The concept is useful in this context. But in our view in relation to administrative decisions the concept of *functus officio* is a conclusion; not a principle or presumption to be applied in order to reach a conclusion.

1 Has a decision been made?

When a decision is provisional, or better characterised as conduct leading to a decision, it has not yet been perfected. In such a case, it is still open to the decision maker to reconsider the issue, whether or not a power to revoke or vary an actual decision exists.¹⁴ This is because in such circumstances the decision is unperfected and not yet operational.

What is required to perfect a decision will depend on the terms of the relevant statute.¹⁵ This was discussed by Finn J in *Semunigus v The Minister for Immigration and Multicultural Affairs*.¹⁶

The making of a decision involves both reaching a conclusion on a matter as a result of a mental process having been engaged in and translating that conclusion into a decision by an overt act of such character as, in the circumstances, gives finality to the conclusion - as precludes the conclusion being revisited by the decision maker at his or her option before the decision is to be regarded as final.

What constitutes such an act can obviously vary with the setting in which the decision is made: it may be no more than a written notation of a conclusion on a departmental file; it may be publication of the conclusion in a particular forum, or communication of it to another; it may be performing a consequential or collateral act that presupposes the decision having been made, etc.

The proceedings in issue involved a decision by a Member of the Refugee Review Tribunal to deny a protection visa. It was contested on the basis that the Member had failed to consider additional submissions after he had forwarded reasons for his decision to the registry for

recording and dissemination. Spender J in the Full Court of the Federal Court was of the opinion that:

had the Member wanted to recall his signed decision, because for example, he had changed his mind or had realised that he had made a mistake, he would have been able to retrieve the decision at any time prior to a copy of it having been sent to either the Minister or the applicant as then required by s430(2) of the *Migration Act 1958* (Cth).¹⁷

Madgwick J on the other hand held that only communication to the applicant was relevant to perfection because, in the context of an appeal to the Refugee Review Tribunal, the applicant was the only party.¹⁸

In this case, the disagreement did not need to be resolved, because the Full Court held that, under the *Migration Act 1958* (Cth), the Federal Court did not have jurisdiction to consider applications alleging a breach of natural justice. However, the case indicates that where express provision is not made in the relevant legislation, the question of when a decision is perfected can be contentious.

Nonetheless a decision will generally be perfected where it is communicated to the affected person, either orally or in writing, and in a manner that indicates that the decision is not merely provisional.¹⁹ Until then the decision maker will be able to change their mind.

2. Can the decision be treated as invalid?

What if the decision is invalid? Can the decision maker just ignore it and make it again? Of course where the decision is subject to judicial review, or some form of administrative review, the decision maker is subject to the jurisdiction of the review court or other body; if the court or other body sets aside the decision and orders the decision maker to make it again, the decision maker must do so. The difficult legal issue is whether a decision maker can simply treat a decision as invalid and make it again without direction from a review court or other body. The recent decision of the High Court in *Bhardwaj* is directly relevant to this issue.

Before *Bhardwaj* this question had been one of considerable controversy. In *Bhardwaj* Justice Kirby noted that the debate about invalidity of administrative decisions “presents one of the most vexing puzzles in administrative law. Principle seems to pull one way. Practicalities seem to pull in the opposite direction”.²⁰ There were in fact a number of different approaches to the question of whether a decision maker could simply treat a decision as invalid and make it again without direction from a court or other body. We outline these in a very general manner.

Absolute invalidity

The first approach follows from the concept of absolute or objective invalidity, which is the view that if a decision maker acts outside their jurisdiction, the decision is invalid from that time and for all purposes. Importantly, in this context, there is no need to have a court determine this issue. This approach pays significant deference to the principle of legality by allowing the decision maker, and others affected by a decision infected by jurisdictional error, to ignore it.²¹

An important statement of the approach of absolute invalidity was made by Dixon J in *Posner v Collector for Interstate Destitute Persons*:²²

It must be borne in mind that, when a party is entitled as of right upon a proper proceeding to have an order set aside or quashed, he may safely ignore it, at all events, for most purposes. It is, accordingly, natural to speak of it as a nullity, whether it is void or voidable, and, indeed, it appears almost customary to do so. ...

When there has been a failure of the due process of law at the making of an order, to describe it as void is not unnatural. But what has been said will show that, except when upon its face an order is bad or unlawful, it is only as a result of the construction placed upon a statute that the order can be considered so entirely and absolutely devoid of legal effect for every purpose as to be described naturally as a nullity. Modern legislation does not favour the invalidation of orders of magistrates or other inferior judicial tribunals and the tendency is rather to sustain the authority of the orders until they are set aside and not to construe statutory provisions as meaning that orders can be attacked collaterally or ignored as ineffectual, if the directions of the statute have not been pursued with exactness.

This case concerned the status of an order made by a court of summary jurisdiction in Perth against Mr Posner, in proceedings based on that order in Victoria. Mr Posner apparently had no notice of the proceedings in Perth, and raised this in the Victorian proceedings. Dixon J approached the matter on the basis that the Perth order appeared upon its face to be regularly made.²³ He considered that the question whether the Perth order was “completely void” depended on the legislation under which it was made.

A few points can be noted. First, Dixon J linked treatment of a decision as invalid to the availability of proceedings; the order can be treated as “void” if the party is entitled to have it set aside. We return below to the relationship between the availability of judicial review and the ability to treat a decision as invalid. But we note that some formulations of the absolute invalidity theory suggest that the ability to treat a decision as invalid is unrelated to the availability of judicial review.²⁴

Second, Dixon J drew a distinction between an order bad or unlawful upon its face, and one bad on further investigation, in particular “as a result of construction placed upon a statute”. This appears to be a distinction between obvious or patent error, and latent error, and a suggestion that some latent legal errors may allow a decision to be ignored, but others may not. This is an issue to which we return below.

Third, Dixon J appears to suggest that the ability to treat an order as invalid and ignore it, and its susceptibility to collateral challenge, go hand in hand. Collateral challenge generally means a challenge that occurs in proceedings where the validity of the administrative act is merely an incident in determining other issues.²⁵ Interestingly, Dixon J notes the modern tendency to sustain the authority of orders, that is to presume them to be valid, rather than to jump too quickly to a position of absolute invalidity, with its related liability to both collateral attack and to being ignored as ineffectual. This may simply be a recognition of the ability of legislation to be directory, and not mandatory, in its requirements; but in its terms it is also a recognition of a move away from the absolute theory of invalidity.

Fourth, we also need to note the decision of the Court in *Posner*. Dixon J held that the structure and arrangement of the relevant legislation did not support the conclusion that non-service rendered an order “absolutely void”.²⁶ Rather, in effect, the Perth court had jurisdiction to decide the matter. A majority of the High Court agreed that the non-service had not rendered the Perth order void. Thus although the comments we have noted by Dixon J are often used to support the absolute invalidity position, the reasoning and result in *Posner* reflects many of the complexities involved in the issue.

The absolute invalidity approach has received recent judicial support from McHugh J in *Ousley v R*²⁷ and Finkelstein J in *Leung*.²⁸ In the latter case, Finkelstein J, with whom Beaumont J concurred, held that a decision, tainted by jurisdictional error, fraud or misrepresentation, does not in fact have the character of a decision and can simply be ignored.²⁹ It does not have to be revoked because it is a nullity, and it does not require a judicial determination that it is a nullity.

The absolute invalidity approach also has support from some commentators.³⁰

Relative invalidity

The alternative approach is that there is no such thing as absolute invalidity; decisions are only invalid if a court determines that they are invalid. This position is often articulated as a presumption of validity for administrative decisions. It may have its source in separation of powers principles, under which, in Australia, courts have the exclusive role of conclusively determining the rights and liabilities of individuals in their disputes with the state.³¹

A leading statement of the relative or subjective view of invalidity is by Aickin J in *Forbes v New South Wales Trotting Club Ltd*.³²

That which is done without compliance with applicable principles of natural justice, in circumstances where the relevant authority is obliged to comply with such principles, is not to be regarded as void ab initio so that what purports to be an act done is totally ineffective for all purposes. Such an act is valid and operative unless and until duly challenged but upon such challenge being upheld it is void, not merely from the time of a decision to that effect by a court, but from its inception. Thus, though it is merely voidable, when it is declared to be contrary to natural justice the consequence is that it is deemed to have been void ab initio.

This view has received much modern judicial support,³³ and was accepted by Gummow J in the recent decision of *Ousley v The Queen*.³⁴ Justice Wilcox stated most forcefully in *R v Balfour; ex parte Parkes Rural Distributions Pty Ltd*.³⁵

Although this was not so clear in earlier times, it is now accepted that, however apparent the defect may be, an administrative decision remains good in law unless and until it is declared to be invalid by a court of competent jurisdiction.

It also has much support amongst commentators.³⁶

The relative view of invalidity appears more suited to a system of administrative law where judicial remedies are discretionary.³⁷ Professor Wade has argued that the concept of a void decision has always been relative:

Unless the validity of the action is challenged within the time allowed by law and by someone entitled by law [and unless the court in its discretion grants a remedy], it will have to be accepted as valid not only by those affected but by the rest of the world also.³⁸

Alan Robertson has recently noted³⁹ that there are a range of discretionary considerations in relation to judicial review: bad faith or other blameworthy conduct, delay, waiver, relying on one's own error, lack of standing, futility, mootness, fragmentation of civil or criminal processes, immateriality of the error of law, adverse effect on third parties, and the public interest in good administration. That any of these factors may lead a court to decline relief notwithstanding error undermines any absolute view of invalidity, unrelated to a judicial determination.

The reforms of the *Administrative Decisions (Judicial Review) Act* seemed to be moving in the direction of relative invalidity. Section 16 sets out the orders which a court may make. This includes:

(a) an order quashing or setting aside the decision, or a part of the decision, with effect from the date of the order or from such earlier or later date as the court specifies;

When a court sets aside a decision, the default position is that it is from the time of the order of the court, not from the time the decision was made. This suggests relative invalidity, not absolute invalidity. Further, the section provides for a range of non-invalidating remedies. In addition, s10 of the ADJR Act provides the court with a discretion to refuse an application if adequate provision is made for review by another court, tribunal, authority or person.

A middle position

But whilst most judges and commentators begin at one end of the spectrum, they are often forced by practical realities to move towards the middle. There is a need to balance the insights of one position, with those of the other; to balance the presumption of validity with underlying legality; to accommodate the fact that all decisions have effect for some purposes, but that some decisions are blatantly beyond power.

Even those who would start from the relative view of invalidity differentiate within the sphere of jurisdictional error between those decisions that are patently invalid and those that are latently invalid.⁴⁰ The presumption of validity then applies to decisions that are latently invalid, while decisions that are patently invalid are treated as nullities from their inception. Even Professor Wade, a staunch relativist, seemed to acknowledge such a category when he stated⁴¹:

If the Eastbourne Watch Committee purported to dismiss the Brighton Chief Constable, or if the Indian Minister purported to dissolve the Jaffna Municipal Council, the Brighton Watch Committee and the Sinhalese Minister of Local Government would respectively take no notice. Since the authors of these decisions would have no physical power to carry them out, no legal consequences would be produced.

This position has some support in New Zealand cases, such as *AJ Burr Ltd v Blenheim Borough Council*⁴² where Cooke J stated that except in cases of “flagrant invalidity”, a decision is generally recognised as operative until set aside.

Similarly, those who begin with the absolute view of invalidity are forced to note that objectively invalid decisions are operative for some purposes. Justice Finkelstein, apparently an absolutist, nevertheless stated in *Leung*:⁴³

There is no doubt that an invalid administrative decision can have operational effect. For example it may be necessary to treat an invalid administrative decision as valid because no person seeks to have it set aside or ignored. The consequence may be the same if a court has refused to declare an administrative decision to be invalid for discretionary reasons.

This debate looks esoteric. But it can have significant practical ramifications, in particular in relation to revocation of decisions. Can a decision maker who has made an error, in particular a jurisdictional error, simply ignore the decision and make it again? Or do they need to await a judicial determination of invalidity before they can act?

The decision in *Bhardwaj* dealt with this issue.

Bhardwaj

Mr Bhardwaj's student visa was cancelled by a delegate of the Minister for Immigration and Multicultural Affairs under the *Migration Act*. He applied for review of that decision by the Immigration Review Tribunal. The Tribunal invited him to attend a hearing on 15 September

1998. Late on 14 September 1998 the Tribunal received a letter from the Mr Bhardwaj's agent requesting an adjournment of the hearing on the ground that he was ill. That letter did not come to the attention of the member of the Tribunal to whom the review had been assigned, and on 16 September 1998 the Tribunal affirmed the cancellation decision (the September decision). The Tribunal communicated its decision to Mr Bhardwaj and his agent the next day. His agent drew the attention of the Tribunal to the letter requesting an adjournment, after which a new hearing was arranged, at which Mr Bhardwaj presented evidence. On 22 October 1998 the Tribunal revoked the cancellation decision and published a new decision (the October decision).

The Minister applied to have the October decision set aside by the Federal Court under Part 8 of the *Migration Act* on the basis that the Tribunal had no power to review the cancellation decision after making the September decision. That application was dismissed by a single judge⁴⁴ and by a majority of the Full Court of the Federal Court on appeal.⁴⁵ The matter came before the High Court after the Minister was granted special leave to appeal.

The issue was whether the Tribunal was able to reconsider Mr Bhardwaj's review application and make the October decision, in particular in light of the statutory scheme in the *Migration Act*.

Part 5 of the *Migration Act* concerned review by the Tribunal. Unless the Tribunal made a decision on the papers favourable to the respondent, s360 required the Tribunal to give the respondent an opportunity to appear before it and give evidence and present arguments. Sections 367 and 368 made provision in relation to the Tribunal's "decision on review", in particular specifying how the Tribunal was to record the reasons for its decision. Part 8 of the Act provided for review by the Federal Court of various decisions, including decisions of the Tribunal, to the exclusion of most other jurisdiction of that Court (s485). Review under Part 8 was on limited grounds, so that, for example, breach of the rules of natural justice was not a ground of review (s476(2)(a)). Applications for review under Part 8 were strictly required to be made within 28 days (s478).

The Minister argued that the statutory scheme for review of decisions under Parts 5 and 8 of the Act then in force manifested an intention to preclude the reconsideration undertaken by the Tribunal, and that this was a contrary indication for the purposes of s33(1) of the *Acts Interpretation Act*. The Minister accepted that the Tribunal had denied Mr Bhardwaj an opportunity to answer the case against him, but considered that Mr Bhardwaj's only remedy was to challenge the September decision before a court.

Mr Bhardwaj argued that it was consistent with general principles relating to administrative decisions reached in breach of the rules of natural justice for the Tribunal to reconsider the September decision, and that the September decision was not a "decision on review" for the purposes of ss367 and 368 of the *Migration Act* and therefore had no legal effect.

Majority reasoning

By a 6-1 majority (Kirby J dissenting), the High Court dismissed the Minister's appeal.⁴⁶ The majority judges all held that the Act permitted the action taken by the Tribunal in making the October decision. All the majority judges held that the Tribunal had failed to discharge its statutory function in making the September decision, such that the Tribunal's review function remained unperformed. The Court held that nothing in the Act or the principles of administrative law required that a purported decision involving such an error should be treated as valid unless and until set aside by a court. Thus it was open to the Tribunal to reconsider the matter and make the October decision.

The finding of the majority of the High Court apparently places it well within the absolute invalidity school, the first position which we discussed above. The Court held that it was open to the Tribunal, indeed that it was the duty of the Tribunal, to treat the September decision as invalid and to remake it properly. Justices Gaudron and Gummow stated:⁴⁷

There is, in our view, no reason in principle why the general law should treat administrative decisions involving jurisdictional error as binding or having legal effect unless and until set aside. A decision that involves jurisdictional error is a decision that lacks legal foundation and is properly regarded, in law, as no decision at all. Further, there is a certain illogicality in the notion that, although a decision involves jurisdictional error, the law requires that, until the decision is set aside, the rights of the individual to whom the decision relates are or, perhaps, are deemed to be, other than as recognised by the law that will be applied if and when the decision is challenged. A fortiori in a case in which the decision in question exceeds constitutional power or infringes a constitutional prohibition.

Justice McHugh generally agreed with the judgment of Gaudron and Gummow JJ. Justice Hayne eschewed the doctrine of “absolute nullity”, but similarly found that the Tribunal was able to ignore the September decision, notwithstanding that no court had set it aside, and make its October decision. Chief Justice Gleeson in a separate judgment held that the Tribunal in its September decision had failed to implement its own intention, to comply with the statutory requirements and to fulfil its statutory function; it was therefore able to make its October decision. Justice Callinan, also in a separate judgment, held that the Tribunal had failed to exercise its jurisdiction in its September decision, and it was therefore able to do so in its October decision.

The difficulty of the decision lies in establishing the preconditions for such action by decision makers. On one view the Court was simply responding to the blatant error of the Tribunal in failing to provide procedural fairness in relation to its September decision. If so, the principles enunciated in the case may be limited to similar circumstances of such blatant errors, and have no more general application. But members of the Court do, to varying degrees, discuss the case on the basis of broader principles, and in particular the contest between absolute and relative invalidity. The general utility of the case rests on identifying such broader principles, and in particular the necessary preconditions for the ability to ignore an administrative decision. In our view, an analysis of these preconditions goes some way to whittling away the apparent strong support for the absolute invalidity position.

Nature of the error

The Tribunal's error was characterised differently by the members of the Court.

Chief Justice Gleeson saw it not just as a denial of procedural fairness, that is a jurisdictional error, but as a failure to conduct a review of the decision:

In the present case there was a denial of procedural fairness; but there was more to it than that. There was an error of the kind described as “error in fact” in the context of proceedings by writ of error: the non-fulfilment or non-performance of a condition precedent to regularity of adjudication such as would ordinarily induce a tribunal “to stay its hand if it had knowledge, or to re-open its judgment had it the power.”⁴⁸

Justice Callinan held that the September decision was bad in a “jurisdictional sense”; it was something more than a breach of the rules of natural justice, it was a failure to exercise a jurisdiction which it was bound to exercise.⁴⁹

The remaining majority Justices characterised the Tribunal's error as a jurisdictional error, or at least regarded a jurisdictional error as sufficient to enable a decision maker to ignore the decision. Gaudron and Gummow JJ stated:⁵⁰

To say that the September decision was not a "decision on review" for the purposes of ss 367 and 368 of the Act is simply to say that it clearly involved a failure to exercise jurisdiction, and not merely jurisdictional error constituted by the denial of procedural fairness. Either of these grounds would entitle Mr Bhardwaj to have the September decision quashed by this Court as an incident of relief by way of mandamus or prohibition under s 75(v) of the Constitution. This notwithstanding, the question whether the Tribunal could disregard its September decision depends on the scheme of Pts 5 and 8 of the Act.

In essence, the Tribunal had denied Mr Bhardwaj something the Act required him to be given, namely an opportunity to answer the case against him.

Justice Hayne characterised the error as a jurisdictional error; what the Tribunal did did not constitute performance of its duty under the Act.⁵¹ As Justice McHugh agreed with the judgment of Gaudron and Gummow JJ, this provides a majority of four Justices for the view that jurisdictional error is sufficient to enable the decision to be ignored.

Mr Bhardwaj had put his case in part on the basis that as a general rule, an administrative tribunal may cure a breach of natural justice by subsequently providing a proper hearing to the person thereby affected.⁵² Gaudron and Gummow JJ, with whom McHugh J generally agreed, and Hayne J did not limit their reasoning to natural justice. Rather they based their reasoning on the existence of jurisdictional error, not limited to procedural unfairness.

This approach builds on the distinction between jurisdictional error, which involves an administrative body acting in excess of its powers, and non-jurisdictional error, where the body has acted within power but has made an error of law. This is a distinction which has all but disappeared in England. But it is a distinction which has been articulated and emphasized by the High Court, most notably in *Craig v South Australia*.⁵³ An administrative decision maker will make a jurisdictional error where they act in bad faith or beyond power, fail to accord natural justice, misconstrue the statute or a jurisdictional fact, fail to take into account a relevant matter or rely on an extraneous consideration.⁵⁴ This encompasses most legal errors made by administrative bodies, and therefore leaves few non-jurisdictional errors. Significantly, the constitutional writs in s75(v) of the Constitution are available to remedy jurisdictional errors by Commonwealth decision makers.

The result, in this context, of a broad view of jurisdictional error is to open the door for decision makers to ignore their decisions and make them again on the basis of a broad range of circumstances.

Privative clause

Whether there is jurisdictional error will depend on the nature of the decision made, and in particular whether it is subject to any privative clause. On one view, a privative clause may expand the jurisdiction of the decision maker, and therefore contract the bases of jurisdictional error. In contracting the bases for jurisdictional error, a privative clause may also contract the bases for ignoring a decision as invalid. We note however that the High Court has recently rejected such a view, at least in part and in relation to the privative clause in s474 of the *Migration Act*.⁵⁵ Nonetheless it must be the case that the existence of jurisdictional error in a particular circumstance will depend on the form of the legislation under which the decision has been made.

Judicial review

Availability of judicial review

The majority in *Bhardwaj* seems to suggest that the fact that judicial review of the September decision was available in the High Court was a relevant factor in allowing the Tribunal to treat that decision as invalid. This consideration may have been simply in support of the finding of jurisdictional error, or the finding that the *Migration Act* did not stand in the way of the Tribunal's October decision (which we discuss further below). But the discussion goes beyond this, and suggests that access to judicial review is itself a relevant factor.

For example, Gaudron and Gummow JJ noted⁵⁶ that it was not disputed by the Minister that the September decision was made in circumstances in which Mr Bhardwaj was denied a reasonable opportunity to answer the case against him. It thus involved a breach of the rules of natural justice "and may be set aside by this Court pursuant to s75(v) of the Constitution".⁵⁷ This comment suggests that judicial review needs to be available for a decision maker to treat a decision as invalid. The existence, for example, of a limitation period which has expired, would be relevant to whether judicial review was available, and may therefore be relevant to whether a decision can be ignored as invalid.

Availability of successful judicial review

It is possible that these comments go even further, and suggest that what is required is not only that judicial review for the error be available, but also an assessment that that review will be successful and will result in the decision being held invalid.

Justice Hayne noted that the matter proceeded on an assumption that "if application had been made either to the Federal Court ..., or to this Court for a writ of prohibition, ... [Mr Bhardwaj] would have been entitled to have the September decision set aside".⁵⁸ Hayne J said in relation to this consideration:⁵⁹

This is not to adopt what has sometimes been called a "theory of absolute nullity" or to argue from an a priori classification of what has been done as being "void", "voidable" or a "nullity". It is to recognise that, if a court would have set the decision aside, what was done by the Tribunal is not to be given the same legal significance as would be attached to a decision that was not liable to be set aside. In particular, it is to recognise that if the decision would be set aside for *jurisdictional error*, the statutory power given to the Tribunal has not been exercised.

The Tribunal's October decision is supported on the basis that a court "would have set the [September] decision aside". Where a decision "would be set aside", the power has not been exercised. Justice Hayne makes other similar comments.⁶⁰

Once it is recognised that a court could set it aside for jurisdictional error, the decision can be seen to have no relevant legal consequences.

...

It may be that other considerations would arise if there were no available remedy to quash the decision. It may be, as H W R Wade said, meaningless to speak of an act being void, or a nullity, where the law will give no remedy to any person in respect of that act. It is unnecessary to express a conclusion on this question in this case.

Other judgments did not articulate this issue as clearly, but made relevant comments.⁶¹

In summary, the judgments seem to approach the issue on the basis that the September decision would have been held invalid by a court. That is, not only was the availability of judicial review of the Tribunal's September decision a precondition to the Tribunal's October decision, but the availability of successful judicial review was a precondition.

On this reasoning, factors which would lead a court to exercise its discretion not to grant a remedy will also be relevant in deciding whether an administrator can treat a decision as invalid and ignore it. If a court would not hold the decision invalid because of discretionary considerations, then the ability of a decision maker to treat it as invalid is similarly limited.⁶² Whilst it is unusual for a court to decline to hold invalid a decision infected by jurisdictional error, this is clearly possible, especially given the breadth of the concept of jurisdictional error for administrative decisions.

If this is so, whilst the Court has affirmed the absolute theory of invalidity, it has in effect moved the absolute and relative views closer together. The Court has, like others, adopted a middle position. The Court has affirmed a decision maker's right to treat a decision infected by jurisdictional error as invalid and ignore it, but in doing so has suggested that the availability of successful judicial review is a precondition for the decision maker doing so. In practice such a precondition will require a court decision, or a blatant error, or perhaps the agreement of the parties. A complete failure to accord natural justice, and fraud, are likely to be such blatant errors. But if this analysis is correct, beyond such situations the case is of limited practical relevance; whilst the High Court can say that judicial review would have been successful, it is generally difficult for decision makers and their advisers to take that position.

Collateral challenge

There is also a question as to whether any requirement for judicial review to be available could be met by the availability of collateral challenge. As we have noted, collateral challenge generally means challenge in proceedings where the validity of the administrative act is merely an incident in determining other issues.⁶³ The High Court recently confirmed the availability of collateral challenge in relation to administrative decisions infected by jurisdictional error in *Ousley v The Queen*.⁶⁴ Whilst some of the Justices noted the policy issues raised by collateral challenge, none suggested that the availability of collateral challenge was in fact limited by the unavailability of judicial review, or the failure to utilise available judicial review.⁶⁵

It may be that the Court's discussion in *Bhardwaj* focuses on the availability of judicial review in the High Court as a factor in allowing the decision maker to treat the decision as invalid simply because such review was available in that case, and not because it is a necessary precondition. It may be that the Court would view the availability of collateral challenge of administrative decisions in the same light as the availability of direct judicial review of decisions under s75(v) of the Constitution. This result would mean that the references to the availability of judicial review in the High Court were an indication on the facts in *Bhardwaj* that the September decision could properly be treated as invalid, but not a necessary precondition for that treatment. But this result is not articulated in the leading judgments.

Notwithstanding the lack of a discussion about collateral challenge, the decision in *Bhardwaj* is in effect an affirmation of its availability. The Minister sought review of the October decision. To support the validity of that decision, Mr Bhardwaj challenged, collaterally, the validity of the September decision. Mr Bhardwaj's success flowed from the fact that the September decision was held to be invalid, pursuant to that collateral challenge. The issue of whether it was open to the Federal Court to adjudicate such a collateral challenge, given the limitations placed upon it in relation to judicial review of *Migration Act* decisions, is discussed below.

Agreement of the parties

There is one important factor which the majority Justices do not directly comment on. The Tribunal, at least impliedly, thought that the September decision was invalid. Mr Bhardwaj also, at least impliedly, thought the decision was invalid. There is a line of thought that where the relevant parties agree that a decision is invalid they can treat it as such.⁶⁶ This thinking was expounded in particular in the decision of the Full Court of the Federal Court in *Comptroller-General of Customs v Kawasaki Motors Pty Ltd*.⁶⁷ It is a line of thought which resonates with the practical issues which arise in relation to variation or revocation of administrative decisions.

As we have noted, Gaudron and Gummow JJ stated in *Bhardwaj*⁶⁸ that it was not disputed by the Minister that the September decision involved a breach of the rules of natural justice “and may be set aside by this Court pursuant to s75(v) of the Constitution”. Justice Hayne noted that the matter proceeded on an assumption that “if application had been made either to the Federal Court ..., or to this Court for a writ of prohibition, ... [Mr Bhardwaj] would have been entitled to have the September decision set aside”.⁶⁹ On one view the case may therefore stand for the unarticulated proposition that if the parties to a decision agree that a court would set aside the decision as invalid, then they can treat it as invalid and ignore it. The relevance of agreement to the ability to vary or revoke a valid decision is considered in section 3 below.

Chandler and functus officio

As mentioned in the introduction, the Court in *Bhardwaj* generally rejected any blanket principle that once a power to make an administrative decision had been purportedly exercised, it was necessarily spent;⁷⁰ that is it rejected some general principle of *functus officio* for administrative decisions analogous to that for courts.

The majority judgments relied to a significant extent in this area on the decision of the Canadian Supreme Court in *Chandler v Alberta Association of Architects*.⁷¹ That case concerned a decision of the Practice Review Board of the Alberta Association of Architects, which after a hearing into the practices of a firm of architects who had gone bankrupt made various findings and orders, in particular findings of unprofessional conduct, and fines and suspensions for that conduct. The Court allowed an application for certiorari and quashed the findings and orders; the Practice Review Board was only responsible for reporting and recommending to a Council, and it was another body, the Complaint Review Committee, which should have dealt with disciplinary matters. The Board indicated that it wanted to continue its hearing and make appropriate recommendations. The decision in *Chandler* considered whether it could. It should be noted that *Chandler* says nothing about the absolute or relative views of invalidity. It did not need to because a court had already held the findings and orders of the Board were invalid. Rather the case considered whether an administrative decision maker who had made an invalid decision could proceed to make a valid decision.

The Supreme Court of Canada held that there was no general doctrine of *functus officio* for administrative decision makers which prevented the Board remaking an invalid decision. Sopinka J held that a tribunal cannot generally revisit its own decision simply because it had changed its mind. But where a tribunal had failed to discharge its statutory duty, and there were appropriate indications in the enabling statute, it could reopen its decision so as to discharge the function committed to it.⁷² Any principle of *functus officio* in relation to administrative decisions must be “more flexible and less formalistic” in respect of the decisions of administrative tribunals which are subject to appeal only on a point of law.⁷³

This thinking is picked up by the majority in *Bhardwaj*. Chief Justice Gleeson stated:⁷⁴
... circumstances can arise where a rigid approach to the principle of *functus officio* is inconsistent with good administration and fairness. The question is whether the

statute pursuant to which the decision maker was acting manifests an intention to permit or prohibit reconsideration in the circumstances that have arisen.

The judgment supports the view, set out in our introduction, that in contrast to judicial decisions, there is no general principle or presumption that administrative decisions cannot be varied or revoked.

Presumption of validity

A further distinction between judicial decisions and administrative decisions emerges in relation to the presumption of validity. As Justice Hayne pointed out in *Bhardwaj*, judicial decisions are valid until they are set aside on appeal, even if they are subject to jurisdictional error.⁷⁵ This has recently been confirmed by the High Court in *Re Macks; ex parte Saint*,⁷⁶ in relation to judicial decisions made under the invalid cross-vesting scheme. Judicial decisions can therefore be presumed to be valid until set aside. The relative theory of invalidity applies this type of thinking to administrative decisions.

Administrative decisions can be set aside in any relevant appeal, or in judicial review proceedings, or in the context of collateral challenge. In the absence of any such challenge, administrative decisions can be presumed to be valid. But the judgment in *Bhardwaj* suggests that this is a much weaker presumption than in relation to judicial decisions. As Justice Hayne noted:⁷⁷

Where there is a challenge, the presumption may serve only to identify and emphasise the need for proof of some invalidating feature before a conclusion of invalidity may be reached. It is not a presumption which may be understood as affording all administrative acts and decisions validity and binding effect until they are set aside. For that reason, there is no useful analogy to be drawn with the decisions of the Court concerning the effect of judgments and orders of the Federal Court of Australia made in proceedings in which that Court had no constitutionally valid jurisdiction.

Effect of the Migration Act

The argument of the Minister flowed in particular from the restricted regime for judicial review under the *Migration Act*. There was no provision of the *Migration Act* which expressly purported to give any legal effect to decisions of the Tribunal that involved jurisdictional error. But it was argued that the provisions which limited the grounds upon which the Federal Court may set aside a Tribunal decision,⁷⁸ which required that applications for judicial review be made within 28 days,⁷⁹ and which expressly provided that the Federal Court had no jurisdiction with respect to judicially reviewable decisions other than that conferred by Part 8,⁸⁰ had that effect. The argument of the Minister was that, as the Federal Court could not have held the decision invalid because of these provisions, the Tribunal could not do so.

Gaudron and Gummow JJ held that in effect these restrictions on the Federal Court did not require it to find the September decision, infected by a jurisdictional error, was valid.

As the result of the decision in *Abebe v Commonwealth*, the Parliament may limit the body of law to which the Federal Court may have regard when reviewing a decision under Pt 8 of the Act. However, it does not follow that the Parliament may require it to act on the basis that the law to be applied is contrary to that which would be applied in this Court if an application were made for prohibition or mandamus under s 75(v) of the Constitution.

Assuming that Ch III of the Constitution does not preclude the Parliament from requiring the Federal Court to act on the basis that the law is contrary to that which

would be applied by this Court in proceedings under s 75(v) of the Constitution, there are nonetheless good reasons why the Act should not be construed as impliedly so requiring. To so construe the Act would be to construe it on the basis of a legal fiction and to subvert the function of the Federal Court in review proceedings. It is impossible to impute such an intention to the Parliament. The construction for which the Minister contends must be rejected.⁸¹

The restrictive provisions in the *Migration Act* did not have the effect of requiring the Federal Court to treat an invalid decision as valid. Because the Federal Court was not so limited, the Tribunal itself was not so limited.

Justice Hayne supports the general conclusion of Gaudron and Gummow JJ:

... the fact that the Federal Court had only limited jurisdiction to review the decision does not lead to the conclusion that the September decision is to be treated as having some effect.⁸²

It should be noted that Gaudron and Gummow JJ were in the minority in *Abebe v Commonwealth*.⁸³ But the basic position of Gaudron and Gummow JJ is clearly consistent with *Abebe*. As the majority there held, the Parliament is able to limit the basis upon which a federal court can review administrative decisions; the Parliament is not obliged by the Constitution to give the court authority to determine every legal right inherent in a controversy. But the fact that a court does not have jurisdiction to determine particular matters or rights cannot affect those matters or rights; nor can this require the court to explicitly or implicitly find that those matters or rights are other than they would be found to be by a court whose jurisdiction was not so limited.

The judgments suggest that the *Migration Act* could have removed the ability of the Tribunal to remake its invalid decision, and that other legislation could also do this.⁸⁴ Gaudron and Gummow JJ though suggest that a legislative provision should not be construed so as to give an administrative decision greater effect than it would otherwise have unless that implication is strictly necessary.⁸⁵

Additional considerations

Some of the Justices in *Bhardwaj* also alluded to some additional considerations relevant to determining whether a decision maker can ignore an invalid decision. These were not discussed in any detail but nonetheless may be important factors in limiting the range of decisions that can be ignored for invalidity.

Chief Justice Gleeson held that he would:

... accept that it is inconsistent with the scheme of the Act to conclude that the Tribunal, upon being persuaded that it has denied procedural fairness, at any time after it has made or purported to make a decision, and regardless of what a person affected by the decision has done or failed to do, may treat the decision as legally ineffective and consider afresh the matter that was originally before it.⁸⁶

This suggests that there may be a time limitation on when a decision maker can decide to ignore an invalid decision. The conduct of the person affected by the decision may be relevant. So if they fail to promptly indicate that an error has been made, the decision maker may no longer be entitled to ignore it.

In addition, Hayne J noted that it was relevant that no question arose “about the rights or duties of other persons who may have acted in reliance on one or other of the two

decisions".⁸⁷ This indicates that where third parties are affected, a court may be more reluctant to accept that a decision maker may ignore an invalid decision.

A prudent course

These factors can raise issues of considerable difficulty. Notwithstanding the legal position, Justice Hayne made some comments about the prudence of administrators acting without a judicial determination of invalidity:

The question that now arises is *not* one concerning good administrative practice. It is not the province of the courts to say whether particular administrative practices are prudent or efficient and yet there would be little dispute that characteristics of prudence and efficiency are relevant to good administrative practice. It is, therefore, not to the point to ask whether the Tribunal was *wise* to make its October decision without first having the comfort and certainty of a court order holding the September decision to have been not a lawful performance of the Tribunal's duties any more than it is to the point to ask about the efficiency of adopting the course that was followed in this matter.⁸⁸

Minority reasoning

Kirby J in dissent gave greatest attention to the competing theories of invalidity. He noted the support for the relative theory in modern case law, in particular overseas.⁸⁹ He noted the rejection of the absolute theory in relation to judicial decisions, but suggested that administrative decisions may be in a different category:

...the assumption upon which s 75(v) is written appears to be that even fundamentally flawed decisions by officers of the Commonwealth, without constitutional power or otherwise contrary to federal law, will remain valid for some purposes and have to be obeyed until set aside by a court, at the very least to the extent of engaging the jurisdiction of this Court under the Constitution.⁹⁰

But he draws back from making a concluded finding, in particular in light of issues raised by privative clauses. These issues provide:

a strong reason for caution before embarking upon general propositions about the invalidity of the September decision of the Tribunal in this case. The occasion to elucidate the operation of general theories of invalidity in the context of federal legislation in Australia would be a case where the Parliament has purported, by a privative clause, to circumscribe or expel constitutional review in this Court.⁹¹

Justice Kirby held that, on its proper construction, the Act forbade the Tribunal from making the October decision. In his view, the Act envisaged a single exercise of the "review" performed by the Tribunal which, perfect or imperfect, would be given effect in a "decision". He referred to the "explicit provisions of considerable detail" constituting a "formal process" relating to such a "decision" and said that these provisions either had to be obeyed or they followed automatically by force of the Act itself. In his view the Act evinced a contrary intention for the purposes of s33(1) of the *Acts Interpretation Act*. Parliament had decided that there should be a high degree of clarity and certainty in relation to migration decisions, even if the result was administrative inflexibility. He also noted that if a decision unfavourable to a person could be treated as provisional, then so also could a decision favourable to a person.⁹²

Conclusion

Where does that leave decision makers who wish to ignore a decision on the basis that it is invalid? There is a question as to what extent the decision in *Bhardwaj* is based on particular facts, and indeed somewhat extreme facts, and to what extent it elucidates general principles.

But in summary the following appears to emerge from the judgments as preconditions to a decision maker treating a decision as invalid.

- First, there must be at least a jurisdictional error in the decision.
- Second, the discussion in *Bhardwaj* suggests that there must be access to judicial review for that error. But it could well be that the availability of collateral challenge to the decision is enough. The fact that some form of judicial review is restricted, and would not provide a remedy for the error, is irrelevant, provided at least some other form of review would.
- In addition it may be that there needs to be an assessment not only that judicial review could be sought, but also that it would be successful. An agreement with the affected person to this effect would probably be sufficient. Factors which would lead a court to decline a remedy would be relevant therefore to the decision maker's consideration.
- Third, there needs to be no legislative provision giving such a "decision" effect, and thereby preventing the decision maker from so acting.

As Justice Hayne implies, in cases of doubt, the prudent course will be for a decision maker to await a judicial determination of whether a decision is invalid and can be ignored.

3 Is there a statutory power to vary or revoke?

In *Bhardwaj*, Gaudron and Gummow JJ (with whom McHugh J agreed in general) and Hayne J all decided that there was no need to rely upon s33(1) of the *Acts Interpretation Act* to support the Tribunal's action because, prior to the October decision, there had been no relevant exercise of power by the Tribunal. The reasoning of Gleeson CJ and Callinan J suggests that they would agree with this. But where there has been an exercise of power, it is necessary to go on and address the question of whether the decision maker can vary or revoke a decision.

In general, administrative decision-making takes place pursuant to a particular legislative power. The question of whether the legislation allows the decision maker to vary or revoke a decision is essentially a matter of statutory interpretation.⁹³ As discussed in the introduction, this is sometimes described as determining whether the decision maker is *functus officio*. The issue in each case is to interpret the extent of the statutory power conferred on the decision maker and whether this includes a power to vary or revoke. Consideration needs to be given to whether there is an express power, whether there are relevant general powers, in particular in s33 of the *Acts Interpretation Act*, and whether there is any implied power.

Express statutory power

In many statutes, decision makers are given an express power to vary or revoke a decision.⁹⁴ Such powers can be exercisable on the motion of the decision maker, on that of the person affected by the decision, or by both parties.⁹⁵

A decision taken on the basis of such provisions will, like any administrative decision made pursuant to an enactment, generally be subject to judicial review. General principles of administrative law, such as the need to accord procedural fairness, to exercise the discretion for a proper purpose, and to take into account all and only relevant considerations, will apply. However, additional considerations may be relevant to the exercise of any power to reconsider. These include whether revocation or variation would be oppressive to any parties, including third parties, whether there has been unreasonable delay between the original decision and the reconsideration, and generally the need for finality in decision-making.⁹⁶

Where an express statutory power is given to vary or revoke an administrative decision of a particular kind and on certain grounds, it is likely to be interpreted as excluding by implication the power to vary or revoke on other grounds, and also to exclude variation or revocation of other related decisions taken pursuant to the statute.⁹⁷

A recent example of these principles is *Leung v Minister for Immigration and Multicultural Affairs*.⁹⁸ This case involved the revocation of a certificate of citizenship, prior to the making of a pledge of citizenship, due to the Minister receiving information which showed that the applicants had misrepresented their activities outside Australia and therefore did not satisfy the requisite statutory criterion. Heerey J based his judgment on whether a power to revoke could be implied into the statute. He concluded that there existed a limited power to revoke the certificate until the pledge of citizenship had been taken, but that after this date the power to revoke was limited by s50 of the *Australian Citizenship Act 1948* (Cth), which expressly allowed for revocation of citizenship status only for fraud.

Finally, there is an issue as to whether a power to vary or revoke can be exercised several times, or only once.⁹⁹ This will depend on the nature of the statutory power, and whether it is of a continuing nature (perhaps if it is premised on a change in circumstances) or if it appears to be exercisable only once (perhaps if it deals with correcting an error of fact or law).

General powers

Section 33(3) of the Acts Interpretation Act

Even without an express, specific power to vary or revoke, such a power may exist by operation of general legislation, or by implication. In the Commonwealth sphere, the most relevant general provision is s33(3) of the *Acts Interpretation Act*. This section provides:

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 appears, 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.

The ambit of s33(3) and whether it extends to giving administrative decision makers the power to revoke or vary a decision has been the subject of conflicting judicial interpretations.¹⁰⁰

The most significant current issue that arises in relation to this provision is the scope of the word “instrument”. In *Australian Capital Equity Pty Ltd v Beale*,¹⁰¹ Lee J of the Federal Court held that s33(3) is limited to powers concerning instruments of a “legislative character” and did not apply to instruments of an “administrative character”. Justice Lee’s conclusion was based on the view that the sole and obvious purpose of the *Acts Interpretation Act* is to deal with legislative instruments and that having regard to the provision’s history, it is possible to conclude that the parenthetical expression “(including rules, regulations or by-laws)” was intended to be an exhaustive provision. This view has been accepted in *Director of Public Prosecutions Reference No.2 of 1996*,¹⁰² *Minister for Immigration and Multicultural Affairs v Sharma*,¹⁰³ *Dutton v The Republic of South Africa*,¹⁰⁴ and *Schanka v Employment National (Administration) Pty Ltd*.¹⁰⁵

However, the reasoning of Lee J in *Beale*¹⁰⁶ has a number of very unsatisfactory elements. In our view the conclusion is not supported by a full consideration of the relevant issues of statutory interpretation. It was always inconsistent with the decision of Brennan J, sitting as the Administrative Appeals Tribunal in *Re Brian Lawlor Automotive Pty Ltd and The Collector of Customs, New South Wales*¹⁰⁷ and the decision of the Full Court of the Federal Court in *Barton v Croner Trading Pty Ltd*¹⁰⁸. It has most recently been seriously questioned, and not followed, as a result of careful analysis by Emmett J in *Heslehurst v New Zealand*¹⁰⁹ and by

the Court of Appeal of the Supreme Court of Victoria in *R v Ng*.¹¹⁰ It is not necessary in light of these recent decisions to canvass in detail all the factors in support of the view that s33(3) applies to administrative instruments, but we note these.

The term instrument is not defined in the *Acts Interpretation Act*. It therefore takes its general meaning of a document in writing of a formal legal kind. The general meaning is not limited to legislative documents.

The section partly defines the term by stating that it includes “rules, regulations and by-laws”, which are generally instruments of a legislative nature. But this is an inclusive definition. To suggest that this is the limit of the meaning of the term is inconsistent with the clear words of the section. Further, the use of the word “any” suggests that the scope of “instruments” is not limited those listed in the parenthetical provision. Further again, the power is “to make, grant or issue any instrument”; the terms “grant” or “issue” are not generally appropriate to legislative instruments.

Some of these points, and the legislative history of s33(3), were discussed by Brennan J in *Re Brian Lawlor Automotive Pty Ltd v The Collector of Customs, New South Wales*¹¹¹:

By s6 of the Act Interpretation Act 1941 (No 7 of 1941) s33(3) was amended to its present form. The words “any rules, regulations or by-laws” were omitted and in their stead were inserted the words: “grant or issue any instruments (including rules, regulations or by-laws)”. The instruments to which s33(3) now relates are instruments which are not necessarily rules, regulations or by-laws, and they are instruments which might be “granted” or “issued” rather than “made”. Where pursuant to a statutory power, an authority grants or issues an instrument, other than a rule, regulation or by-law, the exercise of the power may well be an executive or administrative act rather than a legislative act. At all events, the granting or issuing of an instrument other than a rule, regulation or by-law is not necessarily an act of a legislative kind, and the granting or making of an executive or administrative instrument falls within the natural ambit of s33(3).¹¹²

The proceedings in *Lawlor* concerned legislation which provided that dutiable goods may be warehoused in a warehouse licensed by the Minister. Despite the fact that Brennan J decided that s33(3) extended to administrative instruments, he found that there was no power to revoke the licence in this case. The power to grant a licence in the *Customs Act 1901* (Cth) was not a power to grant or issue an instrument, but a power to create legal rights and liabilities. Importantly, there was no requirement that the licence be in writing. This decision was upheld by the Federal Court in *Collector of Customs (NSW) v Brian Lawlor Automotive Pty Ltd*.¹¹³

The second reading speech to the 1941 amendment of s33(3) also supports the broader view. The then Attorney-General, Mr Hughes, explained that the amendment was intended to expand the type of instruments the subject of s33(3). He stated that:

if a power be conferred to make or issue any instrument under an act, then the power to repeal or amend the instrument at some later date is necessary, even though the instrument does not fall under the description of rules, regulations or by-laws.¹¹⁴

He cited proclamations and orders as examples of instruments that would now be covered. While the exact dividing line between legislative and executive instruments is difficult to draw, proclamations and orders, which are typically issued by the Governor-General or a minister, are closer to being executive than legislative instruments.¹¹⁵ The decision of the Victorian Supreme Court of Appeal in *R v Ng* traces the provision further back to the original 1901

version of the Act, and to the parent provision in the *Interpretation Act 1899* (UK),¹¹⁶ and concludes that the legislative history tends to support a broad interpretation of the word instrument.

The broad interpretation of s33(3) is also supported by *Barton v Croner Trading Pty Ltd*¹⁷ where the Full Federal Court held:

The word “instrument” is of wide import...In the *Acts Interpretation Act* the word is used to include, at least, any writing designed to carry into effect a statute: see for example, s33(3), s34B(2)(c), s46(a).

This case concerned proceedings, which could not be instituted “except with the consent in writing of the Minister, or of a person authorised by the Minister”. The Court held that the Minister’s authorisation was an instrument to which s46(b)¹¹⁸ of the *Acts Interpretation Act* applied. Such an authorisation is clearly an executive instrument, and it is a presumption of legislative interpretation that words are used consistently within a statute.¹¹⁹

The broad interpretation is given additional weight by the current use of the word “instrument” in s25D of the *Acts Interpretation Act* to denote the document giving reasons for a decision by a tribunal, body or person. Further, s4 of the Act was amended in 1976 to include the phrase “to make an instrument of a legislative or administrative character (including rules, regulations or by-laws).” This not only clarifies that the parenthetic provision cannot be exhaustive, but also provides support for the view that “instruments” can be of either a legislative or administrative nature.

The suggestion that the *Acts Interpretation Act* is concerned only with legislative instruments is misconceived. The Act is concerned with interpreting Acts of Parliament and for shortening their language,¹²⁰ and applies to delegated legislation. But the power to make administrative decisions is contained in such primary or delegated legislation. Subsection 33(3) deals with the power to make instruments under such primary or delegated legislation, and establishes an interpretative presumption in relation to such powers. There is no reason to limit s33(3) to the power in legislation to make only legislative instruments. A wide range of factors suggests that s33(3) applies to power in legislation to make all instruments, administrative and legislative.

In our view, s33(3) provides a general statutory presumption in favour of a power to revoke or vary administrative instruments. The key issue in relation to the application of the provision is whether there is a contrary intention which overrides this presumption. We return to this issue below.

Section 33(1) the Acts Interpretation Act
Section 33(1) provides that:

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.

A restrictive view of s33(1) is that its sole role is to clarify that a general power to grant social security benefits or citizenship, for example, can be exercised each time an application is made, rather than only once. This view is supported by Branson J in *Dutton v Republic of South Africa*,¹²¹ where she held that s33(1) “does not refer to the withdrawal or cancellation of the exercise of a power”.

However, a broader view has been given to s33(1) in *Minister for Immigration, Local Government and Ethnic Affairs v Kurtovic*¹²² and applied by the Federal Court in *Bhardwaj*¹²³. In *Kurtovic* it was held that the revocation of a criminal deportation order, made pursuant to a recommendation of the Administrative Appeals Tribunal, did not prevent the Minister from making a second deportation order in respect of the same criminal offence. In his reasons¹²⁴, Gummow J held that s33(1) gave administrative decision makers the power to reconsider, revoke or remake a decision, unless the statute, upon a proper construction, indicated that the power was not to be exercised from time to time, but was spent by its first exercise.

This reasoning was applied by the Federal Court in *Bhardwaj* by Beaumont and Carr JJ, but with a qualified meaning of the phrase “as the occasion requires” in s33(1). Beaumont and Carr JJ held that “as the occasion requires” was satisfied by circumstances “where, in coming to that decision [the Tribunal] has by its own mistake failed to accord an applicant a fundamentally important right, the error is not in dispute between the interested parties, the error is material to the case before it and which reconsideration takes place within a reasonable time of the original decision.”¹²⁵

The above analysis indicates an acceptance by the courts that s33(3) and s33(1) of the *Acts Interpretation Act* give administrative decision makers the power to vary or revoke their decisions subject to a relevant contrary intention. The primary practical issue in relation to s33(3) or s33(1) of the *Acts Interpretation Act* is whether there is a contrary intention in the relevant statute. We consider this issue further below.

Implied Statutory Power

It is also necessary to consider whether, apart from s33(3) and s33(1) of the *Acts Interpretation Act*, a power to vary or revoke may be found in the statute by implication. Some of the recent judicial consideration has looked at the issue of whether there is an implied power without the lens provided by the *Acts Interpretation Act* provisions.¹²⁶ In our view it is more appropriate to begin with the general statutory powers. But we note that the question of whether there is a contrary intention for the purposes of these powers, and the question of whether there is there an implied power, give rise to much the same issues.

There is a significant issue as to what is the basic test for whether a power can be implied from statutory provisions. In *Austereo Ltd v Trade Practices Commission*¹²⁷ French and Beazley JJ accepted as a correct formulation the following passage from FAR Bennion *Statutory Interpretation*¹²⁸:

The question of whether an implication should be found within the express words of an enactment depends on whether it is proper or legitimate to find the implication in arriving at the legal meaning of the enactment, having regard to the accepted guides to legislative intention. ... This may involve a consideration of the rules of language or the principles of law, or both together.

In deciding whether there is an implied power to vary or revoke, and in determining whether there is a contrary intention for the purposes of s33 of the *Acts Interpretation Act*, the Courts have looked for common factors. In doing so, they have been concerned to balance the conflicting policy considerations identified by French J in *Sloane v Minister for Immigration, Local Government and Ethnic Affairs*.¹²⁹

The implication into an express grant of statutory power of a power to reconsider its exercise would be capable, if not subject to limitation, of generating endless requests for reconsideration on new material or changed circumstances.... Against the difficulties that may arise from the implication of a power to reconsider the decision there is 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.

Relevant factors for a contrary intention and implied power

Slips

One situation in which the courts have uncontroversially found a power to vary is where a decision maker wishes to correct a clerical error that does not change the form or substance of the previous determination.¹³⁰ It has in fact been argued that the power to correct clerical errors may be regarded as a necessary incident of the obligation to provide a written decision.¹³¹

Clear statutory intention

Another relevant factor is where there is a clear statutory indication that the power granted, once exercised, is spent. In some few cases, the legislation makes clear that there is no power to vary or revoke. Section 26 of the *Administrative Appeals Tribunal Act 1975* is such a provision.

For example where a statute provides that certain decisions are “final” or “final and conclusive”, this evidences an intention contrary to the existence of a power to revoke or vary.¹³² On the other hand, *Beaumont and Carr JJ* in the Full Court of the Federal Court in *Bhardwaj* held that the provisions in the *Migration Act* requiring that the Tribunal provide a mechanism that is “fair, just, economical, informal and quick”, not be bound by “technicalities, [or] legal forms” and “act according to substantial justice and the merits of the case” were strong indications that the presumption in s33(1) of the *Acts Interpretation Act* applied, and of an implied power to revoke.¹³³

Nature of the function

A further factor is the nature of the function exercised, which may either indicate that the power is continuing or that it is to be exercised only once.¹³⁴ The effect on third parties will be an important aspect of the nature of the power, and the effect of variation or revocation on them an important aspect of this factor. For example, where decisions involve granting a licence, funds or employment to one individual over others, the fact that allowing the decision maker to reconsider the decision at the request of an unsuccessful party could have a severe negative impact on the innocent successful party is an indication that the power should be exercised only once.

A further factor, according to one line of authority, is that where the decision maker is given the power to decide questions affecting existing legal rights, the exercise of the power will be irrevocable. Whereas, if the power is discretionary, the decision can be made, revoked or varied from time to time.¹³⁵ We note, however, that these are English authorities, which have seldom been applied in Australia, and which were decided in a context where there is no presumption of a power to revoke or vary administrative instruments in the *Interpretation Act 1978* (UK), and less concern for constitutional issues in relation to separation of judicial power (often characterised as concerning existing rights) and executive power (often concerning discretionary, or future, benefits or detriments).

Consequences

A related factor is the consequence of a power of amendment or revocation, or lack of power, in light of the statutory scheme. In *Heslehurst v New Zealand*¹³⁶ Justice Emmett considered whether there was a power to vary the name of the police officer who was to escort the surrendered person under a warrant issued under the *Extradition Act 1988* (Cth). He held that

there was no contrary intention, so that s33(3) of the *Acts Interpretation Act* allowed amendment. Justice Emmett stated:

... if the contrary conclusion was reached, there would be, to use the words of Spender J [in *Edenmead Pty Ltd v Commonwealth*¹³⁷], “startling consequences”. Those startling consequences are relevant to the question of whether or not a contrary intention appears. If there were no power to amend the warrant in relation to the identity of the New Zealand escort officer, the court’s power pursuant to s 34(1) could be effectively nullified simply because of the unavailability of the person identified.

Procedure

Another factor is the procedure and manner for making the decision. In the Full Federal Court consideration of *Bhardwaj*, Justice Lehane discussed the possible application of s33(1) of the *Acts Interpretation Act*. However Justice Lehane found that the strict time limits for the decision making process, detailed provisions governing the conduct of the process, and the limited form of judicial review made it “incongruous with that scheme for the Tribunal to have ... a power from time to time, as occasion requires, to make (and revoke) decisions.”¹³⁸ In the High Court, Kirby J also held, in his dissenting judgment, that on its proper construction the *Migration Act* evinced a contrary intention for the purposes of s33(1) of the *Acts Interpretation Act*. In Kirby J’s view, the Act envisaged a single exercise of the “review” performed by the Tribunal which, perfect or imperfect, would be given effect in a “decision”. He referred to the “explicit provisions of considerable detail” constituting a formal process relating to the decision.¹³⁹

The fact that a majority of the High Court found in *Bhardwaj* that the Tribunal was able to ignore its September decision and make its October decision does not affect the relevance of these comments, or those of Beaumont and Carr JJ in relation to a clear statutory intention. The majority held that the September decision was invalid and could be ignored. They did not consider whether a valid decision could have been revoked, and the October decision made, because of an implied power to do so or the general powers in the *Acts Interpretation Act*.

Merits review

Another factor, which the courts have recognised as indicating a statutory intention contrary to the existence of a power to vary or revoke, is the availability of merits review, be this internal or through an administrative appeals tribunal.¹⁴⁰ In *Sloane*, French J held that:

The existence of the regulation making power and the detailed provisions of s115 in relation to the review of decisions tend to suggest a legislative purpose of codifying and confining the bases upon which decisions made under the Act or the Regulations are able to be reviewed.¹⁴¹

Opportunity to reapply

A related factor is the existence of an opportunity to make a further primary application where some benefit has been denied.¹⁴²

We note that, while the application of these last two factors are clearly relevant where the affected person is seeking reconsideration,¹⁴³ they appear less relevant where the decision maker wishes to reconsider the decision on their own motion. In some cases a decision maker can appeal their own decision, but in most cases they cannot.¹⁴⁴ Therefore, where the question is whether the decision maker can revoke or vary a decision on their own motion, the availability of merits review and the possibility of making a new application are less significant.

Nature of any error

The nature of any error made by the decision maker, a possible further factor, is likely to be less relevant after the High Court's decision in *Bhardwaj*, and the finding there that a jurisdictional error generally results in an invalid decision, which can be ignored and made again without the need for a power to revoke. The judgment of Madgwick J at first instance in *Bhardwaj*¹⁴⁵ suggests that judges may be more willing to find a power to revoke or vary in a statute with respect to serious legal error, in that case jurisdictional error involving a denial of procedural fairness, than with respect to less serious legal or factual errors, for example where more evidence has later come to hand. Further, it may be that a power to revoke or vary will be found more readily where there has been an error of law, even though less than a jurisdictional error, in contrast to where there has been no legal error.

Time

In our view another factor is that any variation or revocation needs to be timely. There is unlikely to be found an implied power to vary or revoke at any time after a decision has been made. There may be other similar factual considerations which in particular circumstances tell against an implied power, and in favour of a contrary intention for the purposes of the *Acts Interpretation Act* general powers.

Change in law

Where a decision is revoked on the basis of a change of law, it may offend any rule or presumption against retrospectivity in relation to the operation of the law.¹⁴⁶ This would be one circumstance where a power to revoke or vary a decision is unlikely.

Agreement of parties

An important issue in this context is the relevance of the decision maker and the party or parties affected agreeing to the variation or revocation. As a matter of practicality, this will clearly be relevant, since there is unlikely to be a legal challenge to this course. However, it is sometimes difficult to find a principled basis for this approach.

We have noted that in *Bhardwaj* there was agreement between Mr Bhardwaj and the Tribunal as to the course to be taken, and impliedly that the September decision was subject to jurisdictional error, and thus invalid and therefore able to be ignored. The Court confirmed the correctness of their agreed position, though it did not explicitly draw any relevance from their agreement.

There are significant further questions as to whether an agreement that a decision is tainted by non-jurisdictional error, or simply an agreement to vary or revoke the decision, is enough to support a power for that decision to be varied or revoked.

In *Re Kretchmer and Repatriation Commission*¹⁴⁷ where an application was dismissed pursuant to the *Administrative Appeals Tribunal Act 1975* (Cth) by an improperly constituted Tribunal, the Tribunal reviewed its decision and held that:

We do consider, however, that if the Tribunal is of the view that no order of a properly constituted Tribunal made under s42A(2) in fact exists then there is no reason why in the circumstances of this particular case the Tribunal should not proceed to carry out its statutory duty to determine the application for review which has been instituted by the applicant and we intend to give directions to bring this about. Of particular relevance in this particular case is the attitude of the parties (who consented and the fact that)...this is not a case where the rights of third parties are involved.

Similarly in *Comptroller-General of Customs v Kawasaki Motors Pty Ltd*,¹⁴⁸ a case involving the decision of the Comptroller-General to revoke a previous revocation of a Commercial Tariff Concession order with the consent of the affected party, Hill and Heerey JJ held that:

It would in our opinion be strange if an administrative order remained valid until set aside by an order of a court even though the decision-maker did not seek to uphold the order. Courts have long recognised the rule of policy that there is a public interest in the avoidance of litigation and the termination of litigation by agreement when it has commenced. The argument that disputed orders could not be treated, by agreement of all concerned, as void would directly conflict with that rule. Parties would be forced into pointless and wasteful litigation.

A decision can be set aside by a court even without a jurisdictional error. In particular the *Administrative Decisions (Judicial Review) Act* provides for review on grounds which are broader than jurisdictional error. If the parties agree that a court would set aside a decision on the basis of a non-jurisdictional error, then there is little legal risk in treating the decision as invalid and making it again. Such a course would appear to be supported by the *Kawasaki* decision.

But it is necessary to note that agreement generally cannot give a decision maker additional power. As Finkelstein J noted in *Leung*¹⁴⁹ it is hard to see how jurisdiction to ignore a decision can be conferred on a statutory decision maker merely by the consent of the persons who might be affected by the act. Further, it is hard to see how the power to revoke or vary a decision can be conferred on a statutory decision maker merely by the consent of the persons who might be affected by the act. Certainly agreement would not entitle the decision maker to reconsider and reach a new decision that would be otherwise beyond power. The question of how and whether this needs to be policed may be one consideration militating against this principle.¹⁵⁰

Notwithstanding this concern, it may be arguable that an implied power to vary or revoke exists, or that a contrary intention in relation to the general powers does not exist, where the relevant parties agree to the variation or revocation. This argument is not that the agreement gives the power. But that as a matter of statutory interpretation, a power can more easily be implied, and any contrary discounted, where there is agreement. This argument is stronger where there is a legal error, but may also be possible without error.

We also note a line of authority in England, which suggests that where an administrative decision maker realises that they have inadvertently denied a benefit to a person, they have a duty, independent of any statutory power, to consider whether the error should be corrected.¹⁵¹ This duty is “subject to a discretion as to what action to take, exercised in accordance with the requirements of good administration”.¹⁵²

4 Can the decision maker be estopped from varying or revoking?

A further question, which arises with respect to the exercise of a power to revoke or vary an administrative decision, is whether the doctrine of estoppel applies to administrative decision-making. This will be of concern where a decision favourable to the affected person is revoked and they claim to have relied upon the decision to arrange their affairs, or where a third party claims to have relied upon a decision, which has later been varied. This is a complicated area and it is beyond the scope of this paper to cover it comprehensively. It is, however, worthwhile to note the judicial consideration of this issue in *Kurtovic*¹⁵³ by Gummow J, when a Justice of the Federal Court.

Gummow J found that the doctrine of estoppel cannot operate where a party asserts that an administrator is estopped from “rescinding” an *ultra vires* decision, that is a decision infected

by jurisdictional error. This would threaten to undermine the rule of law because it would enable public authorities to extend their powers simply by making representations beyond power.¹⁵⁴ Elements of this thinking are found in Gummow J's judgment, with Gaudron J, in *Bhardwaj*.

In the case of *intra vires* decisions, Gummow J held that estoppel will not be available where the decision is taken pursuant to a planning or policy level power, but may be available where the decision is taken pursuant to an operational or private exercise of government power.¹⁵⁵ The distinction between these two types of decisions is difficult to draw. However, it seeks to recognise that, where a discretionary power is provided for in a statute, there is a duty to exercise that discretion freely on the basis of a proper understanding of what is required in the public interest. If estoppel were permitted it would derogate from that statutory obligation.¹⁵⁶ Where the decision is solely operational or the government is acting in its private capacity, these concerns are less pertinent.

A final practical difficulty with the operation of estoppel in administrative law is the necessity to show detrimental reliance. In *Kurtovic*,¹⁵⁷ Gummow J held that emotional or psychological detriment would not suffice and that a change of position resulting from the representation would be necessary. While, in cases such as the granting of building licences, this may be relatively easy to show, in many administrative decisions, for example concerning entry permits or welfare benefits, it would be extremely difficult.

The application of estoppel to public law remains an uncertain and developing area. Without such a remedy, substantive fairness to the individual will not be assured in all circumstances. However, the requirement of procedural fairness upon any revocation of a decision, or failure to fulfill a representation, may go some way to remedy this. As Gummow J's judgment notes, some aspects of administrative decision making are similar to contractual decision making, but the two rest on very different legal foundations.¹⁵⁸

Conclusion

The concept of good government according to law incorporates a concern to maintain the functionality of an administrative state providing services in the public interest, and a concern to protect the citizen against misuse of administrative power. Achieving a balance that satisfies these sometimes competing goals is a difficult task, especially in relation to the issue of whether a decision maker can revoke or vary their decision.

This paper suggests that an administrative decision maker who wishes to revoke or vary a decision, or who has been asked to do so by the affected person, should adopt a five-staged approach to determining whether they have the power to do so.

- First they should ascertain whether the decision is in fact perfected as if it is not, no power to revoke or vary will be necessary for a reconsideration to occur.
- Second they should consider whether the decision is subject to a jurisdictional error and can be ignored. The ability to ignore a decision is more likely to exist if judicial review is available and it is clear that a court would hold the decision invalid. A prudent course in cases of doubt would generally be to await a judicial determination before doing so. Agreement of the persons affected to this course limits the legal risk.
- Third, if there is a decision, which cannot be ignored, the decision maker should then look to whether there is an express power, a general power arising from ss33(1) or 33(3) of the *Acts Interpretation Act*, or an implied statutory power to revoke or vary. This is essentially a process of statutory interpretation, and we have noted a range of relevant factors in

determining whether there is a contrary intention for the purposes of ss33(1) or (3), or whether a power can be implied.

In relation to the general issues we discussed to begin with, this consideration has reinforced the importance of the concept of invalidity, flowing from jurisdictional error, in Australian administrative law. As with its consideration of other basic administrative law issues, the concept of jurisdictional error and invalidity are central to the High Court's approach in *Bhardwaj*. Jurisdictional error results in an invalid decision which can be ignored and made again. The decision clearly leans towards the absolute theory of invalidity, notwithstanding the limitations we have noted which bring it back to a middle position. A decision can be treated as invalid even though no court has formally decided this.

Generally this consideration notes a concern amongst the courts and the legislature to give to decision makers the flexibility to reach decisions which are within jurisdiction, fair and well considered, a concern generally given greater weight than the need for finality.

This consideration has also highlighted growing distinctions between administrative decisions and judicial decisions. Administrative decisions are not necessarily presumed valid until set aside by a court, and can be the subject of collateral challenge. Whether they can be varied or revoked is essentially a question of statutory power.

Endnotes

- ¹ This paper has been developed from a paper written by Robyn Briese as an intern with the Australian Government Solicitor whilst a student at the Australian National University. A condensed version has been issued by the Australian Government Solicitor as a Legal Practice Briefing.
- ² [2002] HCA 11 (14 March 2002); (2002) 187 ALR 117. The decision in *Pfeiffer v Stevens* [2001] HCA 71 (13 December 2001); (2002) 185 ALR 183 is also indirectly relevant to this issue.
- ³ *Minister for Immigration, Local Government and Ethnic Affairs v Kurtovic* (1990) 21 FCR 193; 92 ALR 93; *Sloane v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 37 FCR 429; *Jayasinghe v Minister for Immigration and Ethnic Affairs* (1997) 145 ALR 532; *Leung v Minister for Immigration and Multicultural Affairs* (1997) 150 ALR 76; *Semunigus v Minister for Immigration and Multicultural Affairs* (2000) 96 FCR 533.
- ⁴ E Campbell, "Revocation and Variation of Administrative Decisions" (1996) 22(1) *Mon LR* 30; E Campbell "Effect of Administrative Decisions Procured by Fraud or Misrepresentation" (1998) 5 *AJ Admin L* 240; M Allars "Perfected Judgments and Inherently Angelical Administrative Decisions: The Powers of Courts and Administrators to Re-open or Reconsider Their Decisions" (2001) 30 *AIAL Forum* 1, 21(1) *Australian Bar Review* 50.
- ⁵ E Campbell, "Revocation and Variation of Administrative Decisions" (1996) 22(1) *Mon LR* 30 at 30-31.
- ⁶ *Sloane v Minister for Immigration and Ethnic Affairs* (1992) 37 FCR 429, French J at 443.
- ⁷ See generally F C Hutley "The Cult of Nullification in English Law" (1978) 52 *ALJ* 8.
- ⁸ *Leung v Minister for Immigration and Multicultural Affairs* (1997) 150 ALR 76 at 84.
- ⁹ *Minister for Immigration, Local Government and Ethnic Affairs v Kurtovic* (1990) 21 FCR 193, Gummow J at 211.
- ¹⁰ [2002] HCA 11 at [8]; 187 ALR 117 at 119.
- ¹¹ (1990) 21 FCR 193 at 211.
- ¹² (1992) 37 FCR 429 at 443.
- ¹³ (1997) 145 ALR 532 at 542.
- ¹⁴ E Campbell, "Revocation and Variation of Administrative Decisions" (1996) 22(1) *Mon LR* 30 at 38-40; E H Shopler, "Power of administrative agencies to reopen and reconsider final decisions as affected by lack of specific statutory authority" 73 *ALR* 2d 939 at 941.
- ¹⁵ See E Campbell, "Revocation and Variation of Administrative Decisions" (1996) 22(1) *Mon LR* 30 at 38-40 for a discussion of statutory requirements to perfect a decision.
- ¹⁶ [1999] FCA 422 at [19]-[20]. These comments were upheld by the Full Court, see *Semunigus v Minister for Immigration and Multicultural Affairs* (2000) 96 FCR 533.
- ¹⁷ (2000) 96 FCR 533 at 536.

¹⁸ (2000) 96 FCR 533 at 547.
¹⁹ E Campbell, "Revocation and Variation of Administrative Decisions" (1996) 22(1) *Mon LR* 30 at 40; see also W Wade and C Forsyth, *Administrative Law* (7th ed 1994) at 262.
²⁰ [2002] HCA 11 at [101]; 187 ALR 117 at 142.
²¹ B Selway, "The Rule of Law, Invalidity and the Executive" 9(2) *PLR* 196 at 201-203, for a discussion of the implications of *ultra vires* decisions see M Aronson and B Dyer, *Judicial Review of Administrative Action* (1996) at 642-659; W Wade and C Forsyth, *Administrative Law* (7th ed. 1994); PP Craig, *Administrative Law* (1994) at 451-475.
²² (1946) 74 CLR 461 at 483.
²³ At 479.
²⁴ In *Boyle v Charge* (1987) 73 ALR 446 at 453 Justice Neaves of the Federal Court stated that:

Finally, and most importantly, as the condition precedent to the granting of the approval did not, in fact, exist, with the consequence that the approval was ineffective in law, for the court to decline relief would not have the effect of giving to the instrument of approval any greater efficacy than it would otherwise have.

In other words, a decision may be invalid, not only in the absence of any court consideration, but even if a court considers the matter and decides not to grant a remedy.

²⁵ *Ousley v The Queen* (1997) 192 CLR 69, McHugh J at 99.
²⁶ (1946) 74 CLR 461 at 483.
²⁷ (1997) 192 CLR 69 at 100, quoting Dixon J in *Posner*.
²⁸ (1997) 150 ALR 76 at 88.

²⁹ It is in the area of fraud and misrepresentation that courts appear most willing to declare that a decision so procured can simply be ignored; see *Lazarus Estates v Beasley* [1956] 1 QB 702; *Jones v Commissioner of Police* (1990) 20 ALD 532; E Campbell, "Effect of Administrative Decisions Procured by Fraud or Misrepresentation" (1998) 5 *AJ Admin L* 240 at 244-247; but see also G Ganz, "Estoppel and Res Judicata in Administrative Law" (1965) *PL* 237 at 246.
³⁰ Sykes, Lanham, Tracey and Esser state in *General Principles of Administrative Law* (4th edition, Butterworths, 1997) at 447:

The concept of "void" seems to be simple, and **is** simple. The meaning is that the decision is a nullity and has been a nullity from the time of its purported birth and no order of the court is necessary to establish the invalidity.

³¹ It is clear however that administrative decision makers must decide questions of law in making their decisions: *Drake v Minister for Immigration and Ethnic Affairs* (1979) 24 ALR 577 at 584-585.
³² (1979) 143 CLR 242 at 277.
³³ *Smith v East Elloe Rural District Council* [1956] AC 736; *F Hoffman-La Roche & Co AG v Secretary of State for Trade and Industry* [1975] AC 295; *Wattmaster Alco Pty Ltd v Button* (1987) 70 ALR 330.
³⁴ (1997) 192 CLR 69 at 130-131:

The more appropriate principle is that the validity of an administrative act or decision and the legality of the steps taken pursuant to it are presumed valid until the act or decision is set aside in appropriate proceedings.

³⁵ (1987) 17 FCR 26 at 33.
³⁶ Aronson and Dyer in *Judicial Review of Administrative Action* (2nd edition. LBC, 2000) conclude on this issue at 409:

The truth is that there is no such thing as a complete nullity; it always takes a court decision to say so.

See also in particular M Taggart, "Rival Theories of Invalidity" in M Taggart (ed), *Judicial Review of Administrative Action in the 1980s – Problems and Prospects* (1986) 70.
³⁷ *Administrative Decisions (Judicial Review) Act* s16.
³⁸ HWR Wade, "Unlawful Administrative Action: Void or Voidable?" (1968) 84 *LQR* 499 at 508.
³⁹ A Robertson "Administrative Law Remedies: Some discretionary considerations" (2002) 22(2) *Aust Bar Rev* 119.

40 *Reid v Rowley* [1977] 2 NZLR 472, Cooke J; M Taggart, "Rival Theories of Invalidity" in M Taggart
 (ed), *Judicial Review of Administrative Action in the 1980s – Problems and Prospects* (1986) 70 at
 85-88.

41 HWR Wade, "Unlawful Administrative Action: Void or Voidable" (1968) *LQR* 499 at 517.

42 (1980) 2 NZLR 1 at 4.

43 (1997) 79 FCR 400 at 413.

44 *Minister for Immigration & Multicultural Affairs v Bhardwaj* [1999] FCA 1806 (22 December 1999),
 on the basis that the September decision had not been lawful and was therefore open to collateral
 challenge in the Federal Court.

45 *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2000) 99 FCR 251, on the basis that
 the Tribunal had the power to make the October decision because of s33(1) of the *Acts*
Interpretation Act.

46 [2002] HCA 11 (14 March 2002); (2002) 187 ALR 117.

47 At [51]; ALR 129.

48 [2002] HCA 11 at [14]; ALR 121.

49 [2002] HCA 11 at [162] - [165]; ALR 156-157.

50 [2002] HCA 11 at 44; ALR 127.

51 [2002] HCA 11 at [149]; ALR 153.

52 [2002] HCA 11, Gleeson CJ at [5]; ALR 119; Gummow and Gaudron JJ at [39]; ALR 125; see
Ridge v Baldwin [1964] AC 40, Lord Reid at 79.

53 (1995) 184 CLR 163; C Finn, "Jurisdictional Error: Craig v South Australia" (1996) 3 *AJ Admin L*
 177 at 178; *Re Australian Industrial Relations Commission; Ex parte CFMEU* (1999) 164 ALR 73,
 and *Corporation of the City of Enfield v Development Assessment Commission* (2000) 199 CLR
 135.

54 *Craig v South Australia* (1995) 184 CLR 163 at 177.

55 *Plaintiff S157 of 2002 v The Commonwealth* [2003] HCA 2, 4 February 2003.

56 [2002] HCA 11 at 42; ALR 126.

57 Gaudron and Gummow JJ also stated that the *Migration Act* only limits the grounds upon which a
 decision may be challenged and the time within which it may be challenged in the Federal Court. It
 did not then limit the basis upon which a decision may be challenged for jurisdictional error in the
 High Court or the time within which it may be challenged. In relation to non-jurisdictional errors of
 law, Gaudron and Gummow JJ noted at [50]; 128 that once judicial review was unavailable, the
 decision was effective for all purposes. The illogicality referred to at [51]; 129 in the subjective view
 of invalidity operates "until the decision is set aside"; it does not reflect "the law that will be applied
 if and when the decision is challenged".

58 [2002] HCA 11 at [147]; ALR 152.

59 At [142]; 154.

60 At [155] and [157]; 155.

61 Chief Justice Gleeson specifically noted that the High Court has recently decided in *Re Refugee*
Review Tribunal; ex parte Aala (2000) 204 CLR 82 that failure to accord procedural fairness
 resulted in an excess of jurisdiction sufficient to attract prohibition, but that the remedy was
 discretionary. Whilst not pursuing this thought, this indicates a concern that discretionary
 considerations are a break on moving too far towards an absolute view of invalidity.
 As we have noted, the illogicality referred to by Gaudron and Gummow JJ at [51]; 129 arises in the
 situation "until the decision is set aside", suggesting that what is required before a decision maker
 can treat a decision as invalid is not only the availability of judicial review, but an assessment that a
 court will set aside the decision.

62 See also the comments at [2002] HCA 11 at [13]; ALR 120 by Gleeson CJ in relation to time, and
 at [143]; 151 by Hayne J in relation to the effect on third parties, both factors traditionally relevant to
 the exercise of judicial discretion to grant a remedy.

63 *Ousley v The Queen* (1997) 192 CLR 69, McHugh J at 99.

64 (1997) 192 CLR 69. There is a disagreement within the Court as to what that means in the case of
 a decision to grant a warrant.

65 See generally M Aronson, "Criteria for Restricting Collateral Challenges" (1998) 9(4) *Pub L Rev*
 237.

66 M Akehurst, "Revocation of Administrative Decisions" (1982) *PL* 613 at 616-617; E Campbell,
 "Revocation and Variation of Administrative Decisions" (1996) 22(1) *Mon LR* 30 at 53; see also *Re*
56 Denton Road, Twickenham [1953] 1 Ch 51.

67 (1991) 103 ALR 661 at 671.
 68 [2002] HCA 11 at 42; ALR 126.
 69 [2002] HCA 11 at [147]; ALR 152.
 70 [2002] HCA 1, Gleeson CJ at [5]; ALR 119.
 71 [1989] 2 SCR 848.
 72 [1989] 2 SCR 848 at 862.
 73 [1989] 2 SCR 848 at 863.
 74 [2002] HCA 11 at [8]; ALR 119.
 75 [2002] HCA 11 at [151]; ALR 154.
 76 (2000) 204 CLR 158.
 77 [2000] HCA 11 at 151; ALR 154.
 78 Section 476.
 79 Section 478(1).
 80 Section 485(1) and (3).
 81 [2002] HCA 11 at [59], [60]; ALR 131.
 82 [2002] HCA 11 at [153]; ALR 155.
 83 (1999) 197 CLR 510.
 84 [2002] HCA 11, Gleeson CJ at [8]; ALR 119; Gaudron and Gummow JJ at [44], [54]; ALR 127, 130.
 85 [2002] HCA 11 at [48]; ALR 128.
 86 [2002] HCA 11 at [13]; ALR 120.
 87 [2002] HCA 11 at [143]; ALR 151.
 88 [2002] HCA 11 at 150; ALR 153.
 89 [2002] HCA 11 at [103], [105]; ALR 142, 143.
 90 [2002] HCA 11 at [108]; ALR 143.
 91 [2002] HCA 11 at [110]; ALR 144.
 92 [2002] HCA 11 at [114] - [116]; ALR 145.
 93 *Minister for Immigration, Local Government and Ethnic Affairs v Kurtovic* (1990) 21 FCR 193 at 211;
Sloane v Minister for Immigration, Local Government and Ethnic Affairs (1992) 37 FCR 429 at 443;
Jayasinghe v Minister for Immigration and Ethnic Affairs and Another (1997) 145 ALR 532 at 541.
 94 See E Campbell, "Revocation and Variation of Administrative Decisions" (1996) 22(1) *Mon LR* 30
 at 57-63 for a detailed description of the reasons for conferring these powers and the
 consequences thereof.
 95 See for example the *Veterans Entitlement Act 1986* (Cth) s. 31 and s. 118ZP; the *Safety*
Rehabilitation and Compensation Act 1988 (Cth) s. 62.
 96 *Shipp v Herfords Pty Ltd* [1975] 1 NSWLR 412; E Campbell, op cit at 59-60; M Akehurst,
 "Revocation of Administrative Decisions" (1982) *PL* 613 at 625; A O Ginnow and L Fingerman
 (eds), "Administrative Law and Procedure: Rehearing, Modification, Costs and Fees" 73A *Corpus*
Juris Secundum 151 at 152.
 97 *Pearce v City of Coburg* [1973] VR 583 at 587-588; E Campbell, op cit at 56; M Akehurst, op cit at
 623.
 98 (1997) 150 ALR 76.
 99 E Campbell, op cit at 61; *R v Moodie and Others; Ex parte Mithen* (1977) 17 ALR 219.
 100 There are similar though not identical provisions to s33(3) in State and Territory legislation and in
 New Zealand, Canada and England legislation. The South Australian (*Acts Interpretation Act 1915*
 (SA) s39), English (*Interpretation Act 1978* (UK) s14) and Canadian (*Interpretation Act* (Canada)
 s4) provisions make it clear that the power to revoke or vary applies only to legislative instruments.
 The Queensland (*Acts Interpretation Act 1954* (Qld) s24AA), Victorian (*Interpretation of Legislation*
Act 1984 (Vic) s41A), New South Wales (*Interpretation Act 1987* (NSW) s43), Western Australia
 (*Interpretation Act 1984* (WA) s55), Northern Territory (*Interpretation Act* (NT) s43) and New
 Zealand (*Interpretation Act 1999* (NZ) ss13 and 15) provisions make it clear that the power
 applies to both administrative and legislative instruments, although in the case of WA and NZ the
 power to revoke or vary can only be exercised where there is an error in the first exercise of the
 power. The NSW provision provides for the revocation or amendment of any administrative
 decision whether it is in writing or not. The ACT provision (*Legislation Act 2001* (ACT) s180)
 applies to a power to make a decision which presumably includes a decision of an administrative
 nature. Only the Tasmanian (*Acts Interpretation Act 1931* (Tas) s22) provision appears to be as
 unclear as the Commonwealth one.
 101 (1993) 114 ALR 50.

- 102 (1997) 141 FLR 414.
- 103 (1990) 90 FCR 513; 161 ALR 53.
- 104 (1999) 162 ALR 625.
- 105 (2001) 110 IR 97.
- 106 (1993) 114 ALR 50 at 59-63.
- 107 (1978) 1 ALD 167.
- 108 (1984) 54 ALR 541 at 557.
- 109 (2002) 189 ALR 99.
- 110 [2002] VSCA 108 (2 August 2002).
- 111 (1978) 1 ALD 167.
- 112 (1978) 1 ALD 167 at 172.
- 113 (1979) 24 ALR 307.
- 114 *Commonwealth Hansard*, House of Representatives, 19 March 1941, Volume 166, at 126-127.
- 115 D C Pearce and R S Geddes, *Statutory Interpretation in Australia* (5th ed 2001) at 2.
- 116 [2002] VSCA 108 at [52].
- 117 (1984) 54 ALR 541 at 557.
- 118 Sections 46(a) and 46(b) are now sections 46(1)(a) and 46(1)(b).
- 119 D C Pearce and R S Geddes, *Statutory Interpretation in Australia* (5th ed 2001) at 90-93.
- 120 Long title to the *Acts Interpretation Act*.
- 121 (1999) 162 ALR 625 at 636.
- 122 (1990) 92 ALR 93.
- 123 (2000) 99 FCR 251.
- 124 (1990) 92 ALR 93 at 112.
- 125 (2000) 99 FCR 251 at 15, see also *Minister for Immigration and Multicultural Affairs v Bhardwaj* [1999] FCA 1806 (22 December 1999). In W Wade and C Forsyth, *Administrative Law* (7th ed 1994) at 261-262, the authors suggest that it is misleading to construe the English equivalent to s33(1) literally if the power under consideration is one which affects legal rights. The authors argue that courts will be inclined to hold a decision, validly made under such a power, irrevocable due to the importance accorded to finality.
- 126 *Jayasinghe v Minister for Immigration and Ethnic Affairs* (1997) 145 ALR 532 at 541; *Sloane v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 37 FCR 429; *Leung v Minister for Immigration and Multicultural Affairs* (1997) 150 ALR 76, Heerey J at 77-79.
- 127 (1993) 41 FCR 1 at 36-37, 115 ALR 14; see also *Jayasinghe v Minister for Immigration and Ethnic Affairs* (1997) 145 ALR 532 at 547.
- 128 2nd edition, 1992, at 367.
- 129 (1992) 37 FCR 429 at 443
- 130 R A MacDonald, "Reopenings, Rehearings and Reconsiderations in Administrative Law: *Re Lornex Mining Corporation and Bukwa*" (1979) 17(1) *Osgoode Hall LJ* 207 at 221; E H Shopler, "Power of administrative agencies to reopen and reconsider final decisions as affected by lack of specific statutory authority" 73 *ALR 2d* 939 at 941.
- 131 *Re Scivitarro and Ministry of Human Resources* (1982) 134 DLR (3d) 521; see also *Re Brown and Acting Commissioner for Superannuation* (1981) 3 ALD 185; E Campbell, "Revocation and Variation of Administrative Decisions" (1996) 22(1) *Mon LR* 30 at 46-47.
- 132 E Campbell, "Revocation and Variation of Administrative Decisions" (1996) 22(1) *Mon LR* 30 at 56-57; E H Shopler, "Power of administrative agencies to reopen and reconsider final decisions as affected by lack of specific statutory authority" 73 *ALR 2d* 939 at 956; see also R A MacDonald, "Reopenings, Rehearings and Reconsiderations in Administrative Law: *Re Lornex Mining Corporation and Bukwa*" (1979) 17(1) *Osgoode Hall LJ* 207 at 211-212; see also *Jayasinghe v Minister for Immigration and Ethnic Affairs* (1997) 145 ALR 532 at 547 in relation to a reference to "finally determined".
- 133 (2000) 99 FCR 251 at [34] - [37].
- 134 E H Shopler, "Power of administrative agencies to reopen and reconsider final decisions as affected by lack of specific statutory authority" 73 *ALR 2d* 939 at 952-953; see for example *Minister for Immigration, Local Government and Ethnic Affairs v Kurtovic* (1990) 21 FCR 193, where Neaves and Gummow JJ held that the power to make a deportation order once the conditions for such an order were satisfied was of a continuing nature.
- 135 *Re 56 Denton Road, Twickenham* [1953] 1 Ch 51; *Rootkin v Kent County Council* [1981] 1 WLR 1186; see also M Akehurst, "Revocation of Administrative Decisions" (1982) *PL* 613.

- ¹³⁶ (2002) 189 ALR 99 at 107.
- ¹³⁷ (1984) 4 FCR 348 at 353; 59 ALR 359.
- ¹³⁸ *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2000) 99 FCR 251 at 265; see also *Minister for Immigration & Multicultural Affairs v Bhardwaj* [1999] FCA 1806 (22 December 1999), Madgwick J at [12].
- ¹³⁹ [2002] HCA 11 at [113] - [119]; 187 ALR 117 at 145-146.
- ¹⁴⁰ *Sloane v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 37 FCR 429; *Re Cotterell and Repatriation Commission* [2000] AATA 444; see also *Re Lornex Mining Corp Ltd and Bukwa* (1976) 69 DLR (3d) 705, where the British Columbia Supreme Court (Verchere J) held that the Human Rights Commission had the power to reconsider a matter because there was no right of appeal.
- ¹⁴¹ (1992) 37 FCR 429 at 444.
- ¹⁴² *Jayasinghe v Minister for Immigration and Ethnic Affairs* (1997) 145 ALR 532 at 547.
- ¹⁴³ See *Yilmaz v Minister for Immigration and Multicultural Affairs* (2000) 100 FCR 495.
- ¹⁴⁴ For example, s60 of the *Therapeutic Goods Act 1989* (Cth) provides that a person whose interests are affected by an initial decision may seek a review. It is unlikely that the decision maker's concerns would fall within that definition.
- ¹⁴⁵ [1999] FCA 1806 (22 December 1999).
- ¹⁴⁶ R A MacDonald, "Reopenings, Rehearings and Reconsiderations in Administrative Law: *Re Lornex Mining Corporation and Bukwa*" (1979) 17(1) *Osgoode Hall LJ* 207 at 223.
- ¹⁴⁷ (1988) 16 ALD 206 at 210.
- ¹⁴⁸ (1991) 103 ALR 661 at 671.
- ¹⁴⁹ (1997) 150 ALR 76 at 88.
- ¹⁵⁰ For criticisms of the concept of revocation by agreement, see S Lloyd, "The *Kawasaki Cases*: Validity of Administrative Orders, Natural Justice and Interest Payments" Newsletter (1992) No. 9 Administrative Review Council. See also *R v Hertfordshire County Council; ex parte Cheung*, 26 March 1986, TLR 4 April 1986.
- ¹⁵¹ *R v Kensington and Chelsea Rent Tribunal; Ex parte McFarlane* [1974] 1 WLR 1486; *R v Hertfordshire County Council; Ex parte Cheung*, 26 March 1986, TLR 4 April 1986 (note that in this case the error of law came to light in a test case which showed that previous unlitigated cases were based on an erroneous view of the law).
- ¹⁵² *R v Hertfordshire County Council; Ex parte Cheung*, 26 March 1986, TLR 4 April 1986.
- ¹⁵³ (1990) 21 FCR 193, 92 ALR 93.
- ¹⁵⁴ *Minister for Immigration, Local Government and Ethnic Affairs v Kurtovic* (1990) 21 FCR 193, Gummow J at 207-211.
- ¹⁵⁵ *Minister for Immigration, Local Government and Ethnic Affairs v Kurtovic* (1990) 21 FCR 193 at 214-216.
- ¹⁵⁶ A Abadee, "Keeping Government Accountable for its Promises: The Role of Administrative Law" (1998) 5 *AJ Admin L* 191 at 197.
- ¹⁵⁷ (1990) 21 FCR 193 at 216-218.
- ¹⁵⁸ For a more detailed analysis of the doctrine of estoppel, see J Thomson, "Estoppel by Representation in Administrative Law" (1998) 26 *Fed L Rev* 83; for an American perspective see J F Rydstrom, "Modern Status of the Applicability of Doctrine of Estoppel Against Federal Government and its Agencies" 27 ALR FED 702.