Revocation and Variation of Administrative Decisions

ENID CAMPBELL*

INTRODUCTION

The principal question with which this article is concerned is this: When, if at all, can an administrative decision made, or purporting to have been made, in exercise of a statutory power be revoked or varied by the person or body which made it?[1] A subsidiary question to be considered is: When, if at all, is it permissible for a person or body in whom a statutory power has been reposed, to revoke or vary a decision made in exercise, or purported exercise, of the power by a delegate of that person or body? These questions are of considerable importance in public administration and ones on which administrators need guidance.[2]

There are various reasons why revocation or variation of an administrative decision may be sought.[3] The document recording or communicating the decision may contain clerical errors or there may be accidental errors in or omissions from it. Or the document may simply fail to express the actual decision. The decision may have been procured by fraud or it may, for some other reason, not be a valid decision. It may have been based on mistaken facts or on what is later recognised as a mistake about the relevant law. Relevant new evidence may have been discovered. There may have been a change in the circumstances of the person to whom the decision relates, or a subsequent change in the applicable law or policy. The decision may be seen to be inconsistent with other decisions in like cases or to be unsatisfactory for some other reason.

In some situations a decision-maker may be under a statutory duty to reconsider and redetermine a matter on the application of a person affected by the initial decision. Sometimes a decision-maker will be obliged to reconsider and redetermine by reason of action taken by another body having authority to review the decision. For example, a court of supervisory jurisdiction may have found the decision invalid, have set it aside, and directed that the matter be redetermined according to law.[4] The court may also have

* Sir Isaac Isaacs Professor of Law, Faculty of Law, Monash University.

[1] These questions are briefly considered in some of the standard texts on administrative law. See SA de Smith, *Judicial Review of Administrative Action* (4th ed, 1980) 106–8; HWR Wade and CF Forsyth, *Administrative Law* (7th ed 1994) 261–4. Fuller treatments include RF Reid and H David, *Administrative Law* (2nd ed, 1978) Chap 3; M Akehurst, 'Revocation of Administrative Decisions' [1982] *Pub Law* 613; G Ganz, 'Estoppel and *Res Judicata* in Administrative Law' [1965] *Pub Law* 237; RA Macdonald, 'Reopenings, Rehearings and Reconsiderations in Administrative Law' (1979) 17 *Osgoode Hall LJ* 207.

[2] *Re Sarina and Secretary, Department of Social Security* (1988) 14 ALD 437, 438–9 (AAT).

[3] MacDonald, op cit (fn 1) 221.

[4] *Administrative Decisions (Judicial Review) Act* 1977 (Cth), s 16(1)(a) (Cth).

given further directions which affect the process of redetermination. An appeals tribunal may have set aside the decision and remitted it for reconsideration, again with directions or recommendations.[5] Corrective action may have been recommended by an Ombudsman and a failure to respond to the recommendations may result in an adverse report to the relevant Parliament.[6]

This article is not, however, concerned with reconsiderations and redeterminations which have been directed by a review body. It is concerned rather with reconsiderations and redeterminations by the person or body making the initial determination, either on the motion of that person or body or on the application of a person affected by that initial determination.

In the absence of an express statutory provision authorising a decision-maker to re-open, revoke or vary a decision, the entitlement of that decision-maker to revoke or vary the decision will, of course, ultimately depend on what view a court of law takes about the extent of the decision-maker's powers. As will be seen, the judicial case law on this general question does not yield a well-settled and coherent body of doctrine. There is certainly room for further development of the general law in this regard. And since this development is largely in the hands of judges, it may be that they will be guided to some extent by the principles the courts themselves have evolved in relation to the setting aside and amendment of their own judgments and orders.

The next section of the article examines those judicial principles. The extent to which the principles have been and should be drawn upon in development of principles governing revocation and variation of administrative decisions by the authors of those decisions will be explored in later sections of the article.

SETTING ASIDE OF JUDGMENTS AND ORDERS OF COURTS OF LAW

In certain circumstances, courts of law may set aside or vary their own judgments and orders, either on the application of a party or on their own motion. This they may do in the exercise of an inherent or incidental jurisdiction or in exercise of powers conferred on them by legislation,[7] or both.

The law which enables courts of law to set aside and vary their own judgments and orders is not, of course, universally applicable to administrat-

[5] *Administrative Appeals Tribunal Act* 1975 (Cth), s 43(1)(c); *Administrative Appeals Tribunal Act* 1984 (Vic), s 25(2)(c).

[6] See eg *Ombudsman Act* 1976 (Cth), s 15(2); *Ombudsman Act* 1973 (Vic), s 23(2).

[7] For example: Rules of the High Court of Australia O12 r 11; O28 r 15; O44 r 22; Rules of the Federal Court of Australia O35 r 7; Rules of the Supreme Court of NSW Pt 20 r 10; Pt 34 r 5; Pt 40 r 9; Rules of the District Court, Pt 13 r 1(2); Pt 17 r 10; Pt 31 r 12A (NSW); *Justices Act* 1902 (NSW), Pt 4A; *Local Courts (Civil Claims) Act* 1970 (NSW), s 30; General Rules of Procedure in Civil Proceedings (Supreme Court of Victoria), 1986, rr 21.07; 22.15; 24.06; 36.07; 46.08; County Court Rules (Vic) O5 r 15; O24 r 21; *Magistrates (Summary Proceedings) Act* 1975 (Vic), s 103 and Pt XVII.

ive decisions. That part of it which depends on the concept of inherent or incidental jurisdiction may, nonetheless, be relevant in those cases where a decision has been made by a body which is not part of the ordinary court system, but where the decision has been made in exercise of judicial powers, in the strict constitutional sense, or in the exercise of powers which are closely akin to judicial powers.

Unperfected Judgments

The power of courts to set aside and vary their judgments and orders depends first on whether or not the judgment or order has been perfected. The general rule is that a judgment or order can be set aside or varied at any time prior to its perfection.[8] But, according to the High Court of Australia, this power should 'be exercised with great caution'.[9] It has been said that while 'there may be little difficulty in a case where... some mistake or misprision is disclosed... in other cases it will be a case of weighing what would otherwise be irremediable injustice against the public interest in maintaining the finality of litigation'.[10] Circumstances which have been regarded as justifying the variation of a judgment prior to its perfection have included (a) subsequent discovery of relevant 'new facts';[11] (b) a subsequent decision by a higher court which shows that the decision was wrong;[12] (c) subsequent enactment of applicable legislation having retroactive effect;[13] (d) subsequent action by a statutory authority which renders the judgment or order inappropriate;[14] and (e) a case where a party 'can show that, by accident and without fault on' his or her part, 'he or she has not been heard'.[15]

In *Autodesk Inc* v *Dyason (No 2)*[16] Mason CJ made the following general observations on the jurisdiction of the High Court of Australia to reopen its judgments prior to their perfection:

> The public interest in the finality of litigation will not preclude the exceptional step of reviewing or rehearing an issue when a court has good reason to consider that, in its earlier judgment, it has proceeded on a misapprehension as to the facts or the law. As this Court is a final court of appeal, there is no reason for it to confine the exercise of its jurisdiction in a way that would inhibit its capacity to rectify what it perceives to be an

[8] *Harvey* v *Phillips* (1956) 95 CLR 235, 242; *Carroll* v *Price* [1960] VR 651; 26 *Halsbury's Laws of England* (4th ed) Judgments and Orders, para 555; *Laws of Australia*, Courts 5.7, para [84].

[9] *Wentworth* v *Woollahra Municipal Council* (1982) 149 CLR 672, 684; *State Railway Authority of NSW* v *Codelfa Construction Pty Ltd* (1982) 150 CLR 29, 38, 45–6; *Wentworth* v *Woollahra Municipal Council (No 2)* (1982) 154 CLR 518.

[10] *State Railway Authority of NSW* v *Codelfa Construction Pty Ltd* (1982) 150 CLR 29, 38 (Mason and Wilson JJ).

[11] *Dietz* v *Lennig Chemicals Ltd* [1969] 1 AC 170.

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

[13] *Porteous* v *North Vancouver School Trustees (No 2)* [1935] 2 WWR 280 (SCBC); *Holmes Foundry Ltd* v *Village of Point Edward* (1963) 39 DLR (2d) 621 (Ont CA).

[14] *R* v *Industrial Court of South Australia; Ex parte General Motors Holden Pty Ltd (No 2)* (1976) 43 SAIR 1027.

[15] *Autodesk Inc* v *Dyason (No 2)* (1993) 176 CLR 300, 302 per Mason CJ; see also 308, 309 per Brennan J.

[16] Id 300.

> apparent error arising from some miscarriage in its judgment. However, it must be emphasized that the jurisdiction is not to be exercised for the purpose of re-agitating arguments already considered by the Court; nor is it to be exercised simply because the party seeking a rehearing has failed to present the argument in all its aspects or as well as it might have been put. What must emerge, in order to enliven the exercise of the jurisdiction, is that the Court has apparently proceeded according to some misapprehension of the facts or the relevant law and that the misapprehension cannot be attributed solely to the neglect or default of the party seeking the rehearing. The purpose of the jurisdiction is not to provide a backdoor method by which unsuccessful litigants can seek to reargue their cases.[17]

The time at which a court's order is deemed to have been perfected depends on whether or not the court is a court of record. The judgments and orders of courts of record are not perfected until they have been formally passed and entered in the court's records.[18] But unless there is some legislative provision to the contrary,[19] the judgment of a court not of record is perfected as soon as it is pronounced.[20]

Perfected Judgments

Once a court's judgment or order has been perfected, the general rule is the court has no power to set it aside or vary it.[21] This rule, it has been said, 'rests on the obvious principle that it is desirable that there be an end to litigation and on the view that it would be mischievous if there were jurisdiction to rehear a matter decided after a full hearing'.[22] To this general rule there are exceptions. According to Brennan J,

> the exceptions fall into three classes: those which are founded on the inherent jurisdiction of the court to ensure that its procedures do not effect injustice; those which are authorized by a statute; and those which override the general rule in order to give relief where the judgment is obtained by fraud or by an agreement which is void or voidable.[23]

The exceptions made by or pursuant to statute are various.[24] For present purposes it is not necessary to describe these exceptions in detail. Suffice it to say that they deal with cases such as clerical mistakes, accidental slips or

[17] Id 302–3.

[18] NJ Williams, *Supreme Court Civil Procedure — Victoria* (1987) 160; *R* v *Billington* [1980] VR 625.

[19] *R* v *Judge Rapke; Ex parte Curtis* [1975] VR 641; *Paroukas* v *Katsaris* [1987] VR 39; *McNicholl* v *Tothill* (1988) 32 A Crim R 185.

[20] *R* v *Essex Justices; Ex parte Final* [1963] 2 QB 816; *R* v *Uxbridge Justices; Ex parte Clark* [1968] 2 All ER 992; *McLachlan* v *Pilgrim* [1980] 2 NSWLR 422, 428–9.

[21] *Bailey* v *Marinoff* (1971) 125 CLR 529; 26 *Halsbury's Laws of England* (4th ed) Judgments and Orders, para 556.

[22] *Bailey* v *Marinoff* (1971) 125 CLR 529, 539 (Gibbs J). See also *University of Wollongong* v *Metwally (No 2)* (1985) 59 ALJR 481; 60 ALR 68 (HC).

[23] *Permanent Trustee Co (Canberra) Ltd (Executor Estate of Andrews)* v *Stocks and Holdings (Canberra) Pty Ltd* (1976) 15 ACTR 45, 48 (ACTSC). On the setting aside of judgments obtained by fraud see *Wentworth* v *Rogers [No 5]* (1986) 6 NSWLR 534 (CA); *Monroe Schneider Associates (Inc)* v *No 1 Raberem Pty Ltd [No 2]* (1992) 109 ALR 137 (Full FC); *Laws of Australia*, Civil Procedure 5.7, para [82].

[24] See fn 7 supra.

omissions in judgments; judgments entered in default of appearance or pleadings; and judgments entered where a party has not appeared at a hearing or trial. Some of the statutory exceptions merely replicate exceptions already recognised under the general law as founded on the courts' inherent jurisdiction.[25] Normally the fact that certain exceptions are made by statute does not oust the inherent jurisdiction.[26]

What exceptions rest on the courts' inherent jurisdiction is not altogether clear. There is also some uncertainty about whether inferior courts which derive their authority from statute have any inherent jurisdiction at all. These uncertainties stem in part from the open-endedness of the concept of an inherent jurisdiction.[27]

The High Court of Australia has recognised that a court of law may have an inherent jurisdiction notwithstanding that its jurisdiction is statutory and is limited by statute.[28] It has recognised also that the ambit of the inherent powers of a statutory court of limited jurisdiction is to be determined by reference to the statutory jurisdiction. So a court whose jurisdiction is limited by statute has no 'inherent power except such as might be necessary to enable it to do justice within the limits of the jurisdiction which [the] Act confers on it',[29] it has no inherent power going 'beyond protecting its function as a court constituted with the limited jurisdiction afforded by the Act'.[30]

The inherent powers of a court are not, however, derived from the terms of the statute which endows it with jurisdiction. 'Inherent jurisdiction', it has been said,

> is not something derived by implication from statutory provisions conferring particular jurisdiction; if such provision is to be considered as conferring more than is actually expressed that further jurisdiction is conferred by implication according to accepted standards of statutory construction and it would be inaccurate to describe it as 'inherent jurisdiction', which, as the name indicates, requires no authorizing provision.[31]

While accepting that an inherent jurisdiction is not the same as a statutory jurisdiction conferred by implication, a Full Court of the Federal Court of Australia has suggested that the inherent jurisdiction, arising independently of statutory authority, express or implied, should be regarded rather as

[25] For example the slip rule: *Lawrie* v *Lees* (1881) 7 App Cas 19, 34–5; *Narish Holdings Pty Ltd* v *Commonwealth* (1989) 18 ALD 227. See also *Bradvica* v *Radulovic* [1975] VR 434, 441 (default judgments).

[26] This is made explicit in the Rules of the NSW Supreme Court (Pt 40.9(5)). See also *Taylor* v *Taylor* (1979) 143 CLR 1, 21 (Murphy J). Cf *McLachlan* v *Pilgrim* [1980] 2 NSWLR 422; *Coles* v *Burke* (1987) 10 NSWLR 429.

[27] On inherent jurisdiction generally see IH Jacob, 'The Inherent Jurisdiction of the Court' (1970) 23 *Current Legal Problems* 23; K Mason, 'The Inherent Jurisdiction of the Court' (1983) 57 ALJ 449.

[28] *Taylor* v *Taylor* (1979) 143 CLR 1.

[29] Id 6 (per Gibbs J).

[30] *R* v *Forbes; Ex parte Bevan* (1972) 127 CLR 1, 8 per Menzies J.

[31] Id 7 (Menzies J; Barwick CJ, Walsh and Stephen JJ concurring).

encompassing those powers which are 'incidental or necessary to the exercise of the [statutory] jurisdiction or the powers so conferred'.[32]

Statements are to be found in a number of cases to the effect that inferior courts have no inherent jurisdiction and therefore cannot exercise any of the powers exercisable by superior courts as part of their inherent jurisdiction unless they have been expressly authorised to do so by statute.[33]

While it is clear that there are some heads of inherent jurisdiction exercisable by superior courts which are not exercisable by inferior courts,[34] no convincing reasons have been offered why inferior courts should be denied any inherent jurisdiction to set aside or vary their orders. And there are High Court opinions which suggest that no distinction should be drawn between superior and inferior courts in this regard.[35]

The scope of a court's inherent jurisdiction to set aside and vary its own judgments and orders is, as has already been mentioned, not altogether clear. It has been recognised that the so-called slip rule, which enables a court to vary its perfected judgments and orders so as to correct clerical errors in recording and to rectify accidental slips and omissions, is a rule of law antecedent to any statutory expression of it.[36] It has also been recognised that statutory expressions of the slip rule do not oust a court's inherent jurisdiction to deal with cases which are plainly covered by that particular rule, so as to ensure that the terms of the perfected order or judgment express the court's true intent and are unambiguous.[37] There is even judicial authority for the view that the inherent jurisdiction extends to amendment of a perfected judgment or order so as to incorporate a ruling on a matter subsidiary to, or consequential to, a matter which was in issue, but which was not even dealt with at the hearing.[38]

[32] *Parsons* v *Martin* (1984) 58 ALR 395, 401. See also *Edwards Hot Water Systems* v *SW Hart & Co Pty Ltd* (1985) 63 ALR 314; *Connelly* v *DPP* [1964] AC 1254, 1301.

[33] See cases cited in *McLachlan* v *Pilgrim* [1980] 2 NSWLR 422, 427, 430; *Walsh* v *Giumelli* [1975] WAR 114, 116 (Full Court); *Smith* v *Brown* [1978] WAR 157, 159 (Burt CJ).

[34] For example the power to commit for contempt of court otherwise than in the face of the court.

[35] *Cameron* v *Cole* (1944) 68 CLR 571; *Taylor* v *Taylor* (1979) 143 CLR 1. See also *Mason* v *Ryan* (1884) 1 VLR (L) 335; *Duncan* v *Lowenthal* [1969] VR 180.

[36] *Lawrie* v *Lees* (1881) 7 App Cas 19, 34–5; *Re Swire, Mellor* v *Swire* (1885) 30 Ch D 239; *Milson* v *Carter* [1893] AC 638; *Hip Foong Hong* v *Neotia Co* [1918] AC 888; *Thynne* v *Thynne* [1955] P 272; *Nakhla* v *McCarthy* [1978] 1 NZLR 291, 296; *L Shaddock and Associates Pty Ltd* v *Parramatta City Council (No 2)* (1982) 151 CLR 590, 594.

[37] See cases cited in *Ritchie's Supreme Court Procedure (NSW)* 20.10.3; *Esposito* v *Commonwealth of Australia* (1987) 80 ACTR 9; *Storey and Keers Pty Ltd* v *Johnstone* (1987) 9 NSWLR 446, 449–53 (McHugh JA).

[38] *L Shaddock and Associates Pty Ltd* v *Parramatta City Council (No 2)* (1982) 151 CLR 590, 594–5; *Storey and Keers Pty Ltd* v *Johnstone* (1987) 9 NSWLR 446, 451 per McHugh JA. But the slip rule, the courts have said, should not be invoked when, because of intervening events, it would be inequitable or inexpedient to do so, for example, where third parties have acquired rights in reliance on the judgment, in ignorance of the error sought to be rectified. See *Hatton* v *Harris* [1892] AC 547, 558, 560 (HL); *Moore* v *Buchanan* [1967] 1 WLR 1341, 1350 (CA); *Tak Ming Co Ltd* v *Yee Sang Metal Supplies Co* [1973] 1 WLR 300, 306 (JC); *L Shaddock and Associates* v *Parramatta City Council (No 2)* (1982) 151 CLR 590, 597.

A further important element of a court's inherent jurisdiction is its power to set aside a judgment or order when there has been a denial of natural justice, and, in particular, denial of a fair opportunity to be heard.[39] According to Mason J, 'the jurisdiction extends not only to the setting aside of judgments which have been obtained without service or notice to a party . . . but to the setting aside of a default or ex parte judgment obtained when the absence of the party is due to no fault on his part'.[40]

An inherent curial jurisdiction, it seems, extends also to the setting aside of judgments and orders made without jurisdiction, for example, a summary conviction of an offence which is not triable summarily,[41] and to the setting aside of orders which regulate the conduct of proceedings when it would be futile for the orders to remain in force.[42] An inherent jurisdiction does not, however, extend to the setting aside or variation of perfected judgments or orders on the ground of discovery of fresh evidence which was not previously available,[43] or on the ground of a change in circumstances.[44] Orders for specific discretionary relief, like injunctions, may, however, be varied or discharged.[45]

Courts have not been disposed to extend the range of circumstances in which their inherent jurisdiction to set aside or vary judgments and orders may be invoked, or to treat that jurisdiction as allowing variations in judgments and orders whenever the interests of justice might seem to demand variation.[46] Courts have also rejected attempts to revive the old bill of review procedure employed in the Court of Chancery prior to the *Judicature Acts*,

[39] *Craig* v *Kanssen* [1943] 1 KB 256; *Cameron* v *Cole* (1944) 68 CLR 571; *Taylor* v *Taylor* (1979) 143 CLR 1; *R* v *Seisdon Justices; Ex parte Dougan* [1982] 1 WLR 1476; *Re Anasis; Ex parte Total Australia Ltd* (1985) 63 ALR 493.

[40] *Taylor* v *Taylor* (1979) 143 CLR 1, 16. See also *Owners of SS Kalibia* v *Wilson* (1910) 11 CLR 689, 694; *Bradvica* v *Radulovic* [1975] VR 434, 441; *Isaacs* v *Robertson* [1985] 1 AC 97, 103; *Re Marsh; Ex parte Marsh* v *Paramount Leisure Products Pty Ltd* (1991) 104 ALR 533.

[41] *Caldwell and Kinross; Ex Parte Makin* (1986) 20 A Crim R 413 (Qld Full Court); see also *Kofi Forfie* v *Seifah* [1958] AC 59; *Munks* v *Munks* (1984) 15 Fam L 131 (CA).

[42] *Wentworth* v *Woollahra Municipal Council (No 2)* (1982) 154 CLR 518.

[43] *Edwards Hot Water Systems* v *SW Hart & Co Pty Ltd* (1985) 63 ALR 314 (FC); *Australasian Meat Industry Employees Union* v *Mudginberri Station Pty Ltd* (1986) 65 ALR 683 (Gray J); 26 *Halsbury's Laws of England* (4th ed) Judgments and Orders, para 561.

[44] *Gamser* v *Nominal Defendant* (1977) 136 CLR 145; *Tugby* v *Greenberg* [1940] 1 DLR 426 (Man CA); *Bowling* v *Brooms Head Bowling and Recreational Club Ltd* (1986) 5 NSWLR 521 (CA).

[45] *Attorney-General (ex rel Corporation of Tamworth and the Tamworth Rural District Council)* v *Birmingham, Tame, and Rea District Drainage Board* [1912] AC 788; *Regent Oil Co Ltd* v *JT Leavesley (Lichfield) Ltd* [1966] 2 All ER 454; *Permewan Wright Consolidated Pty Ltd* v *Attorney-General (ex rel Franklins' Store Pty Ltd)*, NSW Court of Appeal 11 Dec 1978 (extract in *Ritchie's Supreme Court Procedure* — Practice Decisions 13, 031). See also *The Supreme Court Practice* 1985, vol 1, 20/11/6(3), American Law Institute, *Restatement of the Law of Judgments, Second* (1982) s 73.

[46] *Bailey* v *Marinoff* (1971) 125 CLR 529, 535 (Walsh J); cf *Watt* v *Barnett* (1878) 3 QBD 363, 366; *Ansett Transport Industries (Operations) Pty Ltd* v *Newton Travel Services Pty Ltd* [1990] VR 37.

whereby, after judgment, the court might, by leave, permit a rehearing.[47] Their attitude has been, rather, that judgments and orders which cannot be rectified by the rendering court should, if they are to be rectified at all, be rectified on appeal or on any other applicable statutory process for review.

Statutory powers to set aside judgments and orders do not always give a party a right to have a judgment or order set aside where the conditions for the exercise of the power have been satisfied. Sometimes they allow the court a discretion in the matter.[48] In contrast, when the inherent jurisdiction to set aside is invoked, the party invoking it may have a right to have the judgment or order set aside *ex debito justitiae*. But, as was pointed out in *Isaacs* v *Robertson*,[49] judges 'have cautiously refrained from seeking to lay down a comprehensive definition of defects that bring an order into the category that attracts *ex debito justitiae* the right to have it set aside, save that specifically it includes orders that have been obtained in breach of rules of natural justice'.[50]

Even if there is a right to have a judgment or order set aside by the court which rendered it, the judgment or order is regarded as valid and operative until such time as it is set aside. This means that until the judgment or order is set aside, a party cannot ignore it.[51] That is certainly the position where the judgment or order is that of a superior court, and it may now also be the position where the judgment or order is one of an inferior court.[52] There does not, however, appear to be any inflexible and universally applicable rule as to the operative date of a setting aside or variation of a judgment or order. In a Victorian case[53] in which a conviction for a traffic offence and the cancellation of a driver's licence was set aside,[54] on the ground that the defendant had not been given notice of the information, it was held that the setting aside rendered the conviction void ab initio, likewise the cancellation of the driver's licence. Even though, at the subsequent re-hearing of the case, the driver was 're-convicted' of the traffic offence previously charged, he could not be convicted of the offence of driving without a licence because, at the relevant time, his licence was still in force.

[47] The Chancery procedure is explained in *In re St Nazaire Co* (1879) 12 Ch D 88, 97; *Re Barrell Enterprises* [1973] 1 WLR 19, 25–6; *Edwards Hot Water Systems* v *SW Hart & Co Pty Ltd* (1985) 63 ALR 314, 318–19; *Monroe Schneider Associates (Inc)* v *No 1 Raberem Pty Ltd [No 2]* (1992) 109 ALR 137, 142–3.

[48] *Garner* v *Gallienne* (1985) 9 ACLR 808 (SC Vic).

[49] [1985] AC 97, 103.

[50] See also *Taylor* v *Taylor* (1979) 143 CLR 1. But compare the discretion of courts of supervisory jurisdiction not to quash decisions made in violation of duties to accord natural justice.

[51] *Australasian Meat Industry Employees Union* v *Mudginberri Station Pty Ltd* (1986) 65 ALR 683, 695 (Gray J).

[52] As to superior courts, *Isaacs* v *Robertson* [1985] AC 97; *In the Application of Harrod* [1978] 1 NSWLR 331 (CA); *Little* v *Lewis* [1987] VR 798 (Full Ct); cf *Brennan* v *Brennan* (1953) 89 CLR 129, 134. The decisions of inferior courts are probably in the same position as decisions of administrative bodies; as to which, see fn 74 infra.

[53] *Lynch* v *Hargrave* [1971] VR 99.

[54] Under the equivalent of Pt XVII of the *Magistrates (Summary Proceedings) Act* 1975 (Vic).

Yet the High Court of Australia has cautioned that

> the consequence that will follow an order setting aside a decision will vary from case to case. So long as the earlier decision stands, and no stay is operative, it is a lawful decision and the action taken in reliance upon it is lawful. It is true that from the moment it is set aside the order can no longer provide the lawful justification for further action, but whether what has been done can be undone will depend on the availability of appropriate remedies, to bring about the appropriate relief.[55]

An inherent jurisdiction to set aside and vary judgments and orders can be excluded, wholly or partially, by statute and there have been cases where it has been held that statutory provisions which confer powers to set aside and vary leave no room at all for the operation of any comparable non-statutory jurisdiction.[56] Consistently with their general approach to the construction of privative clauses, courts are, however, unlikely to construe statutory provisions which allow for the setting aside or variation of judgments and orders as having ousted the inherent jurisdiction, unless those provisions do so by 'express words or necessary implication'.[57]

The judicial law governing the setting aside of judgments and orders, otherwise than on appeal or review by a higher court, clearly cannot, and should not, be applied without qualification to administrative decision-making in general, regardless of the nature of the decision-making power or the character of the decision. But there are some administrative decision-making functions which closely resemble the functions of courts of law in the strict sense and which are performed in a court-style fashion, often with ancillary powers of the kind possessed by courts of law. There may be reasons behind some of the judicial principles which are as germane to some administrative decisions as to judicial decisions.

The elements of the judicial principles which are most germane to administrative decision-making are (a) the distinction made between unperfected and perfected judgments and orders, (b) the slip rule, and (c) the distinction made between valid and invalid judgments and orders.

REVOCATION AND VARIATION OF UNPERFECTED ADMINISTRATIVE DECISIONS

Administrative decisions, like the judgments and orders of courts, can be perfected or unperfected decisions. Generally speaking, administrative decisions which have yet to be perfected can be revoked or varied. What is required to perfect a decision may be prescribed by legislation. The prescription may be that a formal written notification of the decision be given to a

[55] *Wilde* v *Australian Trade Equipment Co Pty Ltd* (1981) 34 ALR 148, 157. See also, *Hillgate House Ltd* v *Expert Clothing Service and Sales Ltd* (1987) 282 *Estates Gazette* 715.

[56] See fn 26 supra.

[57] *Taylor* v *Taylor* (1979) 143 CLR 1, 21 per Murphy J.

certain person or persons,[58] or that the decision be entered in a register, or published in a government gazette.[59] Where there is such a prescription, a decision, even if informally communicated, can usually be revoked or varied before it has been perfected.[60] There could, however, be circumstances in which, once having communicated a decision informally, a decision-maker could not then validly alter that decision without giving interested parties an opportunity to present further arguments.[61] Indeed it has been suggested that, where a tribunal has announced its decision orally at the conclusion of a hearing, its power to re-open the case prior to perfecting the decision in the manner required by legislation should be exercised sparingly, and only in cases of simple error or omission.[62]

Sometimes legislation requires that decision-makers furnish written reasons for their decisions, irrespective of whether reasons are requested. It is not, however, clear whether in such cases the giving of the written reasons is necessary to perfect the decision. In *Jowett* v *Bradford (Earl)*,[63] the English Employment Appeals Tribunal treated a statutory duty to give written reasons for decision as no more than a procedural requirement and it ruled that provision of those reasons was not necessary to perfect an oral decision already communicated to the parties.[64] There are, on the other hand, cases in which a failure to perform a statutory duty to give written reasons for decision — usually by failure to provide adequate reasons — has been held by courts of supervisory jurisdiction to be a ground for quashing the decision.[65] While failure to perform the statutory duty has been identified as an error of law, the courts have seldom gone so far as to suggest that the error invalidates the decision in the sense of depriving it of any legal force or effect.[66]

[58] For example *Planning and Environment Act* 1987 (Vic), ss 64–6.

[59] For example the requirements considered in *Wilson* v *Law Society of New South Wales* [1979] 2 NSWLR 760 and *Village Roadshow Corp Ltd* v *Sheehan* (1987) 75 ALR 539.

[60] *Bowen* v *City of Edmondton* (1977) 75 DLR (3d) 131 (Alta SC — App Div); *R* v *Yeovil Corporation; Ex parte Trustees of Elim Pentecostal Church, Yeovil* (1971) 70 LGR 142 (DC); *R* v *Agricultural Land Tribunal (South Eastern Area); Ex parte Hooker* [1952] 1 KB 1; *Shanahan* v *Strathfield Municipal Council* (1973) 28 LGRA 218 (SC NSW) (and cases cited therein); *R* v *District Council of Berri; Ex parte HL Clark (Berri) Pty Ltd* (1984) 36 SASR 44; *Wilson* v *Law Society of New South Wales* [1979] 2 NSWLR 760; *Village Roadshow Corp Ltd* v *Sheehan* (1987) 75 ALR 539 (FC); *Bates* v *City of Traralgon* (1986) 25 APAD 434 (VPAB).

[61] *Lamont* v *Fry's Metals Ltd* [1985] ICR 566.

[62] *Hanks* v *Ace High Productions Ltd* [1978] ICR 1155.

[63] [1977] ICR 342.

[64] Cf *Hanks* v *Ace High Productions Ltd* [1978] ICR 1155.

[65] *Re Poyser and Mills' Arbitration* [1964] 2 QB 467, 478; *Mountview Court Properties Ltd* v *Devlin* (1970) 21 P and CR 686, 695–6; *Crake* v *Supplementary Benefits Commission* [1982] 1 All ER 498; *R* v *Immigration Appeal Tribunal; Ex parte Khan* [1983] QB 790; *R* v *Mental Health Review Tribunal; Ex parte Clatworthy* [1985] 3 All ER 699; *R* v *Mental Health Review Tribunal; Ex parte Pickering* [1986] 1 All ER 99.

[66] One case was where a report completely failed to satisfy statutory requirements regarding the content of the report: *United Kingdom Association of Professional Engineers* v *Advisory, Conciliation and Arbitration Service* [1979] 1 WLR 570. See also *R* v *Thomas* [1892] 1 QB 426; *Ex parte Gorman* [1894] AC 23. In *Re Cardona and Minister of Manpower and Immigration* (1978) 89 DLR (3d) 77 the Federal Court of Canada suggested that, while breach of a duty to give reasons does not invalidate a decision where the duty arises only when reasons are requested, the position could be different if reasons must be supplied as a matter of course. On the legal consequences of failure to perform a duty to

Where the governing legislation does not prescribe any particular mode for perfecting a decision, the general rule seems to be that the decision is perfected once it is communicated to the person or persons to whom the decision relates. The communication may be made orally or in writing.[67] The important thing is that the decision should have been communicated, and communicated in such a way as to indicate that the decision is not merely tentative or provisional.[68] Even when the decision communicated is a decision to approve an application 'in principle', it may still be regarded as the ultimate effective decision.[69]

Where a decision is to be made by a tribunal after an oral hearing, the tribunal may, even before it has reached a decision, decline to re-open the hearing. In *Re Defiance Milling Co Pty Ltd and Export Development Grants Board (No 2)*,[70] the federal Administrative Appeals Tribunal refused an application to re-open a hearing which had concluded three days before, because the additional evidence sought to be adduced by the applicant had been available at the time of the hearing. In contrast, in *Re Gomez and Commonwealth*[71] the Tribunal agreed to re-open a hearing in order to receive evidence from a witness who had not previously been available.

Finally, it is worth noting that even when a tribunal is in the course of delivering oral reasons for a decision, the party who has initiated the proceedings may effectively forestall the making of a decision in the matter simply by withdrawing the initial application for an adjudication.[72]

furnish reasons see P Bayne, 'The Inadequacy of Reasons as an Error of Law' (1992) 66 ALJ 302; H Katzer, 'Inadequacy of Reasons as a Ground of Appeal' (1993) 1 *Aust Jo of Admin Law* 33.

[67] *Jowett* v *Bradford (Earl)* [1977] ICR 342; *R* v *Greater Manchester Valuation Panel; Ex parte Shell Chemicals (UK) Ltd* [1981] 3 WLR 752; *Collector of Customs (NSW)* v *Brian Lawlor Automotive Pty Ltd* (1979) 24 ALR 307, 322–3 (Full FC). But contrast *R* v *Criminal Injuries Compensation Board; Ex parte Tong* [1976] 1 WLR 1237 (CA) where it was held that an award of compensation took effect even before it was communicated to the person in whose favour it was made and that, though that person died before the award was notified, his widow was entitled to receive the compensation awarded. See also the editorial note on *Bates* v *City of Traralgon* (1986) 25 APAD 434, 435–8.

[68] *Re 56 Denton Road, Twickenham* [1953] Ch 51, 57; *Gunnedah Municipal Council* v *White* (1966) 13 LGRA 336 (informal advice); *Holmes* v *Ryde Municipal Council* (1969) 90 WN (Pt 1) (NSW) 290 (opinion only). But a decision which is styled on 'interim decision' may still, for certain purposes, be regarded as a perfected and operative decision: *The Broken Hill Pty Co* v *American Can Co* [1980] VR 143, 147; *R* v *Smith; Ex parte Mole Engineering Pty Ltd* (1981) 35 ALR 119 (HC).

[69] *AG* v *Bristva Pty Ltd* [1964–5] NSWR 439; *Wattle Park Pty Ltd* v *Commissioner of Highways* (1973) 6 SASR 69; *Foote* v *Brown* (1977) 35 LGRA 146 (SC NSW).

[70] (1986) 11 ALN(N) 230.

[71] (1988) 15 ALD 784.

[72] *Blackmore* v *Flexhide Pty Ltd* [1979] 1 NSWLR 103 (CA). On the effect of withdrawal of applications before they are determined see *R* v *Hampstead and St Pancras Rent Tribunal; Ex parte Goodman* [1951] 1 KB 541, 545; *R* v *Blackburn; Ex parte Transport Workers' Union of Australia* (1953) 88 CLR 125; *Boal Quay Wharfingers Ltd* v *King's Lynn Conservancy Board* [1971] 1 WLR 1558, 1566, 1569 (CA); *Hanson* v *London Rent Assessment Committee* [1976] QB 394; *Schipp* v *Herfords Pty Ltd* [1975] 1 NSWLR 412 (CA); *Re Stevenson and Commonwealth of Australia* (1987) 13 ALD 524 (AAT).

REVOCATION OF INVALID DECISIONS AND DECISIONS WHICH ARE LIABLE TO BE QUASHED FOR ERROR OF LAW

If courts of law can validly set aside their own judgments and orders when there has been a denial of natural justice, or some other error which can be characterised as jurisdictional, is there any good reason why administrative decision-makers should not be able to revoke their decisions in the same circumstances?

One possible difficulty in the way of recognising that administrative decision-makers also have power to revoke their decisions in these circumstances is that, nowadays, most courts subscribe to the view that, except perhaps in cases where an administrative decision is patently invalid, the decision should be regarded as valid and binding, until such time as a court of competent jurisdiction pronounces it to be invalid.[73] There are also cases in which, although a court has found an administrative decision to be invalid, it has, in the exercise of its discretion, declined to grant relief.[74] In these cases, the courts did not, however, consider what the position would be if the administrative decision-maker, on its own initiative, or on the application of a party affected by the decision, chose to revoke the decision on the ground that it was not a valid decision.

Support for the proposition that an administrative decision can be revoked if it is acknowledged to have been made in excess of power is, however, to be found in the decision of the Full Court of the Federal Court of Australia in *Comptroller-General of Customs* v *Kawasaki Motors Pty Ltd.*[75] In the opinion of Hill and Heerey JJ,

> it would . . . 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 all concerned, as void would certainly conflict with that rule. Parties would be forced into pointless and wasteful litigation.[76]

In this case the Court held that the Comptroller-General of Customs had power to revoke a Commercial Tariff Concession Order notwithstanding that

[73] *Smith* v *East Elloe Rural District Council* [1956] AC 736, 769; *Durayappah* v *Fernando* [1967] 2 AC 337 (JCPC); *Hoffman-La Roche & Co* v *Secretary of State for Trade and Industry* [1975] AC 295, 365–6 per Lord Diplock; *Forbes* v *New South Wales Trotting Club* (1979) 25 ALR 1, 30 per Aickin J; *London and Clydeside Estates Ltd* v *Aberdeen District Council* [1980] 1 WLR 182, 189–90 per Lord Hailsham; *Calvin* v *Carr* [1980] AC 574, 589–90 (JCPC); *R* v *Panel on Panel on Take-Overs and Mergers; Ex parte Datafin plc* [1987] QB 815, 840 per Lord Donaldson MR; *Wattmaster Alco Pty Ltd* v *Button* (1986) 70 ALR 330, 334–5 (Full FC); *R* v *Balfour; Ex parte Parkes Rural Distributions Pty Ltd* (1987) 76 ALR 256, 263–4 (FC); *Martin* v *Ryan* [1990] 2 NZLR 209, 235–41 (Ryan J).

[74] *R* v *Monopolies and Mergers Commission; Ex parte Argyll Group plc* [1986] 1 WLR 763.

[75] (1991) 103 ALR 661.

[76] Id 671; see also 667 per Beaumont J.

the validity of that Order was, at the time, the subject of an application for judicial review.[77]

It has been recognised that, if a person has a right to an oral hearing before a tribunal and is not heard at the appointed time because, through no fault of that person or of the tribunal, the notice of the time and place of hearing did not reach the person, any decision made in the absence of that party may be recalled.[78] The party denied a hearing, it has been said,

> can go back to the tribunal, explain why he did not attend, and the tribunal will then have the jurisdiction if it thinks fit to reopen the matter and to reconsider its decision in the light of the representations made by the absent party .... [But,] tribunals must be very firm in the view which they take in this kind of case. There must be no question of absent parties taking no action over a period of months, and then coming back to the tribunal with some story of having been ill or in South America when the hearing occurred. Tribunals must be satisfied before they reopen a case that there is good argument on the merits for giving the absent party a chance to be heard, that he has got a real and reasonable excuse, that he had to be given a further chance and that, in considering whether he ought to be given a further chance, due regard must be had to the other party to the proceedings and to any third parties who may have acted upon the tribunal's decision on the assumption that it was right and to be sustained. All of these matters must be taken into account.[79]

One type of case in which administrative decision-makers may be invited to revoke their decisions and redetermine the matters they previously decided is where litigation in a test case has shown that the previous, unlitigated decisions were based on an erroneous view of the applicable law, amounting to a misdirection as to that law. *R* v *Hertfordshire County Council; Ex parte Cheung*[80] was such a case. Unsuccessful applications had been made in 1978 to local authorities for grant of higher education awards. The applications were refused on the ground that the applicants were not eligible for awards, because they had not been ordinarily resident in the United Kingdom for three years, as the *Education Act* 1962 required. In 1983, following the House of Lords' decision in *R* v *Barnet London Borough Council; Ex parte Shah*,[81]

[77] The Order was subsequently set aside by Davies J, by consent of the parties.

[78] *De Verteuil* v *Knaggs* [1918] AC 557, 563 (JCPC); *R* v *Kensington and Chelsea Rent Tribunal; Ex parte MacFarlane* [1974] 1 WLR 1486 (DC). See also *Ireland* v *Accident Compensation Commission* (1987) 1 Vic ACR 310, where the Victorian Accidents Compensation Tribunal held that r 38 of the Tribunal's rules, which allows the Tribunal to set aside a decision made by it when a party has been absent from a hearing, or has not been represented, was validly made under s 80(1) of the *Accident Compensation Act* 1985 (Vic). The Tribunal also held that it has an inherent jurisdiction to set aside decisions made in the absence of a party and to direct a rehearing. In so ruling the Tribunal had regard to s 40(2) of the Act which gives the Tribunal power to do 'all things necessary or convenient to be done for or in connection with the performance' of its functions under the Act, and s 57(1)(a) of the Act which requires the Tribunal to be guided by the justice of the matter, having regard to the objects of the Act.

[79] *R* v *Kensington and Chelsea Rent Tribunal; Ex parte MacFarlane* [1974] 1 WLR 1486, 1493.

[80] McNeill J, 5 July 1985, *The Times* 15 July 1985; Court of Appeal, 26 March 1986, *The Times* 4 April 1986. The case is discussed in C Lewis, 'Judicial Review, Time Limits and Retrospectivity' [1987] *Pub Law* 21.

[81] [1983] 2 AC 309.

the applicants applied for reconsideration of their original applications — applications which had been decided according to a test of ordinary residence which, in the case of *Shah*, the House of Lords had held to be erroneous.[82] The local authorities refused the applications for reconsideration and did so on the basis of a policy suggested by the responsible Minister. The Minister had suggested that, unless the circumstances were exceptional, the authorities should reconsider only those cases where the refusal to make a higher education award had been in relation to courses of study beginning in the academic year 1979/80, that is, the year in which Shah had made his application for a higher education award, or in later years.

The applicants then sought judicial review of both the decisions made in 1978 to refuse their application for an award, and the decisions of 1983 refusing their requests for reconsideration of their applications. Leave to seek review was granted in respect of the 1983 decisions, but not the initial decision of 1978.[83] Nevertheless, McNeill J, at first instance, granted orders of certiorari to quash the decisions of 1978 and 1983, and of mandamus directing the authorities to reconsider their decisions, according to law. His principal reason for so doing was that, in adopting the policy suggested by the Minister, the authorities had acted ultra vires and unlawfully. They had failed to carry out their statutory duty to consider the applications according to law, and to make awards to those qualified to receive them.[84] Appeals to the Court of Appeal by the local authorities and the Minister were dismissed.[85]

The Court of Appeal's analysis differed in some respects from that of McNeill J. The Court of Appeal considered first the nature of the duties of local authorities under the Act. These duties were to consider and determine whether applicants were qualified to be awarded grants and to make grants to those determined to be qualified. In the present cases, the local authorities had performed the first of these duties, even though their determinations were erroneous. This was not, however, to say that the local authorities had no power to reconsider the erroneous determinations. They did have that power, and moreover, had a duty to consider whether they should correct their error, 'subject to a discretion as to what action to take, exercised in accordance with the requirements of good administration'.[86]

Unlike McNeill J, the Court of Appeal did not consider it necessarily impermissible for the local authorities to have applied a ministerial policy setting a cut-off date for reconsideration of applications rejected prior to *Shah's* case. Where the law was changed or 'suddenly discovered', its retrospective application should be subject to some limitation. It was quite reasonable for the authorities not to reconsider applications dissimilar to those in *Shah's* case. It would also have been proper for the authorities to have refused to reconsider applications for awards in respect of the academic years beginning before the year in which the applicants for judicial review in *Shah's*

[82] Id 350.
[83] *The Times* 2 April 1985.
[84] *The Times* 15 July 1985.
[85] *The Times* 4 April 1986.
[86] Ibid.

case had made their applications. One of those applicants for judicial review had applied for an award in respect of the academic year 1978/79, ie the year before Shah made his application.

The Court's argument here seems to have been that the only applicants for awards who could be regarded as being in a position similar to that of the applicants who were parties in *Shah's* case, and therefore entitled to have their cases reconsidered by the local authorities, were those who had made applications for awards in respect of the first academic year in which any of the applicants in *Shah's* case had sought an award, or a later academic year.

As one commentator has observed, '*Cheung* raises considerably more issues than it solves'.[87] While the Court of Appeal clearly recognised that administrative bodies may re-open and redetermine cases previously decided by them when their prior decisions have been based on a misdirection on the applicable law, and that they may, in some instances, be under a legally enforceable duty at least to consider whether decisions which, in law, are erroneous should be altered, the Court did not indicate whether the power to re-open and redetermine is limited to cases where the error has been established authoritatively by judicial decision. The Court acknowledged that *Shah's* case was a test case, and that persons in a position similar to that of the applicants in that case could assume that the result of *Shah's* case would be applied to them by local authorities, without the need for further judicial review proceedings. Indeed, the Court's view was that, where a test case, like *Shah's* case, was in progress, others in the same position as the applicant for judicial review should not be expected to begin separate proceedings for judicial review in order to protect their position. For 'that would strain the resources of the court to breaking point'.

There is nothing in the reasons for the Court of Appeal's decision in *Cheung* to suggest that the Court considered that the power of the local authorities to redetermine previously rejected applications was limited to the cases in which grants had been sought in respect of 1978/79 or later years. Rather, the Court seems to have accepted that the power was there, but that local authorities had a discretion as to whether the power should be exercised, albeit a discretion which had to be exercised in accordance with principles of 'good public administration'. These principles included the principle that persons who are in a similar position should be treated similarly. It was not really explained why the position of persons whose applications for awards for academic years prior to 1978/79 had been wrongly rejected, because of a mistaken view as to what counted as ordinary residence in the United Kingdom, was not relevantly similar to that of persons whose applications in subsequent years had been rejected for the same reason.

If it is open to administrative decision-makers to re-open and redetermine cases previously decided by them, but invalidly, there seems to be no good reason why the existence of a power to redetermine should depend on the cause of the invalidity. Nor is there any good reason why cases in which the prior decision has been procured by fraud should be treated as irremediable

[87] Lewis, op cit (fn 80) 27.

by the decision-maker merely because judgments and orders procured by fraud can only be set aside when a separate action for setting aside is instituted.[88]

The grounds on which courts of law may hold administrative decisions invalid ab initio are, admittedly, many and various, and the range of errors which courts are now prepared to recognise as errors going to jurisdiction is now so wide that the distinction between jurisdictional errors and errors of law within jurisdiction is a very fine one. Yet the distinction between jurisdictional errors and non-jurisdictional errors is one which Australian courts still maintain.[89] A decision which involves a non-jurisdictional error of law is still regarded by Australian courts as valid and binding until it is quashed by a court of competent jurisdiction, and the order to quash is operative only from the date of the court's order, or such later date as the court determines.

Whether or not administrative decision-makers can validly revoke those of their decisions which involve only non-jurisdictional errors of law seems not to have been carefully considered in any reported judicial decision. If administrative decision-makers were to be permitted to revoke their decisions on this ground, their power to revoke would probably be treated as no greater than the power of a court of supervisory jurisdiction to quash the decision on the same ground. In other words, the administrator's power of revocation would be confined to prospective revocation.[90] Further limitations on the power might be suggested by the cases in which courts have considered the circumstances in which valid and judicially unimpeachable judicial decisions can and cannot be revoked or varied.

On present judicial authority, it cannot be asserted that whenever an administrative decision is invalid, it can always be revoked by the author of the decision. While courts may be disposed to encourage administrators to take corrective action in cases of the kind exemplified by *Cheung*, without need for recourse to judicial review proceedings, they may be less sympathetic to cases where administrators have purported to revoke those of their decisions which, though they may, technically, be classifiable as invalid, have involved recognition or conferment of rights or privileges. *Cheung* was, after all, a case in which individuals had been wrongly *deprived* of cash benefits to which they were entitled. Whether the courts would be prepared to allow administrators to revoke, with retroactive effect, decisions which have resulted in *bestowal* of benefits or of permits to engage in activities prohibited except under licence is by no means certain.

In this connection it is worth remembering that, although the courts have not permitted governmental agencies whose powers derive from statute to

[88] *Halsbury's Laws of England* (4th ed) Vol 26 Judgments and Orders, para 560.

[89] *R* v *Gray; Ex parte Marsh* (1985) 157 CLR 351 (HC); *Houssein* v *Under Secretary, Department of Industrial Relations and Technology* (1982) 56 ALJR 217 (HC).

[90] *R* v *Paddington Valuations Officer; Ex parte Peachey Property Corporation Ltd* [1966] 1 QB 380, 402 per Lord Denning MR. Note, however, that the determination which, in *Re 56 Denton Road, Twickenham* [1953] Ch 51, was held to have been invalidly revoked, was claimed to have been made contrary to a Treasury direction, which, by statute, was binding. This error of law was apparently regarded by Vaisey J as not sufficient to justify, in law, the revocation of the prior decision on entitlement to compensation.

enlarge their powers by estoppels (by representations),[91] they have, on occasions, declined to grant discretionary remedies in respect of official actions which they have acknowledged to be invalid. Where judicial remedy in respect of administrative action pronounced by judges to be invalid is denied, on discretionary grounds, the practical consequence of the court's judgment may well be to convert the invalid decision into a valid decision.[92] Where, for example, a public authority seeks an injunction to restrain a prohibited use of land, and it is shown that the defendant engaged in the prohibited use in reliance on an invalid permit, or on representations suggesting that no permit was required, and judicial remedy is denied, the court is, in effect, saying that the defendant is to be treated as having been the beneficiary of a valid permit.[93]

There is much to be said for the view that any power an administrative agency has to revoke its invalid decisions should be regarded as discretionary and, accordingly, a power which must be exercised in accordance with general principles governing the exercise of discretions. After all, express statutory powers to revoke decisions, or to cancel benefits and permits, are usually discretionary and, to exercise a statutory power of revocation may, in some circumstances, amount to an abuse of discretion.[94]

ADMINISTRATIVE DECISIONS AND THE SLIP RULE

Sometimes statutes which confer authority to make decisions of an administrative character, and which also require decisions to be notified in writing, expressly confer on the decision-makers authority to correct clerical errors and other such slips in the written decision.[95] A power to correct clerical errors may also be implied in the terms of a particular statutory provision.[96] Such a power, a Deputy President of the federal Administrative Appeals Tribunal has held,[97] is implied in s 33(1) of the *Administrative Appeals Tribunal Act* 1975 (Cth), which provides, *inter alia*, that:

[91] See M Aronson and N Franklin, *Review of Administrative Action* (1987) 15–17, 75–6, 109–11, 135–6; PP Craig, *Administrative Law* (3rd ed, 1994) Ch 18; SA de Smith, Lord Woolf, J Jowell, *Judicial Review of Administrative Action* (5th ed, 1995) 565–9.

[92] *Fitzgerald* v *Muldoon* [1976] 2 NZLR 615; *R* v *Senate of Aston University; Ex parte Roffey* [1969] 2 QB 538; *R* v *Monopolies and Mergers Commission; Ex parte Argyll Group plc* [1986] 1 WLR 763, 774–5.

[93] *AG* v *Greenfield* [1961] NSWR 824; *AG* v *BP (Aust) Ltd* [1964–5] NSWR 2055; *Woollahra Municipal Council* v *Morris* [1966] 1 NSWR 136; *Associated Minerals* v *Wyong Shire Council* [1975] AC 538, 560.

[94] *Donovan* v *City of Sale* [1979] VR 461 (unreasonable delay in exercise of a power to revoke a permit on a certain ground); *Garner* v *Gallienne* (1985) 9 ACLR 808 (Vic SC — discretion under ss 152 and 154(2) of *Magistrates (Summary Proceedings) Act* 1975 (Vic)).

[95] *Administrative Appeals Tribunal Act* 1984 (Vic) s 49A; *Hastings Property Developments Pty Ltd* v *Shire of Euroa* (1993) 6 VAR 244; *Commercial Arbitration Act* 1984 (Vic) s 30, *Planning and Environment Act* 1987 (Vic) s 71.

[96] *Re Brown and Acting Commissioner for Superannuation* (1981) 3 ALD 185 (AAT).

[97] *Re Dillon and Department of Trade (No 2)* (1986) 9 ALD 187. See also *Re Mendelson and Commonwealth of Australia* (1982) 4 ALN(N) 278 (AAT) and *Re Pontin and Repatriation Commission* (1991) 22 ALD 191, 194–200 (AAT).

In a proceeding before the Tribunal-
(a) the procedure of the Tribunal is, subject to this Act and the regulations and to any other enactment, within the discretion of the Tribunal.

The Tribunal may, it was said, correct accidental errors in the drawing up of its decisions. (A copy of a decision must be served on each party to a proceeding.[98]) Errors susceptible of correction would include 'errors of calculation of one kind or another, typing errors, errors of punctuation or of setting out which give rise to unintended changes of meaning'.[99]

In the same case, the Tribunal considered whether, independently of s 33(1) of the Act, it had a corrective power, analogous to that exercisable by courts of law in the exercise of their inherent jurisdiction, or under rules of court which give statutory expression to that aspect of their jurisdiction.[100] If the Tribunal had such a power, the power would, it was suggested, extend not merely to correction of clerical mistakes, but also to supply of omissions 'resulting from the inadvertance of a party's legal representative', correction of 'a decision which does not give effect to the decision-maker's meaning and intention', correction of 'a misnomer or misdescription not involving an alteration to the substantive decision', and correction of 'ambiguity in expression of an unambiguous decision'.[101] The Tribunal would not, however, have the power to correct a decision in which:

(a) The decision-maker put down in writing what was meant to be put down, did not put in anything which was not intended to be put in, nor omitted anything which was intended to be inserted, but subsequently considered that if more thought had been given to it at the time it would have been put down differently . . .
(b) The decision itself is ambiguous . . .
(c) The decision of the Tribunal is wrong in fact or in law.[102]

The actual case before the Tribunal was considered to fall within category (a), involving as it did no more than 'inconsistency between the reasoning and decision-making process in one area and that in another'.[103] Although this was the principal reason why the Tribunal declined to make the correction sought by one of the parties, it noted also that 'the very point in respect of which' it was said to have slipped had been raised by that party in a pending appeal before the Federal Court.[104] It was suggested that in such cases it was, in any event, inappropriate to invoke the slip rule.[105]

Where an administrative agency is required by legislation to express and record, or communicate, its decisions in writing, it is, in my view, desirable that the legislation should also expressly authorise the agency to correct clerical mistakes and errors arising from accidental slips or omission in the written

[98] *Administrative Appeals Tribunal Act* 1975 (Cth) s 43(3).
[99] 9 ALD 187, 189.
[100] Reference was made to O29 r 11 of the Rules of the High Court and O35 r 7(4) of the Rules of the Federal Court.
[101] 9 ALD 187, 190.
[102] Id 190–1.
[103] Id 189.
[104] Id 191.
[105] Ibid.

decision. Such a provision may not be necessary to supply a power to correct errors of the kind which can be corrected under the so-called slip rule, for the power may be regarded as a necessary incident of the obligation to provide a written decision.[106] But an express provision leaves less room for doubt.

A power to correct errors of the kind covered by the slip rule should not be confused with the power to repudiate or resile from communications which represent that a decision has been made, when, in fact, no decision has been made, or which completely misrepresent the terms of the decision which has been made. There have been cases of this kind in which a clerk or an officer of a planning authority has notified an applicant that the planning authority has decided to grant a planning permit, whereas in fact no decision has been made. *Norfolk County Council* v *Secretary of State for the Environment*[107] was such a case, but there the error was brought to the notice of the applicant before it had acted in reliance on the representation to its detriment. The Divisional Court rejected the applicant's contention that the planning authority was estopped from denying that a permit had been granted. In *Co-operative Retail Services Ltd* v *Taff-Ely Borough Council*,[108] a planning officer, 'off his own head', sent to the applicant what purported to be a grant of planning permission. Again there had, in fact, not been any such grant by the planning authority, but on this occasion the authority later purported to ratify the officer's action. In this case the Court of Appeal held that the purported grant of permission was of no legal force or effect and could not even be ratified by the planning authority.

These cases should be contrasted with *Brickworks Ltd* v *Council of the Shire of Warringah*.[109] Here too the applicant had received a document, dated 22 April 1960, which clearly stated that the planning authority had consented to the application for a permit. The document had been initialled by a planning officer and signed by the president of the Council. Later letters from the Council assumed that consent had been given. The first time the Council contended that it had not, in fact, consented to the application was on 28 March 1961, when it commenced a suit for an injunction to restrain the applicant from using the land for the purpose sought in its application. A majority in the High Court decided in favour of the applicant on the basis that the document of 22 April 1960 stating that the requisite consent had been granted, coupled with the later correspondence from the Council, raised a presumption, which the evidence had not rebutted, that consent had in fact been given. Windeyer J did, however, add that if it could 'somehow be said that [the Council] did not in fact consent', it was estopped by its representations from denying that consent had been granted.[110] There was, it should be noted, no question about the power of the Council to grant the consent sought by the applicant.

[106] *Re Scivitarro and Ministry of Human Resources* (1982) 134 DLR (3d) 521 (BCSC).
[107] [1973] 1 WLR 1400.
[108] (1979) 39 P & CR 223. See also *Russell* v *Brisbane City Council* [1955] Q St R 419 and *Re 56 Denton Road, Twickenham* [1953] Ch 51, 57.
[109] (1963) 108 CLR 568.
[110] Id 577.

REVOCATION AND VARIATION OF VALID DECISIONS

There are many cases in which courts have asserted or assumed that a valid and perfected decision of an administrative character[111] which affects individual rights or liabilities cannot be revoked or altered by the decision-maker unless there is statutory authority (express or implied) to revoke or alter the decision.[112] This general rule has been applied even where the decision has been based on some error of fact or has been sought to be reopened after discovery of fresh evidence. Valid and perfected decisions which courts have held to be irrevocable, in the absence of statutory authority to rescind or vary them, have included decisions about compensation or other monetary grants payable under legislation,[113] decisions to grant or refuse to grant permits,[114] and various decisions of administrative tribunals.[115]

The requisite statutory authority to reconsider and revoke or vary a valid and perfected decision may be express or implied. Arguments for and against implication of such authority were considered by the Federal Court of Australia in *Sloane* v *Minister for Immigration, Local Government and Ethnic Affairs*.[116] In this case a delegate of the Minister had refused Sloane's application for a temporary entry permit under the *Migration Act* 1958 (Cth) and the regulations made thereunder. The delegate had concluded that Sloane did

[111] As distinct from decisions of a legislative character, as to which see *Ku-ring-gai Municipal Council* v *Mutton* (1973) 28 LGRA 63 and *Edenmead Pty Ltd* v *Commonwealth* (1984) 59 ALR 359. Proclamations of the date on which Acts are to come in force are irrevocable: *Palais Parking Station Pty Ltd* v *Shea* (1977) 16 SASR 350, 358; see also *Reynolds* v *Wingecarribee Shire Council* [1964–65] NSWLR 1808 (NSW Land and Valn Court).

[112] For general statements see *Re 56 Denton Road, Twickenham* [1953] Ch 51, 56–7 (Vaisey J); *Sloane* v *Minister for Immigration, Local Government and Ethnic Affairs* (1992) 28 ALD 480, 486 (per French J). See also *Sarina and Secretary, Department of Social Security* (1988) 14 ALD 437, 438–9 (AAT) and *Re Carde and the Queen* (1977) 34 CCC (2d) 559 (Ont HC) and *Re Scivitarro and Ministry of Human Resources* (1982) 134 DLR (3d) 521, 525 (BCSC).

[113] *Livingstone* v *Westminster Corporation* [1904] 2 KB 109; *Re Denton Road, Twickenham* [1953] Ch 51; *Export Development Grants Board* v *EMI (Australia) Ltd* (1985) 61 ALR 115 (Full F Ct); *Re Queensland Mines Ltd and Export Development Grants Board* (1985) 7 ALD 357, 363 (AAT); see also *Employment and Immigration Commission of Canada* v *Macdonald Tobacco Inc* (1981) 121 DLR (3d) 546 (SCC).

[114] *Shanahan* v *Strathfield Municipal Council* (1973) 28 LGR 218 (NSW SC) and cases there cited; *The Queen* v *District Council of Berri; Ex parte HL Clark (Berri) Pty Ltd* (1984) 36 SASR 404 (SA FC); *Sloane* v *Minister for Immigration, Local Government and Ethnic Affairs* (1992) 28 ALD 480. Prospective revocation of permits must also be authorised by statute: *Collector of Customs (NSW)* v *Brian Lawlor Automotive Pty Ltd* (1979) 24 ALR 307 (FC), though see the qualifications suggested by Smithers J at 329–30.

[115] *R* v *Smith; Ex parte Mole Engineering Pty Ltd* (1981) 35 ALR 119 (HC); *Bogards* v *McMahon* (1988) 80 ALR 342 (FC); *R* v *Agricultural Land Tribunal (South Eastern Area); Ex parte Hooker* [1952] 1 KB 1 (DC); *Re Academic Salaries Tribunal; Ex parte Federation of Australian University Staff Associations* (1985) 59 ALR 89 (FC). See also *Re Dillon and Department of Trade (No 2)* (1986) 9 ALD 187 (AAT). Awards of commercial arbitrators fall into the same category: *Mordue* v *Palmer* (1870) 6 Ch App 22; *Re Bennett Bros* [1910] VLR 51; *R* v *Smith and Harley; Ex parte Crugnale* [1970] WAR 43 (FC). An award may be varied with the consent of the parties (*Re Davis and Brown's Arbitration (No 2)* [1957] VR 127).

[116] (1992) 28 ALD 480.

not qualify for grant of a permit under the applicable regulations. Sloane sought review of the decision by the Immigration Review Tribunal but the Tribunal found that the decision was not reviewable by it. Sloane then requested that the delegate's decision be reconsidered. This request was refused, whereupon Sloane sought judicial review of both the delegate's decision and the refusal to reconsider it. A question to be decided by the Federal Court was whether there was an implied power to reconsider the decision. French J conceded that:

> 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.[117]

But he recognised also that:

> Against the difficulties that may arise from the implication of a power to reconsider a 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. There is nothing inherently angelical about administrative decision-making under the grant of statutory power that requires the mind that engages in it to be unrepentantly set upon each decision taken.[118]

French J concluded that a power to reconsider could not be implied in this case because the *Migration Act* included express provision for review of certain primary decisions.[119]

This case may be contrasted with the Canadian case of *Re Lornex Mining Corporation and Bukwa*.[120] There the Human Rights Commission of one of the provinces had, after a hearing, dismissed a complaint of discrimination on the ground of sex, contrary to the *Human Rights Act* 1969 (BC). Subsequently, the Commission agreed to conduct a rehearing, but one limited to admission of new evidence and legal argument thereon. At the conclusion of that rehearing, the Commission upheld the complaint and made orders against the respondent company. On an application for judicial review, Verchere J held that although the normal rule was that an administrative tribunal has not, in the absence of an express statutory authority, any jurisdiction 'to rehear a matter already heard and decided by it',[121] that rule did not apply where, as in the present case, there was no right to appeal against the Tribunal's decision, and the rehearing was limited to hearing of new evidence and argument thereon.[122]

Verchere J relied heavily on the Canadian Supreme Court's decision in *Grillas* v *Minister of Manpower and Immigration*[123] in which it had been held

[117] Id 486.
[118] Ibid.
[119] Id 486–7.
[120] (1976) 69 DLR (3d) 705.
[121] Id 708.
[122] Id 709, 710.
[123] (1971) 23 DLR (3d) 1.

that the Immigration Appeal Board could reopen and redecide decisions on appeals against deportation orders. It is true that, in that case, one reason for allowing the Board to reopen the cases already decided by it was the absence of a right to appeal against its decisions,[124] but another, and perhaps more important reason, was that a section in the governing legislation was construed as giving the Board a continuing 'equitable' jurisdiction. Thus *Grillas* was a case where statutory authority to reopen was implied.[125] In my opinion, the court's decision in *Re Lornex* was incorrect. Since the Human Rights Commission's function was to adjudicate the existence of a liability, according to antecedent legal rules, its first determination should have been treated as if it were the judgment of a court of law.[126]

Are there any exceptions to the general rule that a valid and perfected administrative decision cannot be rescinded or varied by its author, in the absence of statutory authority to do so? There are some cases in which it has been suggested that the grantor of a permit may revoke the permit if the grantee has not yet acted in reliance on the permit.[127] But the preferred view now seems to be that a valid approval of an application for a permit is irrevocable, irrespective of whether some act has been done or suffered by the applicant in consequence of the notification of approval. As was pointed out in *The Queen* v *District-Council of Berri; Ex parte H L Clark (Berri) Pty Ltd,*[128] even if a person has not expended money in reliance on an approval, withdrawal of the approval can cause loss. When, for example, a planning or building permit has been granted, the very grant of the permit may well enhance the value of the land before any action is taken in reliance upon the permit.

In another case concerning the exercise of a licensing power, *Adelaide Pistol Club Incorporated* v *District Council of Munno Para,*[129] it was suggested that the South Australian Planning Appeals Board could, in some circumstances, vary its determinations. Wells J seems to have had in mind principally cases in which planning permission had been granted on conditions and in which a variation of the conditions was sought by the grantee on the ground that the relevant circumstances had altered. He reasoned as follows:

> The character of planning work is such that it comprehends decisions of broad principles which must be implemented with some particularity. It is wholly consistent with that character that a decision on a point of principle may remain unchanged, but its implementation may require variation in detail in order to accommodate the fundamental purpose of the decision to circumstances that have undergone a change not reasonably capable of being resisted. It would . . . frustrate the determinations of the Board if it were not assigned, by analogy with courts, subsidiary powers to make those

[124] Id 10.
[125] See also *Re Carde and the Queen* (1977) 34 CCC (2d) 559 (Ont HC) regarding the 'equitable' jurisdiction of the National Parole Board.
[126] For a critique of the case see Macdonald, fn 1 supra.
[127] See cases discussed in *The Queen* v *District Council of Berri; Ex parte HL Clark (Berri) Pty Ltd* (1984) 36 SASR 404, 416–17 (SA FC).
[128] Id 417.
[129] (1981) 28 SASR 186.

> variations, whenever it is just and convenient to do so, in order to carry the central purpose of a determination into proper and complete effect in altered circumstances.[130]

Although Wells J concluded that the Planning Appeals Board had been in error in holding that, once having decided that a planning permit be granted, it had no jurisdiction to entertain an application 'to vary a subsidiary or ancillary part'[131] of its determination, he concluded also that, since the condition sought to be varied was invalid, no occasion for the exercise of the jurisdiction had arisen.

Wells J cited no authorities in support of his statement regarding the powers of courts of law to vary their judgments. As has already been pointed out,[132] courts have not asserted any inherent jurisdiction to vary their judgments and orders simply because it may be 'just and convenient to do so', and a change of circumstances after judgment has been expressly rejected as a ground on which a judgment or order may be set aside or varied.[133] Rules of court do, however, sometimes empower a court to stay execution of a judgment or order on the ground of matters occurring after the date on which judgment takes effect.[134] This power is most frequently relied on when the order sought to be varied provides for specific relief such as an injunction.

The power of variation which Wells J acknowledged to exist in the case before him should perhaps be regarded as a power impliedly conferred by the relevant statute.

In considering whether an administrative decision can be revoked by its author, courts have not always looked for statutory authority (express or implied) to revoke. A case in point is *Rootkin* v *Kent County Council.*[135] There a season's bus ticket had been granted by a local authority to cover a child's expenses in travelling to and from school. It was granted on the basis that the distance between the child's home and school was more than three miles and that therefore the local authority was under a statutory duty to provide free transport or else reimburse the cost of reasonable transport expenses. Later it was discovered that the distance between the home and the school was less than three miles. This meant that the local authority could, in its discretion, provide transport, but was under no duty to do so. The local authority revoked its previous grant of transport expenses. On judicial review, the Court of Appeal concluded that the decision to revoke was a valid decision.

Lawton LJ drew a distinction between, on the one hand, a case where a person 'is entitled to payment in certain circumstances' and a public authority 'is given the duty of deciding whether the circumstances exist and if they do exist making the payment', and, on the other hand, a case where a person 'has

[130] Id 192–3.
[131] Id 193.
[132] See p 36 supra.
[133] See p 36 supra and *R* v *Northamptonshire Justices; Ex parte Nicholson* [1974] RTR 97, 100.
[134] For example, *Supreme Court Rules* 1970 (NSW), Pt 42 r 12.
[135] [1981] 1 WLR 1186; discussed by Akehurst, op cit (fn 1) and by DGT Williams in a Case Comment (1981) 40 CLJ 198.

no right to a determination on certain facts being established; but only to the benefit of the exercise of a discretion by the . . . [public] authority.'[136] In the first case, his Lordship said, a valid determination, even if factually incorrect, cannot be rescinded. Where, however, the public authority has a discretion as to whether a payment shall be made to an applicant, a determination that a payment should be made may be rescinded if it is discovered that it was based on a mistake as to the relevant facts. The present case was one of the latter kind. And no estoppel could thwart the exercise of the local authority's discretion.

The decision in *Rootkin's* case invites several comments. First, there was no suggestion by any of the Lord Justices of Appeal that the error of fact involved in the initial determination rendered that determination invalid. In other words, the court seems to have accepted that, in deciding whether an applicant was entitled to free transport, the question of whether the child resided more than three miles from the school was a question within jurisdiction. Secondly, it is implicit in the court's reasoning that in a case where an administrative body has the task of determining the existence of an entitlement, its determination cannot be rescinded merely because it involves an error of fact. Thirdly, it may be inferred that the court conceded that a determination to grant a benefit which is purely discretionary can be rescinded for reasons other than error of fact. And last, it is open to question whether the court's analysis of the nature of the decision to grant the benefit sought was correct in terms of the principles it purported to apply. Should not that decision have been regarded rather as a decision that the child was entitled to free transport and was thus irrevocable, even if it was founded on a relevant mistake of fact?[137]

The general legal principle which, in my opinion, should be adopted and applied, is that, where a valid administrative determination is made in respect of a person's rights, entitlements or liabilities, that determination cannot, in the absence of fraud or misrepresentation, be rescinded or varied by the decision-maker on the ground of error of fact on the part of the decision-maker, except possibly with the consent of the party or parties affected. This view is consistent with opinions expressed by the House of Lords in *R* v *Tan*[138] to the effect that, absent fraud or misrepresentation, an assessment of liability to pay customs duty on imported goods could not be undone because of a mistake by the assessing officer as to the value of the goods.

There have been other cases in which it has been accepted that administrative decisions of a certain type may be altered by their authors without statutory authority. They include other types of decision which have been regarded as susceptible of variation and are decisions made in exercise of powers to make recommendations as to what action should be taken by another body, and findings made in exercise of powers to inquire and report.

[136] Id 1195.
[137] Akehurst, op cit (fn 1) 618.
[138] [1977] AC 650, 666–7, 668, 672. See also *R* v *Secretary of State for the Home Department; Ex parte Ram* [1979] 1 WLR 148.

In *The Queen* v *City of Mitchum; Ex parte G J Coles and Co Ltd,*[139] it was held that a local government council could vary a resolution recommending amendment of zoning regulations, notwithstanding that the resolution had already been notified. In this case no action had yet been taken in response to the council's recommendation. There is also judicial support for the view that, where an Ombudsman has made an inquiry into a complaint and has reported on it, he is not precluded from re-opening the matter, at least on the basis of new evidence, and reaching a different conclusion.[140]

It may be also that if a decision affects only one person, it can be rescinded or varied with the consent of that person.[141]

Finally, it should be noted that if a decision involves the rejection of an application, there may be nothing to prevent the applicant making a fresh application which the decision-maker is then bound to determine.[142] The only situation in which a fresh application could not be entertained was where the decision made on the first application was made by a body which, for the purposes of the doctrine of estoppel *per res judicata*, was a judicial tribunal, and the second or later application raised exactly the same matter as that decided in the first application.[143]

RESCISSION AND VARIATION OF DECISIONS WHICH ARE UNDER APPEAL

Assuming that a decision is one the maker can ordinarily rescind or vary, is the power to rescind or vary taken away when the decision is appealable, on the merits, and an appeal against the decision has in fact been lodged?

The federal Administrative Appeals Tribunal has taken the view that it is not deprived of its jurisdiction to hear and determine the appeal simply because, after the initiation of the appeal, but before its determination, the decision which is the subject of the appeal is rescinded or varied.[144] A Queensland appeals tribunal has held that it could not be deprived of jurisdiction even by withdrawal of the application to which the decision under appeal relates.[145]

Whilst there may be no general and inflexible rule which precludes a decision-maker from rescinding or varying a decision once it has become the

[139] (1980) 26 SASR 74 (SA Full Ct).

[140] *Re Ombudsman of Ontario and the Queen in Right of Ontario* (1980) 117 DLR (3d) 613 (Ont CA); *Boyd* v *The Ombudsman* [1983] 1 NSWLR 620 (CA).

[141] *Re 56 Denton Road, Twickenham* [1953] Ch 51, 57.

[142] *Amoco Australia Ltd* v *City of Berwick* (1983) 22 APA 496, 499; *Andreas* v *City of Keilor (No 1)* (1987) 31 APA 19 (Vic PAB).

[143] See *Administration of the Territory of Papua and New Guinea* v *Daera Guba* (1973) 130 CLR 353, 453.

[144] *Re Paterson and Department of Home Affairs and Environment* (1985) 7 ALD 403 (AAT); *Re Rae and Department of Arts, Heritage and Environment* (1987) 7 ALD 449 (AAT); *Re Hounslow and Department of Immigration and Ethnic Affairs* (1985) 7 ALD 362 (AAT); *Re Cox and Commonwealth of Australia* (1987) 12 ALD 209 (AAT).

[145] *Birch, Carroll and Coyle Ltd* v *Mulgrave Shire Council* (1980) 6 Q L 286 (Q Local Gov Ct).

subject of an appeal, rescission or variation in those circumstances has usually been held impermissible. In *R* v *Moodie; Ex parte Mithen,*[146] the High Court held that once an authorised officer had reconsidered an application for assistance, at the applicant's request (pursuant to s 22 of the *Student Assistance Act* 1973 (Cth)), and once the applicant had sought review by a Student Assistance Review Tribunal (pursuant to s 23 of the Act) of the decision made on the reconsideration, the authorised officer was *functus officio* and could not re-open or revise his or her decision.

This case has frequently been cited in appeals before the federal Administrative Appeals Tribunal which have raised similar issues. In one of the first, *Re Bloomfield and Sub-Collector of Customs, ACT,*[147] Senior Member Todd noted that there were 'many similarities between the process of review provided by the Student Assistance Act and that provided for by the AAT Act'.[148] Nevertheless he thought it might

> be too much to say that a decision-maker always becomes *functus officio* once an application for review pursuant to the AAT Act is lodged with this Tribunal. It is more appropriate to ask whether in any particular instance of the Tribunal's jurisdiction the decision-maker has had conferred on him a residual power to revoke or vary the decision in question.[149]

That residual power could come only from the legislation from which the decision-maker derived his or her decision-making powers. In the Senior Member's opinion, 'in the absence of power suitably conferred, it is not open to a decision-maker to revoke, vary or otherwise amend a decision once it has become subject to the process of review'.[150] He did, however, concede that it would still be open to the decision-maker to 'negotiate with an appellant for the purpose of pursuing the possibility of an agreed solution'.[151]

These opinions have been endorsed in subsequent cases before the Tribunal. In *Re Hounslow and Department of Immigration and Ethnic Affairs*[152] the Tribunal rejected an argument that the *Freedom of Information Act* 1982 (Cth) provided authorised officers with residual authority to alter decisions refusing applications for access to documents once an appeal to the Tribunal had been lodged. In *Re Sarina and Secretary, Department of Social Security,*[153] it ruled that, once an appeal against a decision to cancel a pension had been lodged, that decision could not then be reopened and replaced by another decision cancelling the pension on another ground. To essentially the same effect is the ruling by the Queensland Local Government Court that once objectors have exercised their right to appeal against a local government council's notification of its proposal to approve an application for a planning

[146] (1977) 17 ALR 219.
[147] (1981) 4 ALD 204.
[148] Id 210.
[149] Ibid.
[150] Id 211.
[151] Ibid.
[152] (1985) 7 ALD 362.
[153] (1988) 14 ALD 437. But cf *Social Security Act* 1991(Cth), ss 1239, 1259 and 1284.

permit, the council has no jurisdiction to deal further with the application pending the outcome of the appeal.[154]

EXCLUSION OF POWER TO REVOKE AND VARY

Statutes may expressly or impliedly negate the existence of any power a decision-maker might otherwise have to revoke or vary decisions. Express exclusion of such a power is, however, less likely to occur than implied exclusion.

A power to revoke or vary may, by implication, be excluded or else limited. It may be limited where a statute expressly authorises the decision-maker to revoke or vary a decision of a particular kind on specified grounds. In that case it is implied that decisions of that kind cannot be revoked or varied on grounds other than those specified. In *Pearce* v *City of Coburg*,[155] for example, it was held that s 24 of Victoria's *Town and Country Planning Act* 1961 was exhaustive of the circumstances in which valid planning permits could be revoked and varied and that a local government council, acting in its capacity as a planning authority, could not validly rescind a decision granting a planning permit, otherwise than as authorised by s 24. It could not revoke under s 185 of the *Local Government Act* 1958 (Vic) for this section governed only the formalities for rescinding resolutions of local government councils in general.

Again, where a statute expressly authorises revocation or variation of decisions of one or more types, it may be implied that decisions of other types are not susceptible of revocation or variation. A power in the decision-maker to revoke or vary may also be negatived by the presence of provisions which invest a power of revocation or variation in another body.

There have been cases in which it has been held that a statutory provision authorising correction of slips prevents any alteration of a decision otherwise than as authorised by the slip rule, but these were cases in which the decision-maker had either been constituted as a court[156] or had been invested with an arbitral function and given the same powers as had been reposed in commercial arbitrators under the relevant arbitration Act.[157] It cannot therefore be assumed that the presence of a statutory slip rule would be taken to have excluded powers of revocation or variation where the decision-maker decides otherwise than as an adjudicator.

While there is no solid judicial authority on the point, there is some support for the proposition that, where a statute provides that certain decisions are

[154] *Birch, Carroll and Coyle Ltd* v *Mulgrave Shire Council* (1980) 6 Q L 286.

[155] [1973] VR 583, 587–8. See *also Re McKie and Minister for Immigration, Local Government and Ethnic Affairs* (1988) 8 AAR 90, where the federal AAT held that s 7 of the *Migration Act* 1958 (Cth), which authorised cancellation of temporary entry permits, impliedly excluded power to cancel other entry permits. Section 33(3) of the *Acts Interpretation Act* 1901(Cth), was therefore inapplicable. This subsection is dealt with at p 63 infra.

[156] *Shoalhaven City Robinson* v *Council* (1985) 55 LGRA 135 (NSW Land and Env Ct).

[157] *R* v *Smith and Harley; Ex parte Crugnale* [1970] WAR 43, 50, 52.

'final' or 'final and conclusive', it means that when a decision has been made it cannot be recalled or revised.[158] Most of the judicial decisions on the effect of such clauses have been ones on the question of whether these clauses are effective to exclude supervisory judicial review. It is now well established that they are ineffective to exclude judicial review on jurisdictional grounds. There is also now ample judicial support for the view that such clauses are also not effective to prevent review on applications for certiorari on the ground of patent non-jurisdictional error of law.[159] Such clauses, however, operate to exclude rights of appeal that would otherwise exist under general statutory provisions governing appeals.[160]

STATUTORY POWERS OF REVOCATION AND VARIATION

Decision-makers may be given express statutory authority to reconsider their decisions and to revoke and/or vary them. Sometimes such powers may be implied.[161] Express powers of this kind are conferred for a variety of purposes: for example, to enable correction of clerical slips and accidental errors in or omissions from written determinations; to enable other errors to be rectified; to permit new evidence, not previously available, to be considered; to permit decisions which have a continuing effect to be revised in the light of changed circumstances; or simply to allow for reassessment of claims. A statutory power to re-open and redecide may also be conferred when a statutory tribunal is authorised to dismiss an application for a cause such as failure of a party to appear at a hearing. The relevant statute may provide that the tribunal may reinstate and reconsider an application which has previously been dismissed by it.[162]

Where, by statute, persons are entitled to request reconsideration of decisions affecting them, it may be provided that this right must be exercised before the person can exercise the further right to seek external review.[163]

A statutory power to revoke or vary a decision may be one which may be exercisable on the motion of either the decision-maker or of a person affected by the decision. But the statute may provide that decisions may be varied or revoked only if a request for reconsideration has been made by a person or

[158] *R* v *Agricultural Land Tribunal (South Eastern Area); Ex parte Hooker* [1952] 1 KB 1; *Punton* v *Ministry of Pensions and National Insurance (No 2)* [1963] 1 WLR 1176 (CA); *R* v *National Insurance Commissioner; Ex parte Hudson*, sub nom *Jones* v *Secretary of State for Social Services* [1972] AC 944.

[159] M Aronson and N Franklin, *Review of Administrative Action* (1987) 679–82.

[160] *Achilleos* v *Housing Commission* [1960] VR 164; *O'Malley* v *Chief Commissioner of Police* [1961] VR 729; *Komesaroff* v *Law Institute of Victoria* [1992] 2 VR 257; *In re McCosh's Application* [1958] NZLR 731.

[161] *R* v *District Council of Berri; Ex parte HL Clark (Berri) Pty Ltd* (1984) 36 SASR 404 (SA FC), and pp 49–51 supra.

[162] See eg *Administrative Appeals Act* 1975 (Cth), s 42A (inserted in 1993) and *Re Manoli and Secretary, Department of Social Security* (1994) 35 ALD 133 (AAT).

[163] See eg *Freedom of Information Act* 1982 (Cth), ss 54–5; *Freedom of Information Act* 1982 (Vic), ss 50–1; *Re Borthwick and University of Melbourne* (1985) 1 VAR 33, 37 (AAT); *Student and Youth Assistance Act* 1973 (Cth), ss 22–3.

persons other than the decision-maker.[164] Sometimes there may even be a requirement, express or implied, that a party consents to the revocation or variation.[165] For a power of revocation or variation to be validly exercised, certain procedural requirements may have to be satisfied, for example, service of notices.[166] Even if there are no explicit procedural requirements, a person who may be adversely affected by exercise of the power to revoke or vary, may have a right to have an opportunity of being heard before the power is exercised.[167]

If the power is expressed merely as a power to rescind or revoke, does that power include a power of variation or amendment? There is probably no universal answer to this question. The answer must depend on the statutory context. In *R* v *Mitcham City Corporation; Ex parte G J Coles and Co Ltd,*[168] it was held that, for the purposes of a statute which regulated the procedures to be followed by local government councils where a motion was moved to rescind a resolution previously passed by the council, the term 'rescind' meant to recall a resolution totally rather than simply amend it. But whether a motion was to rescind or to amend involved a consideration of the substance of a motion. In contrast, in *R* v *District Council of Berri; Ex parte H L Clark (Berri) Pty Ltd*[169] it was held that a power to revoke conditions attached to planning consent imported a power to vary a condition. But this was on the assumption that it was 'not conceivable that the power to alter a consent, whether by revocation or variation of a condition, could be exercised by a council unfavourably to the owner.'[170]

According to a Senior Member of the federal Administrative Appeals Tribunal,[171] the power given to the Commissioner by s 20(4) of the *Compensation (Commonwealth Government Employees) Act* 1971 to vary or revoke determinations made under the Act did not import a power to substitute a decision for that revoked. On the other hand, if a determination was revoked, a fresh determination might be made under the preceding sub-sections of the section, that is, in exercise of a power to determine all matters and questions arising under the Act.

There seems to be little doubt that where the power is merely to vary or modify a decision, it does not import a power to revoke or rescind the decision entirely.[172] A power to vary or modify is, in other words, a lesser power.[173]

[164] *Commonwealth* v *Hawkins* (1981) 51 FLR 430.
[165] *R* v *District Council of Berri; Ex parte HL Clark (Berri) Pty Ltd* (1984) 36 SASR 404, 420.
[166] See eg *Planning and Environment Act* 1987 (Vic), s 74. See also *Shire of Pakenham* v *Raven* (1983) 8 APA 1; *AG (Ex rel Kynvenos)* v *City of Preston* (1982) 57 LGRA 345 (Vic SC).
[167] *Shearer* v *Commonwealth* (1969) 14 FLR 400.
[168] (1980) 26 SASR 74.
[169] (1984) 36 SASR 404, 420 (FC).
[170] Ibid.
[171] *Re Kime and Commonwealth of Australia* (1988) 15 ALD 63.
[172] *Sydney City Council* v *Ilenace Pty Ltd* [1984] 3 NSWLR 414; *Double Bay Marina Pty Ltd* v *Woollahra Municipal Council* (1985) 54 LGRA 313 (NSWSC); *Peterson* v *Parramatta City Council* (1987) 28 APA 444 (NSW Land and Env Ct).
[173] *R* v *District Council of Berri; Ex parte HL Clark (Berri) Pty Ltd* (1984) 36 SASR 404, 420.

In considering the ambit of statutory powers of revocation and rescission, it is important to bear in mind that there is a difference between authorising a decision-maker to revoke or rescind a decision as from the date on which the decision was made, and a power to terminate or suspend a benefit conferred by a prior decision. A power of the latter kind may be described in the statute as a power to revoke, eg a licence, or it may be described as a power to cancel. In the absence of indications to the contrary, a statute conferring a power of the latter kind does not permit cancellation or suspension of the benefit from a date earlier than that of the determination to cancel or suspend.[174]

Statutory powers to revoke and vary decisions, or to terminate or suspend benefits conferred by decisions, may delimit the circumstances in which those powers may be exercised, or else delimit the circumstances in which a reconsideration is open. Generally speaking, where the statute so delimits the power, the decision-maker has no authority to reconsider, revoke or vary otherwise than as expressly authorised.[175] Cases where the initial decision is invalid may, however, be an exception.[176]

The fact that the statute is silent on when reconsideration, revocation or variation is open does not mean that the power to reconsider, revoke and/or vary is at large. Discretionary powers of these types have to be exercised in accordance with general principles governing the exercise of statutory discretions. For example, they must not be exercised for improper purposes, in disregard of relevant considerations or with reference to extraneous considerations. What considerations are relevant to an exercise of the discretion will obviously depend on the nature and effect of the decision which may be reconsidered and rescinded or varied and the assumed purpose or purposes of conferring the power to reconsider and rescind or vary.

Bodies which have power to determine claims for workers' compensation and a general power to rescind and vary their determinations[177] have, in exercising the discretion to rescind and vary, thought it relevant to consider whether the prior determination involved any error of fact or law, whether the determination expresses the decision-maker's intentions, whether important new evidence has come to light which was not previously available, and whether there has been a material change in circumstances.[178] They have also had regard to whether revocation or variation would be oppressive to the opposite party, whether the party seeking rescission or variation has been

[174] *Builders Licensing Board* v *Kelly* (1985) 2 NSWLR 300 (CA). See also *Tobias* v *May* [1976] 1 NZLR 509.

[175] *Re Scitivarro and Ministry of Human Resources* (1982) 134 DLR (3d) 521 (BCSC); *Milosevic* v *Romeo* (1976) 5 WCBD (Vic) 81 (WCB).

[176] See pp 41–6 supra.

[177] For example, *Safety Rehabilitation and Compensation Act* 1988 (Cth) s 62; *Workers' Compensation Act* 1926 (NSW), s 36(2) (since repealed); see now ss 60 (review of weekly payments), s 60A (termination of weekly payments), s 61 (variation of awards in relation to dependants); *Workers' Compensation and Assistance Act* 1981 (WA), s 117.

[178] *Gosper* v *Bulwinkle* [1931] WCR 204; *Tucker* v *Atlantic Union Oil Co Ltd* [1937] WCR 186; *Gaskell* v *EF Wilks and Co Pty Ltd* [1938] WCR 253; *Clairs* v *Wright* (1950) 1 WCBD (WA) 33; *Woodyatt* v *Australian Iron and Steel Ltd* [1964] WCR 3; *Aitken* v *Bellway Pty Ltd* (1981) 1 WCR (WA) Pt 1 94; *Lord* v *Boans Ltd* (1982) 1 WCR (WA) Pt 1 201; *Reitano* v *Commonwealth* (1985) 9 ALN 201; *Jamieson* v *Bunbury Aero Club Inc* (1986) 7 WCR (WA) 59; *Re Kime and Commonwealth* (1988) 15 ALD 63.

guilty of unreasonable delay in making application, and the need for finality in adjudication.[179] But according to Western Australia's Workers' Compensation Board, the power of rescission and variation conferred by s 117 of the State's *Workers' Compensation and Assistance Act* 1981 should not be used simply to enable an applicant to seek a different result from a differently constituted Board, on the same facts, or to provide a means of correcting errors on the part of the applicant's legal adviser.[180] And, according to the federal Administrative Appeals Tribunal, the discretion given to the Commissioner by s 20(4) of the *Compensation (Commonwealth Government Employees) Act* 1971 (Cth) to reconsider determination of claims under the Act could not properly be used to review a determination until such time as the Commissioner received a medical opinion which was adverse to the claimant.[181]

Exercise of a statutory discretion to reconsider, rescind and vary a determination, like the exercise of any other statutory discretion, is judicially reviewable. On review of the New South Wales Workers' Compensation Commission's decision not to rescind a prior determination in favour of an employer, the State's Court of Appeal concluded that, although the Commission had made an error of law in not allowing the employee to withdraw his claim for compensation before a determination on it was made, it could not be said that the Commission had erred in not acceding to the employee's request, two years later, for rescission of the decision to dismiss his claim. In exercising the discretion to rescind, it was proper for the Commission to have regard not merely to whether or not an error of law had previously been made, but also to the fact that the applicant had not elected to exercise his right to appeal to the Supreme Court against the prior determination, the delay in seeking rescission, the need for finality in adjudication of claims, and the possible effect of a rescission on the availability of a plea of issue estoppel in a pending action for damages in the Supreme Court between the applicant and the employer.[182]

[179] As to delay see *Gosper* v *Bulwinkle* [1931] WCR 204; *Deigman* v *State Coal Mines* [1956] WCR 169; *Western Mining Corporation Ltd* v *Bertocchi* (1983) 2 WCR (WA) Pt 2 111; *La Macchia* v *PA Spera* (1986) 7 WCR (WA) 75. As to oppressiveness see *Woodyatt* v *Australian Iron and Steel Ltd* [1964] WCR 3.

[180] *Clemente* v *Green* (1984) 4 WCR (WA) 16.

[181] *Re Diskovski and Australian Telecommunications Commission* (1985) 8 ALN 216 (AAT). See also *Re Tanaskovic and ACT Health Authority* (1986) 11 ALN 62 (AAT) (power to reconsider cannot be invoked endlessly in the light of subsequent decisions of superior courts). But, the AAT stressed on several occasions that the Commissioner's power to reconsider is not limited to cases where new facts have come to light or there has been a change of circumstances. It also stated that the Commissioner was not in the same situation as independent workers' compensation tribunals in the States. See generally *Commonwealth of Australia* v *Goodfellow* (1980) 31 ALR 533 (Northrop J). The 1971 Act has been repealed by the *Safety Rehabilitation and Compensation Act* 1988 but s 62 of the 1988 Act preserves the power to reconsider determinations. This power is vested in a new Commission and in administering authorities appointed under s 101.

[182] *Shipp* v *Herfords Pty Ltd* [1975] 1 NSWLR 412. Reference was made to *Hardaker* v *Wright and Bruce Pty Ltd* (1960) 62 SR (NSW) 244, 248, 249 and to cases concerning exercise of powers of reconsideration by tenancy tribunals — *Hilliger* v *Hilliger* (1952) 52 SR (NSW) 105; *Burling* v *Chas Steele and Co Pty Ltd* (1948) 76 CLR 485, 489. See also *Nashua Australia Pty Ltd* v *Channon* (1980) 36 ALR 215, 233–4 (FC).

There have, however, been cases in which courts have held that decisions to reconsider and rescind involved an abuse of discretion. In one, the Ontario High Court of Justice held that a Highway Transport Board's discretion to rehear applications and revoke decisions granting approvals and certificates could not be used to revoke an approval, validly granted, where to revoke would interfere with contractual rights which had been acquired in reliance on that approval.[183] In a later case, the same court held that the authority given to the Ontario Human Rights Commission to reconsider its determinations, on the application of a complainant, and rescind those determinations arises only 'when there is an issue as to the integrity of the tribunal's process or where factual circumstances have changed from the time of the original hearing or where new facts have arisen which were not previously available and are subsequently brought forward.'[184] The court here seems to have been laying down a general rule as to when a power to reconsider and revoke can be exercised, an approach which has not been favoured by Australian courts when reviewing the exercise of like discretions.[185] This is not, however, to say that the Ontario Court was not justified in quashing the decision of the Human Rights Commission to set aside its prior determination to dismiss a complaint against an employer. The complaint had been made in August 1983 and, after investigation, was dismissed September 1984. The decision to rescind that determination and reopen the case was not made until February 1986, by which time the employer's chief witness had died.

Even though a decision-maker has a discretion as to whether a decision should be rescinded or varied, there may, nonetheless, be a duty at least to consider whether that discretion should be exercised. That duty would almost certainly arise when the statute designates classes of persons who may request reconsideration. But even when there is such a duty it is probably not an unqualified duty, for the person or persons to whom application for reconsideration is made can hardly be expected to have to deal with successive applications from the same applicant in respect of the same decision. There is, indeed, authority for the view that, once an application for reconsideration has been dealt with in an orderly way and it has been decided not to reopen the case, the person making that determination should not then be asked to reconsider the decision not to reopen except in the most unusual circumstances.[186] There is also authority for the view that it is not unreasonable to defer decisions on an application for reconsideration pending the outcome of court proceedings which raise a question of law which has an important bearing on the matter raised for reconsideration.[187]

[183] *Re Laidlaw Transport Ltd and Bulk Carriers Ltd* (1979) 97 DLR (3d) 373.

[184] *Re Commercial Union Assurance and Ontario Human Rights Commission* (1987) 38 DLR (4th) 404, 412. See also *Re Merrens and Municipality of Metropolitan Toronto* (1973) 33 DLR (3d) 513 (Ont HC).

[185] See fn 182 supra.

[186] *RV Ontario Labour Relations Board; Ex parte Taylor* (1963) 41 DLR (2d) 456; affd (1964) 42 DLR (2d) 320 (Ont CA). On when there was a duty to reconsider pursuant to s 20(4) of the *Compensation (Commonwealth Government Employees) Act* 1971 (Cth), see *Commonwealth of Australia* v *Ford* (1986) 9 ALD 433 (FC).

[187] *Thornton* v *Repatriation Commission* (1981) 35 ALR 485 (FC).

Finally, are there any circumstances in which a person or body having a discretion to reconsider and revoke its decisions has a legally enforceable duty to revoke a decision, that is, a duty to exercise the discretion in a particular way? Neither an error of law nor an error of fact seems to be sufficient to convert a discretion to revoke into a legal duty to revoke,[188] though the position may be different where the decision in question is a nullity.[189] The position may also be different where the revocable decision was made in exercise of a power to make an order either on the happening of certain events, or on forming the opinion that certain circumstances exist, or on forming the opinion that the order is necessary for certain purposes. What the position would be in a case like this was considered by the Judicial Committee of the Privy Council, on appeal from Malaysia, in *Teh Cheng Poh* v *Public Prosecutor*.[190]

The statutory power of revocation in this instance had been conferred by implication rather than expressly. Section 47 of the *Internal Security Act* 1960 (Laws of Malaysia Act 82) provided:

> (1) If in the opinion of the Yang di-Pertuan Agong public security in any area in the Federation is seriously disturbed or threatened by reason of any action taken or threatened by any substantial body of persons, whether inside or outside the Federation, to cause or to cause a substantial number of citizens to fear organised violence against persons or property, he may, if he considers it to be necessary for the purpose of suppressing such organised violence, proclaim such area as a security area for the purposes of this Part.
> (2) Every proclamation made under subsection (1) shall apply only to such area as is therein specified and shall remain in force until it is revoked by the Yang di-Pertuan Agong or is annulled by resolutions passed by both Houses of Parliament: Provided that any such revocation or annulment shall be without prejudice to anything previously done by virtue of the proclamation.

The relevant Part of the Act prohibited, under pain of criminal penalties, various activities in areas proclaimed as security areas. Although the Judicial Committee rejected the argument that a security area proclamation 'lapsed *ipso facto* as soon as there are no longer any grounds for considering it still to be necessary for the particular purpose described in section 47',[191] it thought that once the Yang di-Pertuan Agong no longer considered a proclamation necessary for the purpose described in the section 'it would be an abuse of his discretion to fail to exercise his power of revocation, and to maintain the proclamation in force for some different purpose'.[192] If the Yang di-Pertuan Agong failed to act, the court would have 'no power itself to revoke the proclamation in his stead', or even to issue mandamus to require him to do so, for Article 32(1) of the Constitution granted him immunity from judicial

[188] *Ex parte Stewart; Re McAlister* (1954) 71 WN (NSW) 267, 270; *Schipp* v *Herfords Pty Ltd* [1975] 1 NSWLR 412 (CA).
[189] *Schipp* v *Herfords Pty Ltd* [1975] 1 NSWLR 412, 434, 439 (Mahoney JA).
[190] [1980] AC 458.
[191] Id 473.
[192] Ibid.

proceedings.[193] But that remedy could be sought against the members of the cabinet, on whose advice the Yang di-Pertuan Agong was required to act, to require them to advise revocation.[194]

INTERPRETATION ACTS

Interpretation Acts commonly include a provision of the following type:

> 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.[195]

Sir William Wade has suggested that provisions of this kind give 'a highly misleading view of the law where the power is a power to decide questions affecting legal rights'.[196] Certainly such provisions will seldom provide authority to revoke or vary decisions made in exercise of statutory powers to determine individual rights and liabilities.[197] Provisions like s 33(3) of the *Acts Interpretation Act* 1901 (Cth) will also not support the revocation or alteration of administrative decisions. This subsection provides that:

> 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 same conditions (if any) to repeal, rescind, revoke, amend, or vary any such instrument.[198]

It has been held to apply only to instruments of a legislative character.[199]

Provisions in Queensland's *Acts Interpretation Act* 1954 and the Northern Territory *Interpretation Act* have a wider operation. Section 24AA of the Queensland Act (inserted in 1991) states that:

> If an Act authorises or requires the making of an instrument or decision -
> (a) the power includes power to amend or repeal the instrument or decision.

Section 43 of the Northern Territory Act provides that:

[193] Ibid.
[194] Ibid.
[195] *Acts Interpretation Act* 1901 (Cth), s 33(1). See also *Interpretation Act* 1987 (NSW), s 48(1) ; *Acts Interpretation Act* 1954 (Qld), s 23(1); *Acts Interpretation Act* 1915 (SA), s 37; *Acts Interpretation Act* 1931 (Tas), s 20; *Interpretation of Legislation Act* 1984 (Vic), s 40; *Interpretation Act* 1984 (WA), s 48; *Interpretation Ordinance* 1967 (ACT), s 26(1); *Interpretation Act* (NT), s 41(1).
[196] HWR Wade and CF Forsyth, *Administrative Law* (7th ed, 1994) 261.
[197] Cf *Minister for Immigration, Local Government and Ethnic Affairs* v *Kurtovic* (1990) 92 ALR 93, 112, 119 (revocation of a criminal deportation order did not prevent the Minister from making a second deportation order in respect of the same criminal offence).
[198] The following provisions are similar: *Interpretation Act* 1987 (NSW), s 43; *Acts Interpretation Act* 1915 (SA), s 39; *Acts Interpretation Act* 1931 (Tas), s 22; *Interpretation of Legislation Act* 1984 (Vic), s 41; *Interpretation Ordinance* 1967 (ACT), s 27.
[199] *Australian Capital Equity Pty Ltd* v *Beale, Secretary, Department of Transport and Communications* (1993) 114 ALR 50 (FC).

> Where an Act confers power to take an action or to make, grant or issue any instrument of a legislative or administrative character, the power shall be construed as including a power . . . to repeal, rescind, revoke, amend or vary any such action or instrument.

These sections must, of course, give way to contrary indications in the statute conferring the power. And neither can be construed as imposing any legally enforceable duty to reconsider a decision. On the other hand both could be invoked as a source of authority to revoke or vary administrative decisions which, under the general law, would be regarded as irrevocable.

Section 55 of Western Australia's *Interpretation Act* 1984 provides much more limited authority to revise administrative decisions. It states that:

> Where a written law [as defined in s 5] confers a power or imposes a duty upon a person to do any act or thing of an administrative or executive character . . . the power or duty may be exercised or performed as often as is necessary to correct any error or omission in any previous purported exercise or performance of the power or duty, notwithstanding that the power or duty is not in general capable of being exercised or performed from time to time.

This section is clearly intended to allow for revision of administrative decisions which, under the general law, would not be open to revision. But the power of revision is a limited power and one the exercise of which is judicially reviewable. The power could not, for example, be exercised simply because the decision-maker had changed his/her mind.

REVOCATION AND VARIATION OF DECISIONS OF DELEGATES

It is well established that when a statutory power has been delegated, the person or body making the delegation is not thereby denuded of authority to exercise the power. Rather, the delegator retains concurrent authority to exercise the power.[200] Sometimes statutes which expressly provide for delegation of the powers they confer also make provision whereby decisions made by delegates may be reviewed and revised by the person or body which has delegated the power to make those decisions. But what is the position where no express provision of this kind has been made?

On principle it would seem to be that if the decision made by the delegate is one which, had it been made by the delegator, could have been revoked or varied by the delegator, the delegate's decision can be revoked or varied by the delegator. In this situation the delegate also would have power to vary or revoke the decision. But if the power involves the exercise of the discretion, the delegator cannot command the delegate to exercise the discretion invested in him or her in a particular way. Should the delegate revoke merely by

[200] *Huth* v *Clarke* (1890) 25 QBD 391; *Manton* v *Brighton Corporation* [1951] 2 KB 393.

direction of the delegator, the purported revocation would not be recognised as valid.[201]

If the decision made by the delegate is one which, had it been made by the delegator, could not have been revoked by the delegator, then again, on principle, it would seem to follow that the decision cannot be revoked or varied by either the delegator or the delegate. In *Re 56 Denton Road, Twickenham,*[202] Vaisey J flatly contradicted the suggestion that any superior officer had authority to rescind and redecide the determination made by an inferior officer as to the applicant's entitlement to war damage compensation.[203] There are other cases in which courts have applied essentially the same general rule.[204]

The general rule is not displaced by a statutory provision which declares delegates or subordinates of the delegator subject to the delegator's control. The effect of a provision of that kind was considered by the High Court in *R* v *Smith; Ex parte Mole Engineering Pty Ltd.*[205] The statute in question, the *Patents Act* 1952 (Cth), had invested powers in the Commissioner of Patents, among them power to decide applications for patents.[206] It expressly authorised the Commissioner to delegate powers and functions to an Assistant Commissioner of Patents, or to a Supervising Examiner of Patents.[207] It provided in s 10(2) that there should be a Deputy Commissioner of Patents who, subject to the Act, should, 'subject to the control of the Commissioner of Patents, have all the powers and functions of the Commissioner' under the Act, other than those specifically mentioned.

In this instance a decision had been made by the Acting Deputy Commissioner in the course of proceedings, under s 60 of the Act, in which an application for a patent was opposed. The decision, styled an interim decision, was that one claim in the specification lodged by Mobile Drilling Co Inc failed for obviousness, but that the company be allowed sixty days within which to lodge a request to amend the specification. Requests as to the suggested amendments were lodged, and the opponent, Mole Engineering Pty Ltd, lodged notice of opposition to one of the amendments. A hearing on this opposition was held before the Principal Supervising Examiner, a duly appointed delegate of the Commissioner. Before the Examiner's decision was handed down, an application was made to the Commissioner on behalf of Mobile for a rehearing of the grounds of opposition to the unamended application. The application was made partly on the ground that the decision of the Acting Deputy Commissioner was wrong, and partly on the ground that, since he had now retired, he would not be available to hear the proceedings

[201] *Nashua Australia Pty Ltd* v *Channon* (1980) 36 ALR 215, 229–31.
[202] [1953] Ch 51.
[203] Id 58.
[204] *Morrison* v *Shire of Morwell* [1948] VLR 73; *Battelly* v *Finsberry Borough Council* (1958) 56 LGR 165.
[205] (1981) 35 ALR 119. See also *Bosnjack's Bus Service* v *Commissioner for Motor Transport* (1970) 92 WN(NSW) 1003; *Social Security Commission* v *MacFarlane* [1979] 2 NZLR 34.
[206] The section relevant in the present case was s 60.
[207] Section 11.

consequent on the amendments. The Principal Supervising Examiner then communicated his decision to Mobile. It was a favourable decision, but he advised Mobile to withdraw its amendments. Once they had been withdrawn and Mole Engineering notified, the Commissioner would, he advised, direct a rehearing of the grounds of opposition to the unamended application. Mole subsequently sought and obtained a writ of prohibition against the Commissioner and Mobile to prevent the proposed rehearing.

The High Court held that the decision of the Acting Deputy Commissioner, though styled an interim decision, was nonetheless a final decision on so much of the case as was then susceptible of decision. Moreover once that decision was made the Commissioner had no authority to rescind it and direct a rehearing of the matters to which it related. Mobile had contended that the Commissioner could re-open and rehear opposition proceedings which had reached the stage of final decision, at any time prior to the ultimate decision on whether the patent applied for should be granted. No such power, the Court said, could be implied in s 10. Indeed that section did not even permit the Commissioner to give directions to a duly authorised delegate who had entered on an inquiry pursuant to s 60 as to how he should decide the case before him. Mason J observed that,

> once a decision has been made under s 60 the Commissioner cannot rehear the proceeding and arrive at a different conclusion. If he could do so, an impossible situation would arise, with no statutory provision to indicate which of the two conflicting decisions was to prevail.[208]

Noting that s 60(5) conferred a right of appeal against decisions made under s 60, Mason J added:

> It would make little sense, if notwithstanding this right of appeal, the Commissioner could rehear an application and give a decision different from that which was the subject of the appeal.[209]

There were also 'considerations of expedition and finality' which told heavily against the interpretation which Mobile had sought to place upon the section.[210]

Like Mason J, Wilson J had no doubt that s 10 of the Act gave the Commissioner no power to order a rehearing of a decision in or in the course of opposition proceedings. The power of control given to the Commissioner by s 10(2) is, his Honour said,

> of an administrative nature, touching the over-all direction of the work of the office, and in particular the allocation of work. It does not contemplate a right to interfere in the exercise by a Deputy Commissioner of the power, pursuant to s 60, to 'decide the case'.[211]

[208] (1981) 35 ALR 119, 124.
[209] Ibid.
[210] Ibid.
[211] Id 133.

In his Honour's view,

> specific words would be required to found a power to order a rehearing. It would be a large and important power, the exercise of which would necessarily have the effect of removing, otherwise than by appeal, an effective and operative decision. The exercise of such a power would also be inexpedient in denying finality and causing complexity in the administration of the Act . . . . [T]here may be some administrative inconvenience if a Deputy Commissioner who has conducted opposition proceedings and published an interim decision dies or is otherwise unavailable to handle any subsequent developments, but the inherent finality of the decision ensures that, subject to appeal, it provides a firm base on which another officer can proceed in the exercise of the powers and functions of the Commissioner.[212]

CONCLUSION

Individuals who are dissatisfied with an administrative decision which affects them personally may sometimes request the decision-maker to reconsider the decision. Such requests are most likely to be made when there is no statutory right to seek external review of the decision, on the merits. Sometimes individuals will have a statutory right to seek reconsideration by the decision-maker or by some other person or body within the relevant government agency. Even when the decision-maker is under no statutory duty to reconsider a decision, upon request, he or she may accede to a request for reconsideration, on the assumption that it is permissible for him or her to reopen and redecide the matter. Issues about whether a decision-maker has legal authority to reconsider a decision made by him or her are likely to arise for judicial determination only when a request for reconsideration has been refused, or when the decision-maker has altered a decision on his or her own motion, or at the request of a third party, and some other person is dissatisfied with the alteration.

While the common law relating to revocation and variation of administrative decisions, by the authors of those decisions, is not entirely certain, there are some legal principles which are now reasonably well established, or for which there is some judicial support. There is ample support for the proposition that administrative decisions which have still to be perfected may be altered, though in individual cases there may be room for argument about whether or not a decision has or has not been perfected. There is also some judicial support for the proposition that the slip rule which courts of law have

[212] Ibid. Wilson J noted that in *Ethyl Corporation* v *California Research Corporation* (1970) 40 *Official Jo of Patents, Trademarks and Designs* 562, the Commissioner granted a rehearing following the death of a hearing officer. This course was 'only adopted after the advice of each party had been sought as to how the matter was to proceed and after each had expressed no objection to the matter being determined in this way' (*Bosnjak's Bus Service* v *Commissioner for Motor Transport* 35 ALR 119, 133). Wilson J expressed no opinion on whether the action taken in this instance was legally open to the Commissioner, or on whether the Commissioner acquires a power to rescind his decisions or that of his delegates and to rehear merely by consent of the parties.

developed in relation to their judgments and orders can be applied to some administrative agencies, in particular administrative tribunals. I have argued that if courts of law have authority to rescind those of their judgments and orders they acknowledge to be invalid (eg because of a denial of natural justice), there is no good reason for not according the same authority to administrative decision-makers. Again there is some judicial support for that view, although no court has suggested that an administrative decision-maker is under a legally enforceable duty to reconsider a decision made by it simply because someone contends that the decision is invalid.

The least settled aspect of the common law relating to revocation and variation of administrative decisions, by the authors of those decisions, concerns those decisions which are both perfected and valid decisions, albeit ones which are flawed by reason of some error in the fact-findings of the decision-maker, an insufficiency of evidence (but not a complete want of evidence) in support of the decision, or some other cause which, for the purposes of supervisory judicial review, would be regarded as a non-jurisdictional error. Courts have, in a number of cases, concluded that administrative decisions which they have accepted as valid and perfected decisions were irrevocable by their maker. The decisions held to be irrevocable have, in the main, been ones concerning individual entitlements or liabilities, and decisions on applications for permits or grant of cash benefits. A general rule that valid and perfected decisions cannot be altered by their authors promotes finality in decision-making. It also protects the interests of individuals who have acted in reliance on those decisions and who may suffer detriment if the decisions are rescinded or varied. That general rule may, of course, be overridden by statute, and in some cases it is entirely appropriate for it to be overridden so as to allow for internal review of decisions on the merits or on specified grounds.[213]

[213] The advantages and disadvantages of statutory procedures for internal review are discussed in Administrative Review Council, *Better Decisions: review of Commonwealth Merits Tribunals* (Report No 39, 1995) paras 6.49–6.67.