THE IMPACT OF JUSTICE KIRBY ON ADMINISTRATIVE LAW JURISPRUDENCE

*John Carroll**

Introduction

Justice Kirby's impact on jurisprudence in Australia has been immense. Although his Honour's divergence from many of his colleagues on a range of issues has attracted the title of the 'great dissenter', his judgments invariably penetrate and dissect in ways that provide the reader with valuable insights and reflections. While the Gleeson court was often characterised as adopting formalist approaches which obscured, rather than revealed, the policy choices open to courts, Kirby J's judgments unapologetically tackled the underlying issues head on. Whether his great dissents have an enduring impact on the corpus of the law remains to be seen. Indeed, it may be that his greatest legacy will prove to be his transparent exposure of the shortcomings of the technical approaches of other High Court judges. Regardless, his Honour's judgments will provide a rich source of ideas and challenges for years to come.

There is no better example of his jurisprudential and methodological contribution than his judgments in administrative law cases. While the judgments of other High Court judges have relied upon highly technical approaches and distinctions to circumscribe the scope of administrative law principles, Kirby J's judgments - largely in dissent - are characterised by a purpose to reveal the underlying policy issues and mark out the court's role in keeping government accountable. One may not always agree with his Honour's conclusion, but one can always engage with his reasoning and identify the point of disagreement. The purpose of this paper is not to give an exhaustive account of Kirby J's contribution to the development of administrative law principles. Rather, it will reflect on two main points that are revealed in his key administrative law judgments: first, that his Honour had a commitment to open and transparent reasoning; and, second, his Honour displayed a commitment to government accountability. These two points will be emphasised by a consideration of his Honour's views on the distinction between jurisdictional and non-jurisdictional error; the creation of a remedy for serious administrative injustice; issues that lie at the public/private divide; and the duty to provide reasons.

The Limits of the judicial function in administrative law

Jurisdictional error

It is well understood that constitutional principles affect the legitimate scope of the judicial function in Australian administrative law. Administrative law principles at the State level have largely kept pace with federal administrative law developments and, thus, the focus on judicial power at the federal level drives much of Australian administrative law. At the federal level, s 71 of the Constitution vests judicial power in the courts, the executive power is vested in the executive by s 61. The mixture of judicial and non-judicial functions is not

* *John Carroll is partner, Clayton Utz.* *This paper was presented at the 2009 AIAL National Administrative Law Forum, Canberra, 7 August 2009.* *The assistance of Nick Swan, paralegal, Clayton Utz, in the preparation of this paper is acknowledged.*

permitted and, thus, it becomes important to identify the content of 'judicial power'. Although the task of defining this concept has proved impossible, in administrative law at least, the dividing line has been calibrated to the well known division between judicial and merits review. The determination of whether federal executive action is valid or invalid is an exclusive function of judicial power, and its exercise by the judiciary assists in upholding the rule of law.[1] As Gleeson CJ, Gummow, Kirby, Hayne, Heydon and Crennan JJ said in *Bodruddaza*,[2] an 'essential characteristic of the judicature provided for in Ch III is that it declares and enforces the limits of the power conferred by statute upon administrative decision-makers'.[3]

What is involved in the judiciary exercising judicial review? How do we know when a decision is an unlawful one? For the purposes of the constitutional jurisdiction to award relief against administrative decision-makers (that is, for the purposes of s 75(v) of the Constitution and s 39B of the *Judiciary Act 1903* (Cth)), the distinction between *jurisdictional error* and *non-jurisdictional error* has emerged from High Court jurisprudence as the guiding principle for determining the judicial function.[4] Thus, the principal constitutional remedies for *mandamus* and prohibition will be issued only where there is a jurisdictional error. Although *certiorari* is available for all errors on the face of the record - jurisdictional and non-jurisdictional - the availability of that remedy largely, although not exclusively, follows the constitutional writs. Accordingly, the jurisdictional error vs non-jurisdictional error distinction is a dominant force in current administrative law thinking.

As judges and commentators recognise, the concept is deeply problematic.[5] It has been rejected in England,[6] and has been the subject of criticism in a series of Kirby J's judgments. In an oft-cited portion of his judgment in *Miah*, his Honour commented:

> "In England, the former distinction between jurisdictional and non-jurisdictional error, once of great significance in cases concerned with the prerogative writs, has now been abandoned. The precise scope of error classified as "jurisdictional" was always uncertain. In contemporary Australian law, the boundary between error regarded as "jurisdictional" and error viewed as "non-jurisdictional" is, to say the least, often extremely difficult to find."[7]

With that distinction abolished, Kirby J has argued that the constitutional writs, and relief under section 39B of the *Judiciary Act*, should be available "to redress established errors of law", regardless of whether they would be classified as jurisdictional or not.[8]

While Kirby J has frequently called for distinction between jurisdictional and non-jurisdictional errors to be abolished,[9] his Honour was unable to convince the other members of the High Court to follow. Indeed, in apparent resignation, in *Futuris*, Kirby J noted that questions concerning jurisdictional error "*will not completely go away and the future will look after them*".[10]

Kirby J's critique of jurisdictional error is twofold: first, that the concept is indeterminate; and second, that it is meaningless. In relation to the first, there is no doubt, as Kirby J has noted,[11] that the scope of error classified as jurisdictional and the boundary between jurisdictional and non-jurisdictional errors is difficult to define. Indeed, in *Craig v South Australia*, the seminal Australian case enunciating the distinction between jurisdictional and non-jurisdictional errors, the High Court accepted that "the line between jurisdictional error and mere error in the exercise of jurisdiction may be particularly difficult to discern".[12] As to the second, Kirby J considers the term "jurisdictional error" to be "meaningless", as it has become only "conclusory" in nature.[13] Aronson, Dyer and Groves agree and, indeed, see the uncertainty of jurisdictional error as stemming from the fact that it has become conclusory.[14] There are now so many ways in which a jurisdictional error can occur. To describe a decision as infected by jurisdictional error does not explain how that decision became infected with jurisdictional error.[15] Furthermore, the concept is said to be prefatory: it explains what the consequence of an error of law will be, that is, a nullity.[16] As Aronson

explains, "...there are many sorts of jurisdictional errors but usually only one legal consequence, which is that they make the relevant act or decision null and void".[17]

As Aronson has said, even if these faults are conceded, that need not lead to the conclusion that the distinction should be abandoned.[18] Conclusory terms can be useful, as they aid in grouping together concepts that share something in common - in this case, legal errors with nullity as the end result.[19] Thus, "where nullity is important and where one has been able to establish it by proving the commission of an error which has nullity as a consequence, there is no harm and much convenience in characterising that error as jurisdictional".[20] Although Aronson agrees with Kirby J that jurisdictional error is conclusory, that, of itself, is not seen as a reason to abolish the category.[21]

There is no guarantee that Kirby J's preferred approach of focusing on legal errors would fare much better if judged by the same criteria. The distinction between jurisdictional and non-jurisdictional errors of law was once made in England but has now all but been abandoned.[22] The net result has been that jurisdictional error in England now covers almost every conceivable error of law.[23] When non-jurisdictional errors of law were first abolished, non-jurisdictional errors of fact and discretion still remained.[24] However, English courts have recently extended the concept of error of law to cover errors of fact, where the error of fact is sufficiently unfair.[25] Consequently, by seeing many errors of fact as errors of law, the English conception of error of law has arguably become so wide that, it too has become indeterminate and conclusory in nature.[26]

Any disagreement with Kirby J's preferred approach does not diminish his contribution. Ascertaining the scope of judicial power has always involved setting up markers. Those markers, however, may operate in different ways to reflect different objectives. As Aronson pointed out, the marker of jurisdictional error need not tell us everything (or even anything) about the circumstances in which an exercise of power will be unlawful. There is nothing wrong with it operating purely as descriptive of a conclusion. The importance of Kirby J's contribution here is to highlight that jurisdiction error, although a marker of invalidity, cannot be used for anything more than that. It cannot tell us what circumstances will give rise to invalidity.

A Remedy for serious administrative injustice

It was Kirby J's open acknowledgment of an assessment of underlying policies that allowed for ready critique of his Honour's judgments. One clear candidate for such critique is his Honour's suggestion that the judiciary can fashion a remedy for serious administrative injustice.

In *Applicant S20*, Kirby J suggested the existence of a residual common law remedy to correct "serious administrative injustice", which was designed to provide a safety net in judicial review cases where an applicant could not make out an established ground of review.[27] For Justice Kirby, the basis of this residual remedial power was the inherent flexibility of the common law: "Our legal system commonly rejects absolute or rigid categories. It does so out of a recognition of the requirement to secure justice in the particular case wherever possible".[28] Kirby J thus argued:

> "Courts of...review do not generally disturb...administrative evaluations of the facts and merits of a case. But, subject to the Constitution or the applicable legislation, they reserve to themselves the jurisdiction and power to intervene in extreme circumstances. They do this to uphold the rule of law itself, the maintenance of minimum standards of decision-making and the correction of clear injustices where what has occurred does not truly answer to the description of the legal process that the Parliament has laid down.
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> ...

> It has been said that the attainment of administrative justice is not the object of judicial review. At the same time, this Court should not shut its eyes and compound the potential for serious administrative injustice demonstrated by the appellant. It should always take into account the potential impact of the decision upon the life, liberty and means of the person affected."[29]

Judicial review courts would, therefore, have a reserve power to intervene where "what has happened does not truly answer to the description of the legal process that the Parliament has laid down". That power is an exceptional one, to be exercised only in "extreme" cases, which, Kirby J argued, were to be defined with respect to both the nature of the decision-maker's error and the gravity of its consequences to the individual.[30] While this is an interesting suggestion, it raises at least two issues.

Kirby J's proposed "serious administrative injustice" remedy is "remarkably similar" to recent developments in English judicial review, where English courts have issued relief where a decision causes "conspicuous unfairness" to an individual.[31] For example, in *Secretary of State for the Home Department v R (on the application of Rashid)*,[32] Pill LJ held that the Home Department's "flagrant and prolonged incompetence" had caused conspicuous unfairness to Rashid, and that "degree of unfairness was such as to amount to an abuse of power requiring the intervention of the court".[33] For Groves, the decisive issue in *Rashid* was the degree of unfairness suffered: "If the unfairness was 'extreme', or capable of attracting similar descriptors, an abuse of power could be found".[34] However, this has been criticised for providing little legal principle to guide the intervention of courts. As Groves has said, this approach provides courts with little more than "impressionistic guidance", and provides no clear criteria to determine when unfairness has become sufficiently serious to warrant the court's intervention.[35]

The same issues arise with respect to a remedy for serious administrative injustice. Under Kirby J's approach, courts must intervene to avoid "serious" injustice, arising in "extreme" circumstances, where what has occurred does not "truly answer" the legal process prescribed by Parliament. The use of "extreme" and "serious", for example, does not clearly articulate or determine when an administrative injustice should be remedied; no clear legal principle or guidance to control the court's intervention is provided. In this respect, Groves has argued that Kirby J's suggested remedy "lacks a coherent legal principle and...simply provides a cloak for the imposition of subjective judicial impressions rather than legal doctrine".[36]

It is also arguable that the Constitution's separation of powers places insurmountable obstacles in the path of such a remedy. The High Court has articulated a narrow conception of judicial power, which prevents Chapter III courts from exercising power over the merits of administrative action. As Brennan J explained in *Quin*:

> "The duty and jurisdiction of the court to review administrative action do not go beyond the declaration and enforcing of the law which determines the limits and governs the exercise of the repository's power. If, in doing so, the court avoids administrative injustice or error, so be it; but the court has no jurisdiction simply to cure administrative justice or error. The merits of administrative action...are for the repository of the relevant power and, subject to political control, for the repository alone."[37]

More recently, in *Lam*,[38] the High Court reiterated the constitutional limits imposed on courts conducting judicial review. Gleeson CJ noted that the High Court's s 75(v) jurisdiction "does not exist for the purpose of enabling the judicial branch of government to impose upon the executive branch its ideas of good administration".[39] Similarly, McHugh and Gummow JJ emphasised that "[a]n aspect of the rule of law under the Constitution is that the role or function of Ch III courts does not extend to the performance of...the executive function of administration".[40]

Kirby J claimed that the serious administrative injustice remedy would fall within the scope of judicial power, as courts exercising it would be "uphold[ing] the rule of law…[and ensuring]...minimum standards of decision-making".[41] However, as Groves has argued, the primary basis upon which the supposed illegality of a decision under review can be judged, and hence the applicability of the remedy determined, is the merits and/or fairness of that decision.[42] Kirby J explicitly calls for courts to consider the "potential impact of the decision upon the life, liberty and means of the person affected".[43] Given the limited nature of judicial review, as described by Brennan J, and the High Court's explicit warnings against entering into the merits of decisions, the determination of the legality of administrative action with respect to a judge's opinion as to whether that action constitutes a serious administrative injustice is likely to transgress the proper limits of judicial review.[44]

A formalistic approach to the question of judicial review might have allowed Kirby J to hide this analysis within the framework of jurisdictional error. Current grounds of review might have been twisted to accommodate his Honour's extended vision of the demands of the rule of law. Such an approach might have deflected critique: what might appear to many to be an exercise of merits review might have masqueraded undetected as an exercise of judicial power by the simple device of a jurisdictional error. However, such an approach would have been disingenuous. Consistent with his other decisions, however, Kirby J eschewed reliance on such conclusory characterisations, instead preferring to explain the principle in transparent terms.

The Public/private distinction

Clearly, judicial review is concerned with the control of governmental - that is, executive power. Executive power is an aspect of sovereign authority. Exercises of power that arise from private arrangements, such as arbitration, do not involve an exercise of sovereign authority. At a time when traditional government activities were performed according to traditional government structures, the question of what was an exercise of government power was relatively straightforward. However, the premises in this proposition are increasingly becoming unstable. Over the last 20 years, various functions that were once performed by government departments and businesses have been transferred to private corporations through privatisation and outsourcing processes. Somewhat surprisingly, however, relatively few Australian cases have dealt with the question of whether decisions made by non-government, non-statutory entities - such as private corporations - are reviewable in Australian administrative law.

In England, the issue was considered in *Datafin*, in which the Court of Appeal decided that private bodies entrusted with "public power" would be subject to judicial review.[45] The case of *NEAT Domestic*[46] provided the High Court with an opportunity to consider this question in an Australian context, and in light of the English developments. Under the *Wheat Marketing Act 1989* (Cth), the export of wheat was prohibited without the consent of the Wheat Export Authority ('WEA').[47] The Act provided, however, that the WEA could not give consent to export without the written consent of AWB (International) Ltd ('AWBI'). AWBI was a wheat exporter and a wholly owned subsidiary of AWB, both companies having been incorporated under the Corporations Law of Victoria. NEAT Domestic was a trader in wheat and hence a competitor of AWBI. NEAT Domestic applied for consent to export wheat and was refused by AWBI, thus forcing the WEA to also refuse consent. Consequently, NEAT sought review under the *ADJR Act* of AWBI's refusal decision.

The issue for the High Court was whether AWBI, a private company exercising powers under the *Wheat Marketing Act*, was subject to administrative law restraints and, more particularly, whether it could exercise its power to grant and refuse export consent with reference to its own commercial interests, or whether AWBI was bound to consider the merits of each individual export application.

The majority decision of McHugh, Hayne and Callinan JJ concluded that AWBI's decision to refuse NEAT's export application was not reviewable under the *ADJR Act* and, furthermore, that the common law judicial review remedies of prohibition, *certiorari* and *mandamus* were unavailable.[48] The majority gave three related reasons for why "public law remedies" did not apply to AWBI:

> "First, there is the structure of s 57 and the roles which the 1989 Act gives to the two principal actors — the authority and AWBI. Secondly, there is the "private" character of AWBI as a company incorporated under companies legislation for the pursuit of the objectives stated in its constituent document: here, maximising returns to those who sold wheat through the pool arrangements. Thirdly, it is not possible to impose public law obligations on AWBI while at the same time accommodating pursuit of its private interests."[49]

As to the first reason, to ascertain whether AWBI's decision fell within the *ADJR Act*'s jurisdictional requirements, the majority adopted an institutional approach to administrative law's public/private distinction, examining the nature of the decision-maker (AWBI), rather than the nature of the decision itself.[50] Their Honours found that the *Wheat Marketing Act* did not confer authority on AWBI to make the consent decision, but rather, that power arose by virtue of AWBI's incorporation.[51] AWBI's decision was not, therefore, an administrative decision made under an enactment. Instead, WEA's decision to consent to an export application was "the operative and determinative decision which the [legislation] requires or authorises".[52]

The second and third reasons related more to the conclusion that judicial review was unavailable at common law.[53] In that respect, the majority held that AWBI need not pay regard to the interests of others when considering export applications. This was because AWBI's private sector profit motive could not co-exist with a requirement to consider the interests of others, especially competitor companies. From that, the majority "extrapolated from the inappropriateness of supposing a duty to consider the commercial interests of others to the general conclusion that AWBI was not governed by common law judicial review".[54]

By contrast, Kirby J found that the decision of AWBI was amenable to review under the *ADJR Act*. His Honour's judgment was premised on a desire to bolster the rule of law, by ensuring that Parliament is unable to place the exercise of public power outside the supervision of the courts. In that vein, he began his judgment by commenting:

> “This appeal presents an opportunity for this court to reaffirm that principle in circumstances, now increasingly common, where the exercise of public power, contemplated by legislation, is "outsourced" to a body having the features of a private sector corporation. The question of principle presented is whether, in the performance of a function provided to it by federal legislation, a private corporation is accountable according to the norms and values of public law or is cut adrift from such mechanisms of accountability and is answerable only to its shareholders and to the requirements of corporations law or like rules."[55]

In considering whether AWBI's decision was reviewable under the *ADJR Act*, Kirby J rejected the institutional approach to the public/private distinction adopted by the majority.[56] Rather, his Honour argued that the character of decisions of bodies assigned important public functions cannot be determined conclusively by reference to their legal structure.[57] Thus, by adopting that approach and examining the nature of the decision under review, Kirby J found (contrary to the majority) that the decision was "made...under an enactment":

> "The only way that AWBI's "decision" could take on a legal character affecting the conduct of the Authority...is by force of the Act...it is the Act that provides for, requires, and gives legal force to, AWBI's "decisions"...It is the role performed for the purposes of the Act, and not the corporate structure of AWBI, that determines the character of the "decisions" in question…"[58]

Kirby J also dealt in depth with the issue of whether AWBI's decision was of an "administrative character".[59] For his Honour, "administrative" decisions include those "made in executing or carrying into effect the laws of the Commonwealth".[60] In determining that AWBI's decision met that definition, his Honour considered the issue of whether AWBI was exercising public or private power.[61] Kirby J argued that if a decision is made pursuant to the exercise of a "public power", it is more likely to be of an "administrative character", within the meaning of the *ADJR Act*.[62] That AWBI's approval was fully integrated into the regulatory scheme so that it effectively held a veto over the exercise of statutory consent was an important reason for his Honour's conclusion. So too was the fact that the decision had an impact on much wider interests than those of an ordinary corporation. Furthermore, since remedies under the *Trade Practices Act 1974* (Cth) were not available, administrative review was the only available mechanism to hold AWBI accountable.[63]

Kirby J (along with Gleeson CJ), was in the minority, and was the only High Court judge to find AWBI's decisions to be amenable to judicial review.

It is surprising that the majority view was not driven by reference to the underlying purposes of judicial review. The majority judges had been parties to other judgments which had emphasised the centrality of judicial review to the maintenance of the rule of law.[64] How is the rule of law affected when private actors are used in regulatory schemes? In the context of determining the reach of ss 75(iii) and (iv) of the Constitution, the High Court has always taken a broad view to ensure that the jurisdiction of the courts is not subject to 'colourable evasion'.[65] The majority in *NEAT Domestic* do not wrestle with these issues. The majority approach, that looks to institutional arrangements for the exercise of power,[66] largely ignores the reality that those institutions may have, in the modern regulatory state, broken down. Thus, it is of limited utility for the purposes of disentangling various threads in public/private regulatory schemes.

Not surprisingly, the reasoning of the majority has been heavily criticised.[67] In particular, Aronson notes that the majority judgment "leaves unresolved the wider question of how far, if at all, Australia's common law of judicial review should follow England's extension to private sector bodies exercising public power".[68] Indeed, for Aronson, "the real question for common law judicial review should be whether AWBI was exercising public or private power".[69]

The judgment of Kirby J identified the broader policy considerations underlying the judicial review of public decisions made by private bodies. His decision was premised on upholding the rule of law by ensuring that such decisions could not be removed from the court's supervision. His Honour offered detailed reasons that properly engaged with the fundamental issue in the case (and common law judicial review more generally): whether AWBI was exercising public or private power.[70]

Griffith University v Tang[71] provided another opportunity to revisit these issues. The case concerned the judicial review of a decision made by Griffith University to exclude Ms Tang from a PhD program, on the basis that she had "undertaken research without regard to ethical and scientific standards".[72] Ms Tang challenged the decision under the *Judicial Review Act 1991* (Qld), alleging a denial of natural justice. The *Judicial Review Act* was framed in the same terms as the *ADJR Act*, and thus the exclusion decision was reviewable if it was, inter alia, "made...under an enactment".[73] The source of the power used to exclude Ms Tang was a Policy on Academic Misconduct, developed by the University's Academic Committee, a body established by, and permitted to exercise delegated powers of, the University Council, pursuant to the *Griffith University Act 1998* (Qld).[74] The fundamental issue was, therefore, whether the exclusion decision was "made...under an enactment".[75]

The majority judgment of Gummow, Callinan and Heydon JJ found that the University's decision to exclude Ms Tang was not made "under an enactment". Prior to *Tang*, *ADJR*'s requirement that the decision be made "under" an enactment "had spawned several tests, most of them vague, and none of them dispositive".[76] In reaching its conclusion, the majority enunciated a new approach to determining whether a decision is, in fact, made "under" an enactment, which has brought a degree of clarity to that issue:[77]

> "The determination of whether a decision is "made … under an enactment" involves two criteria: first, the decision must be expressly or impliedly required or authorised by the enactment; and, secondly, the decision must itself confer, alter or otherwise affect legal rights or obligations, and in that sense the decision must derive from the enactment. A decision will only be "made … under an enactment" if both these criteria are met."[78]

The majority adopted a broad and undemanding approach to the first requirement, holding that a decision could be "authorised" by an enactment even if there was no statutory duty to make it and even if the statutory authorisation had to be implied.[79] Consequently, the majority held that the expulsion decision was authorised by the University Act. The majority judges summarised their second requirement - a "legal right or obligation" test as:

> "[D]oes the decision in question derive from the enactment the capacity to affect legal rights and obligations? Are legal rights and obligations affected not under the general law but by virtue of the statute?"[80]

The majority held that the University's decision did not affect Ms Tang's legal rights and obligations and, consequently, could not satisfy the "legal right or obligation" criterion.[81] Consequently, the decision was not made "under an enactment", and there was no jurisdiction for the court to review the expulsion decision. The majority argued that "the respondent enjoyed no relevant legal rights and the University had no obligations under the *University Act* with respect to the course of action the latter adopted towards the former".[82] Indeed, rather surprisingly, the majority considered that no set of legal rules governed the relationship between the university and Ms Tang - the relationship was "at best...consensual" and "dependent upon the presence of mutuality.[83]

As in *NEAT*, the judgment of Kirby J drew from rule of law principles that public authorities should be accountable to act in accordance with the law when exercising public powers, and a desire to ensure that the ambit of remedial judicial review legislation, such as the *ADJR Act*, is not unduly diminished.[84] His Honour began his judgment by stating:

> "For the second time in less than 2 years, this court adopts an unduly narrow approach to the availability of statutory judicial review directed to the deployment of public power. The court did so earlier in NEAT Domestic Trading Pty Ltd v AWB Ltd. Now it does so in the present case.
>
> Correctly in my opinion, NEAT Trading has been described as a "wrong turn" in the law. Its consistency with past authority of this court has presented difficulties of explanation. Its outcome has been described, rightly in my opinion, as "alarming", occasioning a serious reduction in accountability for the exercise of governmental power. Now, the error of approach, far from being corrected, is extended. This constitutes an erosion of one of the most important Australian legal reforms of the last century [the ADJR Act]. This court should call a halt to such erosion."[85]

For Kirby J, the rule of law "renders the recipients of public power and public funds answerable, through the courts, to the people from whom the power is ultimately derived...".[86] This approach drew the public/private distinction and whether the University was exercising public power, to the centre of Kirby J's judgment.[87] Kirby J expressly rejected the majority's "voluntary association" characterisation of the relationship between Ms Tang and the University, and concluded that the decision to terminate the relationship between the parties involved an exercise of public power that was reviewable under the *Judicial Review Act*: "the reality [was] that the relevant "arrangement" between the university and [Ms Tang] consisted solely in the exercise by the university of its statutory powers under the Higher

Education Act and [the] University Acts".[88] The conclusion that the University was exercising public power was also bolstered, for example, by the recognition that Australian universities are (largely) public institutions that rely on significant government funding.[89]

As in *NEAT*, the majority's judgment is not driven by rule of law considerations. Is the rule of law objective which is said to underlie much of the constitutional writ terrain advanced or unaffected by the conclusion that the challenged decision was not subject to judicial review? The majority test which focused on whether the decision, itself, affected legal rights and obligations, was obviously an attempt to draw out the characteristics of sovereign power. However, there was little effort made to tie this to a broader assessment of the public/private context. As Mantziaris and McDonald have argued, "the appropriateness of judicial review of the exercise of a power that was arguably "private", but exercised by a body that was arguably "public" is the question that lay at the heart of *Tang*".[90] For those commentators, "the criteria for evaluating any proposed test for characterising whether decisions are "made...under an enactment" must include the capacity of the test to frankly acknowledge the policy questions which attend the public/private distinction".[91] In their view, a test examining whether a decision affects a legal right or obligation does not illuminate these issues. Indeed, that approach "is likely to conceal rather than reveal the policy considerations relevant to deciding which decisions made by public authorities should be subjected to administrative law norms".[92] By contrast, as we have seen, Kirby J explicitly dealt with the public/private distinction, finding that the University was exercising a power of a public nature.

The reasoning of Kirby J in these two cases offered a transparent assessment of the underlying policy interests that inform an answer to the question of what constitutes an exercise of sovereign power at the public/private interface and, accordingly, how far judicial review should extend. When judged by those standards, the majority judgments seem to miss the methodological mark.

A Commitment to public accountability: a duty to provide reasons

We have already seen Kirby J's explicit commitment to public accountability in his administrative law decisions. In suggesting the possibility of a remedy for serious administrative injustice and in seeking to dissect the nature of power exercised at the public/private interface, his Honour was driven by the rule of law demands of public accountability. The same administrative law value informed his decision, whilst the President of the New South Wales Court of Appeal, in *Osmond v Public Service Board of New South Wales*[93]. *Osmond* involved a public servant who had applied for promotion, which was determined by the Governor on the recommendation of the Head of the Department of Local Government and Lands. Mr Osmond was not selected and, in accordance with the *Public Service Act 1979* (NSW), appealed the decision to the Public Service Board. The Board dismissed Osmond's appeal; it did not provide reasons as it was not under a statutory duty to do so. Osmond thus sought a declaration in the New South Wales Supreme Court to the effect that reasons had to be given. At first instance, Hunt J rejected Osmond's application, considering himself bound by authority to deny the relief sought.[94] Osmond then successfully appealed to the New South Wales Court of Appeal.

Kirby P held that there existed a general duty on decision-makers to provide reasons for their decisions:

> "The overriding duty of public officials who are donees of statutory powers is to act justly, fairly and in accordance with their statute. Normally, this will require, where they have a power to make discretionary decisions affecting others, an obligation to state the reasons for their decisions. That obligation will exist where, to do otherwise, would render nugatory a facility, however limited, to appeal against the decision. It will also exist where the absence of stated reasons would diminish a facility to have the decision otherwise tested by judicial review…"[95]

His Honour saw the basis of this right as being two-fold: first, fairness in public administration required those who exercise a public power to explain its exercise; and second, being necessary for the facilitation of appeal processes and judicial review proceedings.[96] However, that right would not exist where the provision of reasons would be otiose or would disclose confidential information.[97]

As we have seen, a feature of many Kirby J's judgments is his commitment to transparent reasoning that details and discloses the underlying premises and policy considerations upon which they are based.[98] Kirby P's judgment in *Osmond* is also illustrative of that commitment. Indeed, Marilyn Pittard has commented that "[t]he judgment of Kirby P...remains a focus today for an evaluation of the rationale for the duty; and is exemplary of the possible role of the judiciary in resolving the law in favour of appropriate social and administrative good".[99] In *Osmond*, his Honour stated that:

> "There are opportunities for judicial restraint and judicial development of the law...But the consequence of this...is an obligation to consider relevant policy considerations which, consistent with legal authority, may properly be taken into account in determining whether, as in the present case, to take the next small step in the elaboration of the common law or to hold back."[100]

With that approach in mind, Kirby P discussed in detail a range of policy arguments both in favour of and against a right to reasons.[101] Despite the detailed policy reasons cited by Kirby P in support of the duty to provide reasons, the High Court, on appeal, rejected his Honour's view that the common law required reasons to be given for administrative decisions. For Gibbs CJ, writing the leading judgment, "no rule of common law, and no principle of natural justice, requir[ed] the Board to give reasons for its decision, however desirable it might be thought that it should have done so".[102] Gibbs CJ's approach was also grounded in policy, in that parliament, rather than the judiciary, was better placed to implement such a change: "even if it be agreed that a change such as he suggests would be beneficial, it is a change which the courts ought not to make, because it involves a departure from a settled rule on grounds of policy which should be decided by the legislature and not by the courts".[103] Despite rejecting a general duty to provide reasons, Gibbs CJ acknowledged that, in "special circumstances", natural justice may require reasons to be given.[104]

Despite almost 20 years having passed, the High Court has not revisited *Osmond* and it remains the law in Australia that administrative decision-makers are not under an obligation to provide reasons for their decisions.[105] That is clearly still a matter of regret for Kirby J; indeed, in 2008 he commented that "I do not wish still to be smarting from the decision of this Court in *Public Service Board v Osmond*, but it is still on my mind".[106] Few would now dispute that it is generally desirable for decision-makers to give reasons for their decisions.[107] The real question, therefore, is how far such an obligation should extend. As Lacey has argued, "the question is not whether Kirby P's broad approach to the provision of reasons will be ultimately vindicated in Australian law, but how that approach will manifest itself in Australian common law".[108]

The English courts have also maintained the traditional common law position that there is no general duty to provide reasons, but at the same time they have been willing to require the provision of reasons in certain circumstances, stemming from the requirements of natural justice.[109] In *R v Universities Funding Council; Ex parte Institute of Dental Surgery*[110], Sedley J identified two classes of cases in which the English courts would insist upon the provision of reasons:[111] where the interests affected by the decision are so important (such as the deprivation of liberty) that reasons must be given;[112] and where the decision appears to be aberrant.[113] This English approach is incremental, developing exceptions to the general proposition that no duty to provide reasons exists, and "displaying little concern as to how

the limits of the emerging duty might be defined".[114] This can be contrasted with Kirby P's approach of requiring a broad general duty.[115]

Conclusion

Justice Kirby's impact on the Australian jurisprudence will be long remembered. His Honour's reputation as the 'great dissenter' almost guarantees that result. Whether one agrees or disagrees with his views on any particular administrative law issue, there is much to admire in his Honour's approach to resolving fundamental questions that lie at the heart of our constitutional arrangement. His commitment to developing legal principles to ensure the accountability of government pervades his Honour's judgments, as does a commitment to open and transparent reasoning. The characteristics of his approach have exposed his own judgments to critique but have also operated to expose the shortcomings in the judgments of other members of the Court. For that reason alone, his Honour's impact in the field will be enduring.

Endnotes

1 *Plaintiff S157/2002 v Commonwealth of Australia* (2003) 211 CLR 476.
2 *Bodruddaza v Minister for Immigration and Multicultural Affairs* (2007) 228 CLR 651 ('*Bodruddaza*').
3 Ibid, 668.
4 *Bodruddaza* (2007) 228 CLR 651.
5 See, eg, Peter Cane and Leighton McDonald, *Principles of Administrative Law: Legal Regulation of Governance* (2008), 164-8; Mark Aronson, "Jurisdictional error without the tears", in Matthew Groves and H.P. Lee (eds), *Australian Administrative Law - Fundamentals, Principles and Doctrines* (2007) 330.
6 *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147.
7 *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57, 122-123 [211]-[212] ('*Miah*').
8 *Re Minister for Immigration and Multicultural Affairs; Ex parte Holland* (2001) 185 ALR 504, 509 [22]. See also *Commissioner of Taxation v Futuris Corporation Limited* (2008) 247 ALR 605, 634 [130] ('*Futuris*'), where Kirby J argued that "there is no reason why the constitutional idea sustaining the writs expressed in s 75(v) (and s 39B(1) of the *Judiciary Act*) should not evolve into a broader concept of 'legal error'".
9 Most recently in *Futuris* (2008) 247 ALR 605, 634 [129].
10 Ibid, 635 [131].
11 *Miah* (2001) 206 CLR 57, 122-123 [211]-[212]
12 *Craig v South Australia* (1995) 184 CLR 163, 178. See also *Re Refugee Tribunal; Ex parte Aala* (2000) 204 CLR 82, 141 (Hayne J).
13 *Miah* (2001) 206 CLR 57, 122-123 [211]-[212], *Futuris* (2008) 247 ALR 605, 634[129]. See also *SDAV v Minister for Immigration and Multicultural Affairs* (2003) 199 ALR 43 [27] (Hill, Branson and Stone JJ).
14 Mark Aronson, Bruce Dyer and Matthew Groves, *Judicial Review of Administrative Action* (4th ed, 2009), 14.
15 Ibid, 227.
16 Ibid.
17 Aronson, above n 6, 333.
18 Aronson, above n 6, 333, 344.
19 Ibid, 333.
20 Ibid.
21 Ibid, 344.
22 *R v Hull University Visitor; Ex parte Page* [1993] AC 682.
23 See the discussion in Aronson, Dyer and Groves, above n 15, 218 - 227.
24 Aronson, above n 6, 337.
25 *E v Secretary of State for the Home Department* [2004] QB 1044.
26 Aronson, above n 6, 337-338; Aronson, Dyer and Groves, above n 15, 14.
27 *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20* (2003) 198 ALR 59, 96, 98 [161], [170] ('*Applicant S20*'); Matthew Groves, "Substantive Legitimate Expectations in Australian Administrative Law" (2008) 32 *Melbourne University Law Review* 470, 511-512.
28 Ibid, 96 [161]. Kirby J's approach is not limited to judicial review. In *Whisprun Pty Ltd v Dixon* (2003) 200 ALR 447, the High Court considered the powers of an appellate court to reverse factual conclusions reached by a primary judge. In his consideration of the issue, Kirby J argued that: *"The common law usually recoils from absolute rules of mechanical or inflexible application. It does so because its long experience illustrates too often the need to retain elements of flexibility to cover an exceptional case. Unyielding*

rules...could...become an instrument of serious injustice. That is why common law rules normally reserve a place for the exceptional case" (at [100]).

29 *Applicant S20* (2003) 198 ALR 59, 96, 98 [161], [170]
30 Mark Aronson, "Is the ADJR Act hampering the development of Australian administrative law?" (2004) 15 *Public Law Review* 202, 204.
31 Groves, above n 28, 512. See generally *Secretary of State for the Home Department v Zequiri* [2002] UKHL 3, [44] (Lord Hoffmann)
32 [2005] EWCA Civ 744.
33 Ibid, [52], [54].
34 Groves, above n 28, 488.
35 Ibid.
36 Ibid, 512.
37 *Attorney-General v Quin* (1990) 170 CLR 1, 35-36 (Brennan J). His Honour's comments were cited with approval by Gleeson CJ, Gummow, Kirby and Hayne JJ in *City of Enfield v Development Assessment Commission* (2000) 199 CLR 135, 152-153: Note also the comments of Gleeson CJ in *NEAT Domestic Trading Pty Limited v AWB Limited* (2003) 216 CLR 277 ('*NEAT Domestic*'): "[j]udicial review is not an invitation to judges to decide what they would consider fair or reasonable if they were given the function" that is being reviewed.
38 *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1 ('*Lam*').
39 Ibid, 12.
40 Ibid, 24-25.
41 Groves, above n 28, 512.
42 Ibid.
43 *Applicant S20* (2003) 198 ALR 59, 98 [170]
44 Chief Justice Spigelman, 'Jurisdiction and Integrity' (Speech delivered at the Australian Institute of Administrative Law 2004 National Lecture Series, Adelaide, 5 August 2004)
45 *R v Panel on Take-overs and Mergers; Ex parte Datafin* [1987] 1 QB 815 ('*Datafin*').
46 *NEAT Domestic* (2003) 216 CLR 277.
47 For a more in depth factual background, see the judgments of Gleeson CJ, [1]-[15]; McHugh, Hayne and Callinan JJ, [31]-[35]; Kirby J [69]-[81].
48 *NEAT Domestic* (2003) 216 CLR 277, 297 [49]-[51], 300 [64]. Note that Aronson argues that the majority also found judicial review's *grounds* to be inapplicable to AWBI: Mark Aronson, 'Private Bodies, Public Power and Soft Law in the High Court' (2007) 35 *Federal Law Review* 1, 9.
49 *NEAT Domestic* (2003) 216 CLR 277, 297 [51]
50 Christos Mantziaris, 'A 'Wrong Turn' on the public/private distinction: NEAT Domestic Trading Pty Ltd v AWB Ltd' (2003) 14 *Public Law Review* 197, 198-199.
51 *NEAT Domestic* (2003) 216 CLR 277, 298 [54] - i.e. AWBI's power was sourced from s 124 of the *Corporations Act 2001* (Cth).
52 *NEAT Domestic* (2003) 216 CLR 277, 297 [52]
53 Aronson, above n 49, 10.
54 *NEAT Domestic* (2003) 216 CLR 277, 298-300 [57]-[64]; Aronson, Dyer and Groves, above n 15, 149.
55 *NEAT Domestic* (2003) 216 CLR 277, 300 [67]-[68]
56 Mantziaris, above n 51, 199.
57 *NEAT Domestic* (2003) 216 CLR 277, 307-308 [94]-[96]. Mantziaris, above n 51, 199.
58 *NEAT Domestic* (2003) 216 CLR 277, 315 [121].
59 As required by the definition of a "decision to which this Act applies" in s 3(1) of the *ADJR Act*.
60 *NEAT Domestic* (2003) 216 CLR 277, 310 [102], citing the decision of Ellicot J in *Burns v Australian National University* (1982) 40 ALR 707, 714.
61 *NEAT Domestic* (2003) 216 CLR 277, 310-314 [101]-[115].
62 Ibid, 314 [115].
63 Ibid, 311 [105].
64 *Plaintiff S157/2002 v Commonwealth of Australia* (2003) 211 CLR 476.
65 *Bank of NSW v Commonwealth* (1948) 76 CLR 1, 367 (Dixon J).
66 Wendy Lacey, 'Administrative Law' in Ian Freckelton and Hugh Selby (eds.), *Appealing to the Future: Michael Kirby and his Legacy* (2009) 81, 97.
67 See e.g. Aronson, above n 31, 211-212; Cane and McDonald, above n 6, 66; Mantziaris, above n 51, 198-200.
68 Aronson, above n 31, 212.
69 Aronson, above n 49, 12.
70 Lacey, above n 67, 98.
71 (2005) 221 CLR 99 ('*Tang*').
72 *Tang* (2005) 221 CLR 99, 104-105 [1].
73 Ibid, 105 [2].
74 Lacey, above n 67, 99.
75 *Tang* (2005) 221 CLR 99, 105 [5]

76 Aronson, Dyer and Groves, above n 15, 79. These tests are discussed in e.g. Christos Mantziaris and Leighton McDonald, 'Federal Judicial Review Jurisdiction after Griffith University v Tang' (2006) 17 *Public Law Review* 22, 23-26.
77 Aronson, Dyer and Groves, above n 15, 79.
78 *Tang* (2005) 221 CLR 99, 130-131 [89].
79 Aronson, Dyer and Groves, above n 15, 80.
80 *Tang* (2005) 221 CLR 99, 128 [80].
81 Ibid, 131 [91].
82 Ibid, 132 [96]
83 *Tang* (2005) 221 CLR 99, 131 [91].
84 Lacey, above n 67, 101; *Tang* (2005) 221 CLR 99, 152-153 [153]-[154].
85 *Tang* (2005) 221 CLR 99, 133 [99]-[100].
86 Ibid, 153 [154].
87 Mantziaris and McDonald, above n 77, 47; Cane and McDonald, above n 6, 65.
88 *Tang* (2005) 221 CLR 99, 155 [161].
89 Ibid, 135 [106].
90 Mantziaris and McDonald, above n 77, 46.
91 Ibid, 47.
92 Cane and McDonald, above n 6, 64.
93 [1984] 3 NSWLR 447 ('*Osmond*')
94 *Osmond v Public Service Board of New South Wales* [1983] 1 NSWLR 691.
95 *Osmond* [1984] 3 NSWLR 447, 467.
96 Ibid, 467.
97 Ibid, 468.
98 Lacey, above n 67, 86, 102.
99 Marilyn Pittard, 'Reasons for Administrative Decisions: Legal Framework and Reform', in Matthew Groves and H.P. Lee (ed) *Australian Administrative Law: Fundamentals, Principles and Doctrines* (2007), 172, 178.
100 *Osmond* [1984] 3 NSWLR 447, 463.
101 *Osmond* [1984] 3 NSWLR 447, 464 - 465. See also the comments of Kirby J in *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Palme* (2003) 216 CLR 212, 242 [105]; Marilyn Pittard, above n 100, 173-175; P.P. Craig, 'The Common Law, Reasons and Administrative Justice' (1994) 53 *Cambridge Law Journal* 282, 283-285.
102 *Public Service Board v Osmond* (1985) 159 CLR 656, 671.
103 Ibid, 669.
104 Ibid. See also Deane J, (1985) 159 CLR 656, 676.
105 Aronson, Dyer and Groves, above n 15, 633-634 argue that the High Court's decisions in *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Palme* (2003) 216 CLR 212 and *Jarratt v Commissioner of Police for New South Wales* (2005) 224 CLR 44 suggest the High Court will not embrace a "radical change" to its jurisprudence on the right to reasons.
106 *WR Carpenter Holdings Pty Ltd v Commissioner of Taxation* [2008] HCATrans 173.
107 Gibbs CJ acknowledged this, despite his finding that no general duty arose: *Public Service Board v Osmond* (1985) 159 CLR 656, 668.
108 Lacey, above n 67, 90-91.
109 Aronson, Dyer and Groves, above n ?, 630-633.
110 [1994] 1 All E.R. 651.
111 Ibid, 671-672.
112 E.g. *R v Civil Service Appeal Board; Ex parte Cunningham* [1991] 4 All ER 310.
113 *R v Secretary of State for the Home Department; Ex parte Doody* [1994] 1 AC 531.
114 Aronson, Dyer and Groves, above n 15, 631; *Stefan v General Medical Council* [1999] 1 WLR 1293.
115 Aronson, Dyer and Groves, above n 15, 631.