Division of Law
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29 July 2005

The Secretary
Inquiry into the administration and operation of the *Migration Act 1958*
Senate Legal and Constitutional Committee
The Senate
Parliament House
Canberra ACT 2600

Dear Sir/Madam:

I convene and teach Advanced Administrative Law (LAW404) in the context of the *Migration Act* (Commonwealth) at Macquarie University, and teach also Constitutional Law at that University. Thank you for the opportunity to make a submission to the inquiry.

The Committee's terms of reference include inquiry into 'the administration and operation of the *Migration Act 1958*, its regulations and guidelines by the Minister…' To engage in any analysis of the Act and its regulations is akin to mapping the hide of a moving elephant—the Act has grown from 35 pages in 1958[1] to 744 pages in 2005, the Regulations currently occupy 9 Volumes[2] totalling 1993 pages, and the Guidelines and Directions many pages more,[3] and the likelihood is for yet more amendments to the Act.

My submission is directed to Terms of Reference (a) and (d).

The submission addresses :

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[1] See here also Professor John McMillan, 'Immigration Law and the Courts,' Chapter 5 in *Upholding the Australian Constitution*, Volume 14 — Proceedings of the Fourteenth Conference of The Samuel Griffith Society, Menzies Hotel, Carrington Street, Sydney, 14 --16 June, 2002, 2002, The Samuel Griffith Society.

[2] See the texts on the web : Volume 1 276 pages, Volume 2 196 pages, Volume 3 312 pages, Volume 4 377 pages, Volume 5 212 pages, Volume 6 131 pages, Volume 7 57 pages, Volume 8 216 pages, Volume 9 216 pages.

[3] While these should be easily accessible on the web, in accordance with the requirement for public availability in FOI Act section 9, I have not been able to find them on the DIMIA web site.

- the ramifications of the length and complexity of the *Migration Act* in relation to
  - litigation and its causes,
  - the administration of the Act,
  - the development of the judicial approaches to interpretation in the context of the litigation involving the Act;
- the efficacy of the merits and judicial review regimes under the *Migration Act*, with particular regard to the High Court's approach to the privative clause (s. 474);
- and finally it makes some basic observations concerning the contracting-out of management of the detention centres.

Yours faithfully,

Dr MRLL Kelly

Lecturer

Division of Law.

Submission to the Senate Legal and Constitutional Committee Inquiry into the administration and operation of the *Migration Act* 1958.

Dr MRLL Kelly

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1. LENGTH AND COMPLEXITY OF THE ACT : RAMIFICATIONS

1.1 Volume of Litigation

1.1.1 The growth in the Act may be largely attributed to legislative and executive reaction to court interpretations as a result of litigation by individuals.[4] To date, the Act has been amended some 115 times,[5] three of those amendments constituting major overhauls of the Act.[6]

1.1.2 The growth in migration litigation has been starkly illustrated over the past few years. For example, in 2002-3, 2,105 (or 99%) of applications to the **High Court** for 'constitutional writs'[7] in the High Court's original jurisdiction under s. 75(v) of the *Constitution* involved migration matters (due mainly to a change in interpretation by the High Court),[8] while in 2003-4 the number dropped to 93% of 213 applications (the smaller

[4] See McMillan, note 1 above.

[5] See Attachment A

[6] The Migration Legislation Amendment Act 1989 and associated Acts, the Migration Reform Act 1992 and the Migration Amendment (Judicial Review) Act 2001 and the associated Border Protection package.

[7] Applications for the writs of mandamus and prohibition under section 75(v) of the Constitution, usually known as 'prerogative writs'—this appellation was changed in the constitutional jurisdiction by *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82.

[8] This followed from the High Court's interpretation of the Act in *Plaintiff S157 v The Commonwealth of Australia* [2003] HCA 2, and in *Muin v Refugee Review Tribunal & Ors* and *Lie v Refugee Review Tribunal & Ors* [2002] HCA 30—see High Court *Annual Reports* for 2003-4 and 2002-3.

number arising from matters being brought in the Federal Court jurisdiction at first instance rather than in the High Court), but applications for special leave to appeal to the High Court from Federal Court decisions involving migration matters rose from 186 in 2002-03 (39% of all civil special leave applications) to 307 during 2003-04 (more than 50% per cent of all such applications filed). It should also be noted that approximately 80% of the applications for special leave to appeal involving immigration matters filed during 2003-04 were brought by self-represented litigants.[9]

1.1.3 In 1999-2000, migration matters original matters filed in or remitted to the **Federal Court** constituted 16.5 % (or 967 out of 5,869); in 2003-4, they constituted 48.8% of the total matters filed (2,591 out of 5312 matters).[10] In 1998-99, migration appeals constituted 22.6% of all appeals (94 out of 416) decided by the Full Federal Court;[11] in 1999-2000 35.8% (146 out of 408),[12] while in 2003-4 they constituted 74.6% (or 525 out of 704). In 2003-04 therefore migration litigation constituted a total 51.8% of the total work of the Federal Court (3116 out of 6015 matters).[13]

1.1.4 For the **Federal Magistrates Court** in 2003-4 migration matters constituted 45.4% of all general federal law applications[14] (3031[15] of 6672[16] applications) compared with 27.9% (1396 of 4996) in 2002-3.[17]

1.1.5 There is a clear need to reduce the burden placed on the Courts by the volume of litigation in the jurisdiction, especially considering that between 90-96% of all judicial review applications that proceed to hearing are unsuccessful. In the Federal Court in 2003-4, of 3579 matters the applicant was unsuccessful in 2451 instances, or 68.5% of the time; if one excludes those applications withdrawn by the applicant (890, leaving 2689), the Minister was successful in 91.2% of the cases; if one also excludes those where the Minister herself withdrew from challenge (136, leaving 2553), the Minister was successful in 96% of cases.[18] Litigation expenditure for DIMIA in 2003-4 was in excess of $34 million.[19]

1.1.6 Something must be done to ease the burden on courts and also the cost to the taxpayer of this type of litigation, and to this end I support the *Migration Litigation Reform Bill* 2005, and also the views expressed by the ARC on that Bill, particularly those with respect to summary dismissal of matters on the papers[20]—while this would place an additional burden on both applicant and respondent, the greater need for clarity involved in making the

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[9] See High Court *Annual Report* for 2003-4

[10] See Tables 5.2 and Figure 5.8 in *Federal Court Annual Report* 2003-2004

[11] Table 3.3 *Federal Court Annual Report* 2003-4.

[12] Table 3.3 *Federal Court Annual Report* 2003-4.

[13] Date extracted from Tables 3.3., 5.2, and Figure 5.8, *Federal Court Annual Report* 2003-4.

[14] General federal law jurisdiction of the FMC includes bankruptcy and migration law, and unlawful discrimination, trade practices, general administrative law and privacy law and some areas of copyright law.

[15] See Figure 9, *Federal Magistrates Court Annual Report* 2003-4, Part Three.

[16] See Figure 8, *Federal Magistrates Court Annual Report* 2003-4, Part Three.

[17] See Figures 8 and 9, *Federal Magistrates Court Annual Report* 2003-4, Part Three.

[18] DIMIA Fact Sheet 9, Litigation involving Migration decisions, updated as at 1 February 2005.

[19] DIMIA Fact Sheet 9, Litigation involving Migration decisions, updated as at 1 February 2005.

[20] See paragraphs 3.2.1, 3.2.2., 3.3.6, 3.4.5, and 3.5.2, Senate Legal and Constitutional Legislation Committee, *Report on the Provisions of the Migration Litigation Reform Bill 2005*, May 2005, Commonwealth of Australia. And see ARC's Letter of 3 December 2003 to the Migration Litigation Review (the Penfold Inquiry), at Letter 4, *Supplement to the ARC's Annual Report for 2003-4*.

application would ensure isolation of real issues while simultaneously ensuring that applicants were aware of those issues and the possibilities of success and assisting in limiting time spent in detention.

1.2 Causes of Litigation : the High Court's approach

1.2.1 Much of the litigation proceeds from proliferating and sometimes confusing Court interpretations, but much also proceeds from the desire of unlawful entrants to or unlawful over-stayers in Australia to remain. Sometime the litigation may proceed as a result of suggestions by well-meaning or ambitious or unscrupulous persons. The complexity of the Act, the prolixity of the judicial pronouncements, and applicants' desires all contribute to the large number of unsuccessful applications. Judges themselves have been concerned about the volume of litigation, and also about the increase in the number of unrepresented litigants. In the absence of access to the *Report of the Migration Litigation Review* (the *Penfold Report*), to which one assumes certain judges/courts contributed views, it is difficult to state with certainty the opinions of the judiciary on the current circumstances.

1.3 The judicial interpretative approach

1.3.1 To a very large extent, however, in my view the situation has been exacerbated by the High Court's broad interpretation of the judicial power, particularly in its insistence on the following :

- that administrative persons and bodies are incapable of determining the limits of their own jurisdiction;[21]
- the Court's apparent wide embrace of the notion of jurisdictional fact so as to include an opinion[22] and its concomitant denial of the application of the *Chevron* doctrine[23] as adopted in the US whereby the Court could accept an administrative body's expertise in determining jurisdictional facts;[24]
- the adoption of a very wide view of 'jurisdictional error' for administrators[25] and its companion 'constructive failure of jurisdiction'[26]

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[21] See here *Anthony David Craig v. The State of South Australia*, (*Craig's case*) (1995) 184 CLR 163, [1995] HCA 58, per the Court (Brennan, Deane, Toohey, Gaudron and McHugh JJ) at 179, [10] and [14]; and . *Plaintiff S157/2002 v Commonwealth* [2003] HCA 2, (2003) 211 CLR 476, per Gaudron, McHugh, Gummow, Kirby and Hayne JJ at [73]-[75], [98]-[99].

[22] See here for example, *Minister for Immigration and Multicultural Affairs v Eshetu*, (1999) 197 CLR 611 per Gummow J at 650-651, [127]-[130]; see also 656-657 [145]. See also *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002* [2003] HCA 30, per McHugh and Gummow JJ at [54] (but note [60]).

[23] Named after the US case, *Chevron USA Inc v Natural Resources Defense Council, Inc* 467 US 837 (1984).

[24] See *Corporation of the City of Enfield v Development Assessment Commission* [2000] HCA 5.

[25] See *Craig's case* 1995, at [14], *Minister for Immigration and Multicultural Affairs v Yusuf* [2001] HCA 30, per McHugh, Gummow and Hayne JJ at [82]—an administrative decision-maker will make a 'jurisdictional error' if it 'falls into an error of law which causes it to identify a wrong issue, to ask itself a wrong question, to ignore relevant material, to rely on irrelevant material or, at least in some circumstances, to make an erroneous finding or to reach a mistaken conclusion, and the tribunal's exercise or purported exercise of power is thereby affected', and that this list is 'not exhaustive'., it exceeds its authority or powers.

[26] First clearly articulated in the Migration jurisdiction in 2001 by Gaudron J (majority) in *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* [2001] HCA 22, [80]-[86], and (dissenting) in *Minister for Immigration and Multicultural Affairs v Yusuf* [2001] HCA 30, at [41]-[44]; the doctrine of 'constructive failure of jurisdiction' became mainstream in the case of *Dranichnikov v Minister for Immigration and Multicultural Affairs* [2003] HCA 26, especially at [25] per Gummow and Callinan JJ, and per Kirby J at [86].

- which in turn results in the finding that 'A decision that involves jurisdictional error is a decision that lacks legal foundation and is properly regarded, in law, as no decision at all.'[27]

1.3.2 These judicial findings have resulted in a scramble by applicants to find something which will (or anything which might) fit into the wide 'jurisdictional error' definition and thus enable either judicial review in the High Court's original jurisdiction, or review in the Federal Court or Federal Magistrates Court. They have also resulted in the effective striking down the government's and the legislature's attempts to reduce the burden of judicial review matters in federal courts through the application of a privative clause[28] (see paragraph 2.4 below). They also must result, in my view, in an increase in administrators' uncertainty as to their powers and procedures, with a concomitant deleterious effect on administration. Both these results, together with often ill-informed comment,[29] may well result in administrators feeling besieged.

1.3.3 The Court has also refused to apply its own 1998 *Blue Sky* doctrine[30] in the migration jurisdiction;[31] that doctrine states :

> An act done in breach of a condition regulating the exercise of a statutory power is not necessarily invalid and of no effect. Whether it is depends upon whether there can be discerned a legislative purpose to invalidate any act that fails to comply with the condition. The existence of the purpose is ascertained by reference to the language of the statute, its subject matter and objects, and the consequences for the parties of holding void every act done in breach of the condition.
>
> …a court, determining the validity of an act done in breach of a statutory provision, may easily focus on the wrong factors if it asks itself whether compliance with the provision is mandatory or directory and, if directory, whether there has been substantial compliance with the provision. A better test for determining the issue of validity is to ask whether it was a purpose of the legislation that an act done in breach of the provision should be invalid. This has been the preferred approach of courts in this country in recent years, particularly in New South Wales. In determining the question of purpose, regard must be had to 'the language of the relevant provision and the scope and object of the whole statute'.[32]

The *Blue Sky* principle was endorsed on 21 July 2005 by the House of Lords in *Regina v. Soneji*.[33] An application of that principle would have far different effects from the approach adopted in *Plaintiff S157* (see paragraph 2.4 below). It would result in the Court's paying more attention to both the purpose of the legislation and the consequences of their finding a

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[27] *Minister for Immigration and Multicultural Affairs v Bhardwaj* [2002] HCA 11, (2002) 209 CLR 597 at 614-615 [51], (2002) 76 ALJR 598 at 606 [51] per Gaudron and Gummow JJ, 608 [63] per McHugh J, 624-625 [152] per Hayne J; 187 ALR 117 at 129, 131, 154-155. Endorsed in *Plaintiff S157/2002 v Commonwealth* [2003] HCA 2, (2003) 211 CLR 476, per Gaudron, McHugh, Gummow, Kirby and Hayne JJ at [76].

[28] See *Plaintiff S157 v Commonwealth of Australia* [2003] HCA 2

[29] See here for example, the remarks in the *Report of The Inquiry into Circumstances of the Immigration detention of Cornelia Rau*, (the *Palmer Report*), Commonwealth of Australia, July 2005, at 4.1, pp 57-59, 4,3,2, p. 71, 4.4.4, pp. 84-88.

[30] *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, [1998] HCA 28.

[31] See *Plaintiff S157 v Commonwealth of Australia* [2003] HCA 2, per Gaudron, McHugh, Gummow, Kirby and Hayne JJ at [90].

[32] *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, [1998] HCA 28, per McHugh, Gummow, Kirby and Hayne JJ, at [91] and [93].

[33] See *Regina v. Soneji and another* (On Appeal from the Court of Appeal (Criminal Division)) [2005] UKHL 49, per Lord Steyn at [21].

decision invalid, and would, I believe, result in a diminution of applications.

1.4 The Judicial Power and the Other arms of government

1.4.1 Moreover the High Court has an approach which while elevating the judicial power to pre-eminence as the 'keystone' of Australian governance, pays comparatively little respect to the democratic institutions supporting and safeguarding the Australian citizenry—the legislature and the executive. In 1951, Justice Fullagar remarked in the *Communist Party case* that :

> … in our system the principle of *Marbury v. Madison*[34] is accepted as axiomatic, **modified in varying degree in various cases (but never excluded) by the respect which the judicial organ must accord to opinions of the legislative and executive organs**.[35]

1.4.2 The 'principle' of *Marbury* to which Fullagar J referred is that it is for the courts judicially to review executive decisions for legality, and to pronounce upon the constitutionality of legislation—this view was endorsed in 1990 by Justice Brennan in a famous dictum in *Quin's case*,[36] where he said :

> The duty and jurisdiction of the court to review administrative action do not go beyond the declaration and enforcing of the law which determines the limits and governs the exercise of the repository's power. If, in so doing, the court avoids administrative injustice or error, so be it; but the court has no jurisdiction simply to cure administrative injustice or error.

and also in 2003 in *Marquet*.[37] However, the High Court, while quoting the first part of Justice Fullagar's opinion, has never quoted the qualifying clause—

> As Fullagar J said, in *Australian Communist Party v Commonwealth* [(1951) 83 CLR 1 at 262], "in our system the principle of *Marbury v Madison* is accepted as axiomatic". It is the courts, rather than the legislature itself, which have the function of finally deciding whether an Act is or is not within power.[38]

1.4.3 Indeed, rather than indicating respect for the legislature and the executive as outlined by Justice Fullagar, some judges have gone so far as to suggest that some distrust of responsible government underlies a pro-active approach by the Courts to judicial review :

> … the doctrine of ministerial responsibility is not in itself an adequate safeguard for the citizen whose rights are affected. This is now generally accepted and its acceptance underlies the comprehensive system of judicial review of administrative action which now prevails in Australia.[39]
>
> …It is not coincidental that this growth in administrative law remedies has occurred at a time when the theory of ministerial responsibility, as an effective means of ensuring public

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[34] *Marbury v. Madison* (1803) 1 Cr 137 (2 Law Ed 118)

[35] *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, per Fullagar J at 263, [16] of Fullagar J's judgement, my emphasis.

[36] *AG (NSW) v Quin* (1990) 170 CLR 1, [1990] HCA 21, per Brennan J at [17] of Brennan J's judgement.

[37] *Attorney-General (WA) v Marquet* (2003) 202 ALR 233.

[38] *Attorney-General (WA) v Marquet* (2003) 202 ALR 233, per Gleeson CJ, Gummow, Hayne and Heydon JJ at 248. This is but one of a number of instances.

[39] *R v Toohey (*1981) 151 CLR 170, per Mason J at 222, [16] of Mason J's judgement.

service accountability, has been widely perceived as having serious weaknesses and limitations.[40]

1.4.4 Ministerial responsibility is a complex issue, involving not merely the resignation of Ministers (although eight members of the political executive have resigned since 1996, most for breaches of the ministerial code).[41] It involves also the web of interaction which occurs in the Houses of Parliament, Ministers' responsibility to the electorate, and the scrutiny of their actions and administration by Parliamentary Committees, the Auditor-General, and the media, as the Court has on occasion itself observed.[42] Chief Justice Spigelman sees the multi-faceted aspects of Parliamentary aspects of ministerial responsibility as being 'the performance by Parliament of an integrity function.'[43]

1.4.5 It is not merely Ministerial responsibility which appears to be denigrated by judges in the context of judicial review. Actions of the executive government receive short shrift from some judges.[44] Moreover, the approach of the federal courts has often been to ignore the democratic basis of the legislature, refusing apparently to give it and its elected members credit for even a modicum of intelligence by adherence to a rubric that 'Parliament cannot have intended…' what the judges think the legislature intended,[45] as opposed to what the judges think is a better common law outcome.[46] This is particularly so when the legislature over-rides entitlements initiated and expanded over time by the common law,[47] even though it is a basic tenet of statutory interpretation that statutes over-ride the common law. The clearest example is judicial frustration of attempts by Parliament to confine principles of

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[40] *Hot Holdings Pty Ltd v Creasy* [2002] HCA 51, per Kirby J at [93]

[41] See John Uhr, 'Ministerial Responsibility in Australia: 2005,' paper delivered to the 2005 Constitutional Law Conference, UNSW, Sydney, 18 February 2005.

[42] See Uhr, note above, and also the unanimous High Court, in *David Russell Lange v Australian Broadcasting Corporation*, (1997) 189 CLR 520—the Court stated : 'In his *Notes on Australian Federation: Its Nature and Probable Effects*, Sir Samuel Griffith pointed out that the effect of responsible government "is that the actual government of the State is conducted by officers who enjoy the confidence of the people". That confidence is ultimately expressed or denied by the operation of the electoral process, and the attitudes of electors to the conduct of the Executive may be a significant determinant of the contemporary practice of responsible government.' (footnotes omitted).

[43] See the Hon. Chief Justice JJ Spigelman, Chief Justice of NSW, in *The Integrity Lectures*, The 2004 National Lecture Series for the Australian Institute of Administrative Law, 29 April 2004, Sydney; 5 August 2004, Adelaide; 2 September 2004, Brisbane.

[44] See, for example, Justice Goldberg in *Tien v Minister for Immigration and Multicultural Affairs*, [1998] 1552 FCA, who dismissed successive statements by the Attorneys-General and Ministers for Foreign affairs for successive government in 1995 and 1997 respectively specifically stating that ratification of a treaty did not amount to a holding out by the executive giving rise to any legitimate expectation in administrative law, in order to overcome the conclusion by the High Court in *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 that ratification did amount to such a holding out, in the absence of executive indications to the contrary; he said : 'I do not consider that the Ministerial Statement made on 25 February 1997 is such an "executive indication to the contrary" as to displace the application of the *Teoh* principle to the circumstances before the Court.' Both Teoh and the doctrine of legitimate expectation have largely been rendered redundant by the High Court's decision in *Re Minister for Immigration and Multicultural Affairs Ex parte Lam* [2003] HCA 6.

[45] See, for example, 'it is impossible to conclude that the Parliament intended…' in *Plaintiff S157*, [[2003] HCA 2, note 27 above, at [67] per Gaudron, McHugh, Gummow, Kirby and Hayne JJ; and 'It is improbable in the extreme that Parliament intended…' per Gleeson CJ and Hayne J in *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57, at [43], and 'It is highly improbable that the legislature intended…', and 'It is hardly to be supposed, for example, that the Parliament of this nation intended to exclude the common law rules…' a per McHugh J at [128]and [131] respectively.

[46] See here particularly *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82, and *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57.

[47] For example, the principles of natural justice, which have been expanded enormously by the common law. See here also *Aala* and *Miah*, note 46 above.

natural justice to matters spelled out in the *Migration Act*, following on from federal courts' increasingly widening the categories where natural justice applies.[48] On the other hand, the High Court itself has overturned basic common law principles, the prime example again being in the field of natural justice where it demolished the long-standing common law principle that judges are automatically disqualified from sitting on the basis of pecuniary interest.[49] The fact that an executive government could obtain support for its proposed legislation from a hostile Senate in any endeavour of this kind should surely suggest that there were good reasons for doing so.

1.4.6 However, the combination of the factors outlined above leads to a conclusion that the High Court, and other federal courts, in conducting judicial review of government decision-making have applied extremely onerous (and often changing) standards of decision-making to administrators, justifying this approach by reference to the sanctity of the judicial power and underlying doubts about the efficacy of responsible government. In many ways it could be said that such an approach runs counter to basic democratic principles; others however perceive it as a means of keeping the government in check and accountable, or as a means of protecting human rights.[50] This last view has been repudiated by Chief Justice Spigelman of the NSW Supreme Court, who has said :

> In the administrative law literature integrative concepts have emerged which threaten the legality/merits distinction. One is the suggestion that the specific rules of administrative law are part of a broader principle of preventing an "abuse of power" or of curing "serious administrative injustice".[51] Another posits that these rules are simply "principles of good administration". Such general concepts are beguiling.
>
> It is a short step from stating that all of the particular rules which are in fact recognised in the case law can be so categorised, to saying that the results of a particular dispute should be determined by the judge's opinion as to whether the conduct constitutes an "abuse of power", "serious administrative injustice" or that in some manner, the "principles of good administration" require judicial intervention. Such concepts are more likely to lead to judicial decisions which transgress the proper limits of judicial review in a democratic polity, than the integrative concept which I propound, namely, the performance of an integrity function. …
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> When the courts review matters which do not give rise to integrity issues, it is likely, I said, that they have gone too far.[52]

1.4.7 Taken together, these judicial approaches must inevitably have an effect of the perception of administrators, and may also operate as a vector for encouragement of experimental and hopeful (as opposed to soundly-based) judicial review applications. Most judges have vast experience in litigation and are familiar with the legal culture; they do not

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[48] There is a long line of cases here, beginning with *Kioa v West* (1985) 159 CLR 550 See here the discussion by Professor John McMillan in 'The Courts v The People : Have the Judges Gone Too Far?' Paper to the Judicial Conference of Australia, Launceston Colloquium, 27 April 2002, and in 'Immigration Law and the Courts,' Chapter 5 in *Upholding the Australian Constitution*, Volume 14 — Proceedings of the Fourteenth Conference of The Samuel Griffith Society, Menzies Hotel, Carrington Street, Sydney, 14 --16 June, 2002, 2002, The Samuel Griffith Society.

[49] See *Ebner v The Official Trustee in Bankruptcy* (2000) 75 ALJR 277 per Gleeson CJ, Gaudron J, McHugh, Gummow and Hayne JJ (Kirby J dissenting).

[50] See also the discussion in Section 2, The Merits and Judicial Review Regime, particularly paragraph 2.4 below.

[51] *Ex parte Applicant S20/2002* supra at [170] and [161] per Kirby J.

[52] See Hon JJ Spigelman, note 43, *Integrity Lecture 3*.

usually have any personal experience of government or of parliamentary activities. Perhaps some activity through the Judicial College could assist in acquainting judges with the reality of government administration.

1.5 Administration

1.5.1 The length, complexity, and multi-facetedness of the Act require a considerable staff to administer—currently the Department of Immigration and Indigenous Affairs (DIMIA) comprises 5, 398 people,[53] 4, 245 of whom are involved in administering the *Migration Act*.[54] The Act and Regulations, together with the various Guidelines and Directions, are huge and complex—one doubts if any single person could ever be familiar with the Act, its interpretation, and its application as a whole. The *Palmer Report* noted the need for greater training of staff in their legal obligations (in that instance, with respect to compliance and detention powers) under the Act[55]—the necessity for this is unsurprising given the frequent changes to the Act, the unremitting judicial interpretation of it, the changes in judicial interpretation, and the high volume of cases and detailed work involved in administering the Act.

1.5.2 While the *Palmer Report* also noted that there is considerable evidence of highly committed DIMIA staff [56] and that the problems it identified with respect to the compliance and detention areas 'might not be endemic to DIMIA as a whole',[57] it would seem desirable that there be some basic and thereafter regular training of DIMIA officers in the constitutional and legislative bases of their powers, their legal responsibilities and obligations, and the approach of the federal courts to interpreting the provisions of the Act relevant to officers' areas of responsibility. This suggestion would doubtless be of benefit to any Commonwealth public servant. Costs, however, may well militate against implementation of such a broad training programme in DIMIA, let alone the rest of the Public Service.

1.5.4 Under the Administrative Arrangements Order, (AAO)[58] DIMIA is responsible for 'Entry, stay and departure arrangements for non-citizens; Border immigration control; Arrangements for the settlement of migrants and humanitarian entrants, other than migrant child education; Citizenship; Ethnic affairs; Multicultural affairs; Indigenous policy coordination and the promotion of reconciliation.' In addition to the *Migration Act* and various related immigration Acts, the Minister under the AAO is responsible for administering the *Australian Citizenship Act* and six Acts relating to indigenous Australians, including aspects of the *Native Title Act 1993*.[59] The portfolio has been split between two Ministers—Senator Amanda Vanstone, Minister for Immigration and Multicultural and

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[53] See DIMIA Annual Report 2003-4, Part 5, Appendix 4.

[54] See DIMIA Annual Report 2003-4, Resource Summary Tables in chapter 1, departmental Overview. 4, 245 are involved in administering the enforcement, refugee and humanitarian aspects of the Act, costing $872.08 million; 759 in citizenship and related activities costing $305.295 million, giving a total of . This compares with 40 staff involved in indigenous policies and reconciliation costing $10.408 million, 92 involved in Indigenous economic and social policies at a cost of $228.24 million, and 1,242 staff involved in indigenous programme delivery at a cost of $1,198.662 million. [Total staff and costs for Migration matters

[55] *Palmer Report*, note 29 above, at Finding 9, p. ix, Recommendation 3.1, p. xv.

[56] *Palmer Report*, note 29 above, at Finding 7, p. ix,

[57] *Palmer Report*, note 29 above, 7.4.1, p. 173

[58] See the Administrative Arrangements Order of 16 December 2004, Part 3.

[59] See the Administrative Arrangements Order of 16 December 2004, Part 3.

Indigenous Affairs and Minister Assisting the Prime Minister for Indigenous Affairs, and Mr John Cobb, Minister for Citizenship and Multicultural Affairs. The workload of the Department is large and diverse and it is understandable that the Minister may need assistance. It seems undesirable, however, to split responsibility for the one portfolio between two persons, as this will militate against a coherent approach to administration throughout the Department, and also lead to each Minister not being sufficiently acquainted with the work of the other in an area where the migration matters, and the citizenship (particularly for new citizens) and multicultural matters are intimately related.

1.5.5 On the other hand, matters relating to indigenous Australians ought not to be bundled as part of such a large Department. Indigenous Australians have needs, desires, histories and priorites far different from those relating to new immigratnts, visa-holders, and unlawful entrants. Indigenous matters should be dealt with by a separate Department.

1.5.3 I note the recommendations of the *Palmer Report* concerning the detention regime, concerning means of assisting in changing the 'culture' of the in compliance and detention aspects of the Department. It would seem, however, that the 'culture' of the Department is already fragmented between conflicting demands of indigenous Australians, new citizens, and applications of the *Migration Act*, and responsibility divided between two Ministers. It would be preferable to for there to be a separation of the Departments as I have suggested above, and either one or two persons to be solely (or jointly) responsible for the administration of the migration and citizenship matters. Alternatively, the migration and citizenship aspects could in turn be split between two departments.

1.6 Judicial Interpretation

1.6.1 The length and complexity of the Act itself militates against contextual interpretation by the Courts. For example, Court decisions concentrate usually upon a few sections of the Act, and the whole of the Act is seldom considered. Moreover Courts are constrained by the facts of the instant case, and by the nature and quality of counsels' or applicants' arguments. In particular, the object and purpose of the Act as spelled out in section 4 of the *Migration Act*[60] is seldom considered as is required by the *Acts Interpretation Act*.[61] Moreover, while it has been the intention of successive governments and parliaments that in any case where a Court needs to confirm the ordinary meaning of the Act's provision, or finds an ambiguity in the text of the Act, that regard may be had to the Second Reading speech and the Explanatory Memorandum (see *Acts Interpretation Act* section 15AB)[62] Courts have tended routinely to

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[60] Section 4 Object of Act— (1) The object of this Act is to regulate, in the national interest, the coming into, and presence in, Australia of non citizens.(2) To advance its object, this Act provides for visas permitting non citizens to enter or remain in Australia and the Parliament intends that this Act be the only source of the right of non citizens to so enter or remain. (3) To advance its object, this Act requires persons, whether citizens or non citizens, entering Australia to identify themselves so that the Commonwealth government can know who are the non citizens so entering. (4) To advance its object, this Act provides for the removal or deportation from Australia of non citizens whose presence in Australia is not permitted by this Act.

[61] Section 15AA Regard to be had to purpose or object of Act. (1) In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object. See also Section 3A(2).

[62] See section 15AB Acts Interpretation Act— Use of extrinsic material in the interpretation of an Act. (1) Subject to subsection (3), in the interpretation of a provision of an Act, if any material not forming part of the Act is capable of assisting in the ascertainment of the meaning of the provision, consideration may be given to that material: (a) to confirm that the meaning of the provision is the ordinary meaning conveyed by the text of the provision taking into

disregard such matters. An example arose in the case of the High Court's consideration of the privative clause (section 474). The Minister in his second reading speech detailed the extraordinary growth in the numbers and cost of litigation in the Migration area, despite a two-tiered merits review system—he noted that:

> That scheme has not reduced the volume of cases before the courts: just the opposite. Recourse to the Federal Court and the High Court is trending upwards, with nearly 400 applications in 1994-95; nearly 600 in 1995-96; 740 in 1996-97; nearly 800 in 1997-98; around 1,130 in 1998-99; nearly 1,300 in 1999-2000; and around 1,640 in 2000-01. Based on current litigation trends it is anticipated that applications made to the courts will reach at least 2,000 in the current financial year.
>
> And the cost of litigation continues to soar. In 1997-98 the cost of all litigation for the Department of Immigration and Multicultural Affairs was nearly $9.5 million, and that does not include the cost of running the courts. In 1998-99 it was $11.5 million; in 1999-2000 it was nearly $12.3 million; and in 2000-01 the cost to the department exceeded $15 million.[63]

1.6.2 He further noted that inquiries had been pursued since 1996 with a view to redressing this situation to explore 'options for best achieving the government's policy objective of restricting access to judicial review.' The advice received from Departments and eminent legal counsel was 'that the only workable option was a privative clause.'[64]

1.6.3 Minister Ruddock therefore in his second reading speech to the *Migration Amendment Judicial Review Bill* 2001 designed to reduce judicial review through the application of a privative clause, reiterated the then current understanding of the *Hickman principle* concerning privative clauses,[65] which was firmly based on the High Court's own interpretation. Gaudron and Gummow JJ had stated in *Darling Casino Limited v New South Wales Casino Control Authority & Ors*[66] that:

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account its context in the Act and the purpose or object underlying the Act; or (b) to determine the meaning of the provision when: (i) the provision is ambiguous or obscure; or (ii) the ordinary meaning conveyed by the text of the provision taking into account its context in the Act and the purpose or object underlying the Act leads to a result that is manifestly absurd or is unreasonable. (2) Without limiting the generality of subsection (1), the material that may be considered in accordance with that subsection in the interpretation of a provision of an Act includes: (a) all matters not forming part of the Act that are set out in the document containing the text of the Act as printed by the Government Printer; (b) any relevant report of a Royal Commission, Law Reform Commission, committee of inquiry or other similar body that was laid before either House of the Parliament before the time when the provision was enacted; (c) any relevant report of a committee of the Parliament or of either House of the Parliament that was made to the Parliament or that House of the Parliament before the time when the provision was enacted; (d) any treaty or other international agreement that is referred to in the Act; (e) any explanatory memorandum relating to the Bill containing the provision, or any other relevant document, that was laid before, or furnished to the members of, either House of the Parliament by a Minister before the time when the provision was enacted; (f) the speech made to a House of the Parliament by a Minister on the occasion of the moving by that Minister of a motion that the Bill containing the provision be read a second time in that House; (g) any document (whether or not a document to which a preceding paragraph applies) that is declared by the Act to be a relevant document for the purposes of this section; and (h) any relevant material in the Journals of the Senate, in the Votes and Proceedings of the House of Representatives or in any official record of debates in the Parliament or either House of the Parliament. (3) In determining whether consideration should be given to any material in accordance with subsection (1), or in considering the weight to be given to any such material, regard shall be had, in addition to any other relevant matters, to: (a) the desirability of persons being able to rely on the ordinary meaning conveyed by the text of the provision taking into account its context in the Act and the purpose or object underlying the Act; and (b) the need to avoid prolonging legal or other proceedings without compensating advantage.

[63] *Hansard*, House of Representatives, 26 September 2001, 31559-31561, at 31560.

[64] *Hansard*, House of Representatives, 26 September 2001, 31559-31561, at 31560.

[65] Set down by Dixon J in *R v Hickman; Ex parte Fox and Clinton,* (1945) 70 CLR 598 at 614-617.

[66] [1997] HCA 11

So far as concerns impugned exercises of power, the *Hickman* principle allows the privative clause to operate in the fashion identified by Brennan J in *Deputy Commissioner of Taxation v Richard Walter Pty Ltd*:[67]

> "The privative clause treats an impugned act as if it were valid. In so far as the privative clause withdraws jurisdiction to challenge a purported exercise of power by the repository, **the validity of acts done by the repository is expanded**".[68]

However, a privative clause will sometimes, although, perhaps, not often, protect against a refusal or failure to exercise power.[69] In that situation, it treats the refusal or failure as if there were no obligation to exercise the power in question. And by withdrawing the jurisdiction of the courts to review, it operates to reduce the scope of the decision-maker's duty. In both situations, the privative clause operates, in effect, to recast the legislative provisions which confer the power in question and which condition its exercise.

1.6.4 The Minister's second reading speech specifically drew upon these words:

The privative clause in the bill is based on a very similar clause in *Hickman's case*.

The High Court has not since, despite opportunities to do so, repudiated the *Hickman* principle, as formulated by Justice Dixon in *Hickman's case*. Indeed, that principle was described as 'classical' in a later High Court case.

Members may be aware that the effect of a privative clause such as that used in *Hickman's case* **is to expand the legal validity of the acts done** and the decisions made by decision makers. The result is to give decision makers wider lawful operation for their decisions, and this means that the grounds on which those decisions can be challenged in the Federal and High Courts are narrower than currently.

The options available to the government were very much shaped by the Constitution. While the government accepts that the precise limits of privative clauses may need examination by the High Court, there is no other practical option open to the government to achieve its policy objective.[70]

1.6.5 The High Court, however, after quoting the third paragraph in the quotation above[71] stated that:[72]

> Of course, the Minister's understanding of the decision in *Hickman* cannot give s 474 an effect that is inconsistent with the terms of the Act as a whole.[73]

1.6.6 This statement was in my view disingenuous to say the least. The upshot of this reasoning was threefold :

- the Court refused to accept the second reading speech based upon its own reasoning as assisting in the interpretation of the provision;

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[67] (1995) 183 CLR 168 at 194.

[68] *O'Toole v Charles David Pty Ltd* (1991) 171 CLR 232 at 275, my emphasis.

[69] See, for example, the privative clause considered in *Public Service Association (SA) v Federated Clerks' Union* (1991) 173 CLR 132.

[70] *Hansard*, House of Representatives, 26 September 2001, 31559-31561 at 31560-1, my emphasis.

[71] See *Plaintiff S157 v Commonwealth of Australia* [2003] HCA 2, per Gaudron, McHugh, Gummow, Kirby and Hayne JJ at [55].

[72] See *Plaintiff S157 v Commonwealth of Australia* [2003] HCA 2, per Gaudron, McHugh, Gummow, Kirby and Hayne JJ at [55].

[73] Footnotes omitted.

- while it adverted to the need to construe the Act 'as a whole' but in real terms it did not do so—it did not advert, for example, to the objects and purpose of the Act, nor to the objects and purpose of the amending Act which had inserted the privative clause;[74]
- the numbers of applications, as a result of striking down the privative clause's operation, increased markedly in all federal Courts.

Moreover, the Court made only a slight passing, and again in my view somewhat disingenuous, reference[75] to the *Blue Sky* principle (see paragraph 1.3.3 above), which, had it been applied, would have resulted in my view in a different outcome.

1.6.7 It is sometimes difficult to escape a conclusion that judges in judicially reviewing decisions under the *Migration Act* are more concerned to rectify what they perceive as an abuse of power', or 'administrative injustice' rather than to investigate the legality of the decision under the terms of the Act, in accordance with legal principles and the *Acts Interpretation Act*. (see also discussion below at Section 2.5, particularly paragraph 2.5.3) It is almost impossible under the currently constitutional understanding for the Parliament or the Executive to give directions to the judges as to the exercise of the judicial power, as this would, on the judicial interpretation, contravene the separation of the judicial power and be an unconstitutional infringement of Chapter III of the Constitution and a usurpation of the judicial power.[76] However, some greater attention could be given by the legislature to clarifying and restating statutory interpretative principles in the *Acts Interpretation Act*.

2 THE MERITS AND JUDICIAL REVIEW REGIME

2.1 Judicial Review of decisions made under the *Migration Act* has been in large part responsible for increasing the length and complexity of the Act and consequently for increasing the difficulty in administrators' confidently interpreting and applying the provisions of the Act, and also for the very large increase in applications by non-citizens before the Federal Court, the Federal Magistrates Court, and the High Court.

2.2 The Act and Policy

2.2.1 It seems clear that the Courts' approach to the Act has been heavily influenced by those aspects discussed above, in particular the inability of the Courts, or indeed anyone, to come to grips with the whole of the Act and its regulations and ramifications. The constraint on courts of dealing with matters on a case by case basis, and the limitation therefore on their capacity to consider issues as a result of the facts of a particular case and the arguments of the applicant or counsel, militate against any real perception by courts of the policy(ies) that the Act is intended to implement. Justices McHugh and Gummow noted in *Lam* that the legislative function is that of 'translating policy into statutory form.'[77]

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[74] Callinan J to some extent did advert to the object of the Act by reference to section 3A of the Act.

[75] See *Plaintiff S157 v Commonwealth of Australia* [2003] HCA 2, per Gaudron, McHugh, Gummow, Kirby and Hayne JJ at [90].

[76] This is based on the principle enunciated in *Reg. v. Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 (the *Boilermakers' case*).

[77] *Re Minister for Immigration and Multicultural Affairs Ex parte Lam* [2003] HCA 6, at [76].

2.2.2 However, the *Migration Act* implements a number of different but related policy threads—border protection; an effective and non-discriminatory immigration programme which considers the national interest; and effective post-arrival programme; a humanitarian programme including assistance to and settlement of refugees; safe legal and accountable tourist and business travel into and out of Australia; certain health and quarantine policies; control of entry into and passage out of Australia; preventing unlawful entry into Australia; finding unlawful entrants, and returning them to their country of origin; prosecuting people-smugglers; and detaining unlawful entrants until they may be deported or may legally obtain a visa. These are complex policy areas, with changes in one area having a flow-on effect in others. Despite Justices McHugh's and Gummow's observation, it is unlikely that judges in considering an instant application have any real idea of the policy underlying the relevant *Migration Act* provisions, or any appreciation of what effect their interpretation might have of the policy and its administration. It would appear also that many in the Australian populace also do not have any clear idea of the policies underlying the Act. It would be advantageous for the Government to make greater efforts to articulate and explain clearly the policies informing the *Migration Ac*t, and the relevance of judicial interpretation to those policies and to the administration of the Act.

2.3 Merits Review

2.3.1 The changes introduced by the Labor Government and manifested in the *Migration Reform Act 1992* resulted in the establishment of a two-tiered merits review process, the removal of the majority of migration decisions from the ambit of the *Administrative Decisions Judicial Review Act 1977* (ADJR), and the curtailing of the grounds of judicial review in the Federal Court. It had been hoped that the double 'bite at the cherry' on the merits would provide greater certainty and satisfaction for applicant, and therefore would significantly reduce the numbers of judicial review applications which had proliferated under the ADJR. This did not occur.

2.3.2 The external merits review bodies, the Migration Review Tribunal and the Refugee Review Tribunal, despite much criticism from lobby groups and allegations of bias,[78] do a professional job under difficult circumstances. Since, however, they have not been successful in militating against judicial review applications, and the costs involved are significant, it may well be preferable to revert to a one-step process, with the Minister's delegate making the original (and final) decision).

2.4 The Privative Clause

2.4.1 As discussed in 1.6. above, the government and the legislature combined to insert a privative clause in the Act (s. 474) in an attempt to stem the flow of often unmeritorious and largely unsuccessful judicial review applications on migration decisions. This attempt was frustrated by the High Court in *Plaintiff S157*, where, while finding the section constitutional, it left the section practically no work to do. The Court achieved this end by applying a very wide definition of 'jurisdictional error' by which any error of law, and sometime an error of fact, will mean that decision-maker did not have legal authority to make the decision, and that therefore the 'decision' was not decision at all—therefore, since the privative clause is

[78] See, for example, *Re Minister for Immigration and Multicultural Affairs; Ex parte Epeabaka* [2001] HCA 23; (2001) 179 ALR 296.

based on protecting a 'decision', if any error of law or some certain types of errors of fact can be found, there will not legally be any 'decision' for the clause to protect, and judicial review may proceed to the courts who will then decide if there was any relevant error of law or fact (see also paragraphs 1.3.1-1.3.2 above).

2.4.2 The Court has always acknowledged that there is a distinction in terms of the applicability of the law to citizens or subjects of the Queen, and aliens or non-citizens.[79] However, in *Plaintiff S157* the guiding principle behind that application of these wide legal principles (discussed in 2.4.1. and 1.3.1-1.3.2) seems to derive not so much from a strict application of the law, but rather from an adherence by the court to the idea that 'courts do not impute to the legislature an intention to abrogate or curtail fundamental rights or freedoms unless such an intention is clearly manifested by unmistakable and unambiguous language,'[80] and the courts do not find the legislature's language sufficiently unambiguous or clear. While one may have sympathy with unlawful entrants who seek to stay in Australia, the government's and the legislature's prime responsibility must be to its citizenry, a notion recognized by the courts in *Chu Kheng Lim*[81] and *Lange's case*.[82] This must entail maintenance of the integrity of whole of the migration and humanitarian programmes and their follow-up policies in the national interest, and must also involve an assessment of the cost-benefit value to taxpayers of the expenditure of moneys. This involves the making of difficult legislative and political decisions by both legislature and executive. No right or freedom, even for citizens, and even those constitutionally protected like the freedom of political communication, is ever absolute[83]—primarily this is because individual rights often conflict[84] or at international law are recognized as being subject to restriction in the national interest.[85]

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[79] See *Chu Kheng Lim v Minister for Immigration Local Government and Ethnic Affairs* [1992] HCA 64, (1992) 176 CLR 1, Brennan, Deane and Dawson JJ at 29- 31: "While an alien who is actually within this country enjoys the protection of our law, his or her status, rights and immunities under that law differ from the status, rights and immunities of an Australian citizen in a variety of important respects. For present purposes, the most important difference has already been identified. It lies in the vulnerability of the alien to exclusion …. That vulnerability flows from both the common law and the provisions of the Constitution. For reasons which are explained hereunder, its effect is significantly to diminish the protection which Ch. III of the Constitution provides, in the case of a citizen, against imprisonment otherwise than pursuant to judicial process. The power to exclude … even a friendly alien is recognized by international law as an incident of sovereignty over territory."

[80] *Plaintiff S157*, per Gleeson CJ at [30]. Gleeson CJ reiterated this view in *Al-Kateb v Godwin* [2004] HCA 37 at [19]—'In exercising their judicial function, courts seek to give effect to the will of Parliament by declaring the meaning of what Parliament has enacted. Courts do not impute to the legislature an intention to abrogate or curtail certain human rights or freedoms (of which personal liberty is the most basic) unless such an intention is clearly manifested by unambiguous language, which indicates that the legislature has directed its attention to the rights or freedoms in question, and has consciously decided upon abrogation or curtailment

[81] See note 42 above.

[82] See note 79 above.

[83] See the unanimous High Court in *Lange*, 79 above—'However, the freedom of communication which the Constitution protects is not absolute.'

[84] Such as the right to free speech (ICCPR Article 19—1. Everyone shall have the right to hold opinions without interference. 2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice. 3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (a) For respect of the rights or reputations of others; (b) For the protection of national security or of public order (*ordre public*), or of public health or morals.) and the right to privacy (ICCPR Article 17)

[85] See, for example, ICCPR **Article 21**—The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right *other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights*

2.4.3. While both citizens and non-citizens are recognized as persons before the law[86] and are equal before the courts[87] there is the prime difference recognized by the Courts in *Lim*, and in *Al Kateb*—that is, that unlawful entrants and unlawful over-stayers of visas 'lack(s) any right or title to remain in Australia.'[88] In this instance, the International Covenant on Civil and Political Rights (ICCPR) directs its provisions towards persons lawfully in a country, and notes that aliens *lawfully* in a country may be expelled after a decision reached in accordance with law, and (except where national security considerations are pertinent) must 'be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.'[89] Moreover freedom of movement within a country under ICCPR would appear to be restricted to 'everyone *lawfully* within the territory of a State,' and even this right is restricted in certain ways.[90] Thus even for aliens *lawfully* within a State, there would appear to be no *requirement* that there be any judicial review (that is review by a Court) of a decision to deport, rather a review by a competent authority.

2.4.4 Access to the Courts (and also to merits review bodies) to challenge government decisions is not something which is readily available to citizens, primarily due to cost constraints; such access is also denied to citizens in numerous legal ways, for example by regulation of standing, or by restriction of legislative appeal rights by the discretion of the court in the special leave provisions. Section 75(v) of the *Constitution* has been interpreted to embed beyond legislative competence to deny it, an entrenched ability in the High Court to engage in judicial review of government decision-making, and therefore to enable citizens to apply for judicial review through the constitutional writs of government decisions affecting

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and freedoms of others. And see ICCPR Article 18—1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private to manifest his religion or belief in worship, observance, practice and teaching. 2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice. 3. *Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others*. 4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions. My emphasis. And see the acceptance of the need for some restriction on rights in ICCPR Article 5—1. Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein ***or at their limitation to a greater extent than is provided for in the present Covenant***. (my emphasis)

[86] See ICCPR Article 16— Everyone shall have the right to recognition everywhere as a person before the law. Article 26—All persons are equal before the law…

[87] See ICCPR Article 14—1. All persons shall be equal before the courts and tribunals

[88] *Al-Kateb v Godwin* [2004] HCA 37 per Gummow J at [36] —' In or out of detention the appellant lacks any right or title to remain in Australia.'

[89] ICCPR Article 13—An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.

[90] ICCPR Article 12—1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence. 2. Everyone shall be free to leave any country, including his own. 3. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (*ordre public*), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant. 4. No one shall be arbitrarily deprived of the right to enter his own country.

them where an error of law may be found.[91] However, we have seen (paragraph 1.1.2 refers) that in 2002-3, 99% of such applications were made in the migration jurisdiction under the *Migration Act*, and in 2003-4 the percentage was 93%. The utility of section 75(v) to Australian citizens has to be doubted.

2.4.5. These considerations, together in particular with the High Court's and other federal courts' heavy workload in the migration jurisdiction, explains both the policy behind the privative clause, and the legislature's intention. If, as my interpretation of ICCPR in paragraph 2.4.3 above suggests, there is no *requirement* for judicial review of decisions to deport lawful, let alone unlawful, aliens within the Australian territory or Migration zone, then a transparent merits decision-making process alone would suffice.

2.4.6 However, the High Court's interpretative embedding beyond either executive or legislative control of the judicial power to review government decisions made under either legislation or prerogative pursuant to section 75(v) of the Constitution means that judicial review of migration decisions is beyond the power of the elected representatives in parliament to control.

2.4.7 This being the case, and given the interpretation of the privative clause (s. 474) in *Plaintiff S157*, the only way in which judicial review of migration decisions may be reduced would appear to be through a re-interpretation of the High Court's powers, duties and obligations by the Court itself.

2.4.8 It is doubtful, in my view, on the current jurisprudential thinking in the High Court, that the insertion of 'purported decision' in the Migration Act privative clause as proposed by the *Migration Litigation Reform Bill 2005* would be interpreted other than as being ineffective by the High Court. However, it may be possible for creative legal analysis of the existing provision, including the meaning of 'conduct preparatory to the making of a decision, including the taking of evidence or the holding of an inquiry or investigation' in the definition of 'decision' in s. 474(3)(h) to yield some developments. If the wide definition of 'jurisdictional error' and 'constructive failure of jurisdiction' is maintained by the Court, then any such effort may prove fruitless. Nevertheless, the Court is itself accustomed to considering 'non-decisions' in order to state that they are 'non-decisions', and it may respond to a differentiation between conduct leading to a 'non-decision' and a 'non-decision' itself.

2.4.9 Moreover, it needs to be pointed out that there is a grave distinction made by the High Court between 'decisions' of Courts and those of administrators. A Court decision on judicial review is only rendered a 'non-decision' if the Court lacks authority to make the decision; it is not rendered a 'non-decision' if the Court makes an error while exercising its authority.[92] But an administrator's 'decision' becomes a non-decision if the decision-maker does not have the authority *or* if she makes an error of law while exercising that authority. Furthermore, there would appear to be a growing tendency in the High Court to endorse the idea that if a certain decision *must* be made if a certain opinion is formed, (for example, if the decision-maker is satisfied an applicant meets the refugee criteria she *must* grant the visa, and if she is not so satisfied she *must not* grant the visa) then that opinion constitutes a

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[91] See *Plaintiff S157*.

[92] See *Anthony David Craig v. The State of South Australia*, (*Craig's case*) (1995) 184 CLR 163, [1995] HCA 58, and references at note 21 above.

'jurisdictional fact' and that if an error of law occurs in coming to that opinion (such as, for example, when the Court thinks that the decision-maker unreasonably, illogically, or irrationally came to the opinion on the basis of the facts, including whether the Court thinks not all the relevant facts or some irrelevant facts had been taken into account, or some mistake of fact had occurred in forming the opinion), then the decision-maker had no authority (jurisdiction) to make the 'decision'[93] which then becomes a 'non-decision.' Such an interpretation stems from the High Court's belief that an administrator is incapable of determining the limits of her own jurisdiction,[94] as this is a matter only cognizable by the exercise of the judicial power and not the executive power as exercised by administrators, and to countenance such a thing would be to breach of the separation of powers doctrine[95] which elevates the judicial power over both the executive and the legislature.

2.4.10 Since High Court interpretation of both the *Constitution*, and of its powers of judicial review under s. 75(v) is pre-eminent and unassailable, the only way in which the growing disjunction between the legal obligations of administrators and of judges in decision-making can be overcome, is I think, through High Court re-interpretation.

2.5 Judicial Review and the Merits

2.5.1 The kind of situation potentially encouraged by the notion of opinion as 'jurisdictional fact' discussed in 2.4.9 raises real problems of the judiciary examining not only the legal aspects of a decision, but also its merits. As part and parcel of its adherence to the separation of the judicial power, the High Court has stated many times that the Court cannot review the merits, or the fact finding in the case, nor substitute its decision for that of the administrator, for that would be for the Court to be exercising the executive power, something it is prohibited from doing under the separation of the judicial power doctrine.

2.5.2 Trespassing on the merits of a decision by Courts may occur in other ways—for example, by examination in the use of a discretion (where a decision *may* be made, but does not *have* to be made in a certain way) of what are relevant and irrelevant facts, on whether a decision was reasonable or unreasonable, on whether a policy was applied rigidly, on whether the exercise of a discretion was a *real* exercise of the discretion, or whether the exercise of the discretion occurred in bad faith. Many minds may well differ on these matters. Clearly also, the perceptions of administrators and legislators, and political opponents will differ from those of judges. There have, however, been a number of cases where courts have acted clearly beyond their authority.[96] But in other instances it is sometimes difficult to discern where facts end and law begins, where judicial examination of a situation for errors of law steps over into an examination of the facts of the matter—

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[93] See *Minister for Immigration and Multicultural Affairs v Eshetu*, (1999) 197 CLR 611 per Gummow J at 650-651, [127]-[130]; see also 656-657 [145]. See also *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002* [2003] HCA 30, per McHugh and Gummow JJ at [54].

[94] See *Plaintiff S157* at [9] per Gleeson CJ—'It is beyond the capacity of the Parliament to confer upon an administrative tribunal the power to make an authoritative and conclusive decision as to the limits of its own jurisdiction, because that would involve an exercise of judicial power.,' relying on *R v Coldham; Ex parte Australian Workers' Union* (1983) 153 CLR 415 at 419.

[95] See *Reg. v. Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 (the Boilermakers' case); in short, only a Chapter III court can exercise the judicial power, and a Chapter III court can exercise only the judicial power.

[96] For example, in *Minister for Immigration and Ethnic Affairs v Guo Wei Rong* HCA (1997) 191 CLR 559 and *Minister for Immigration and Multicultural and Indigenous Affairs v B* [2004] HCA 20, where the High Court found that the Federal Court and Family Court has respectively acted beyond their jurisdiction.

Justice Brennan noted that 'unreasonableness' is an area 'which may appear to open the gate to judicial review of the merits of a decision or action taken within power.'[97] While the judicial task is clearly not an easy one, neither is that of decision-makers—some credence by Courts to the capacity of decision-makers to develop or to have expertise in specialized areas would assist in judges leaving merits matters strictly alone.

2.5.3 Beyond my suggestion in paragraph 1.4.7 concerning the Judicial College, and Ministers articulating more clearly the policies and the tenets underpinning them, there is I think little that the legislature or the executive can do to build a brick wall between merits and judicial review—this is ultimately a matter for the judges themselves. Justice Brennan in *Quin* noted that :

> 16. The question can be put quite starkly: when an administrative power is conferred by the legislature on the executive and its lawful exercise is apt to disappoint the expectations of an individual, what is the jurisdiction of the courts to protect that individual's legitimate expectations against adverse exercises of the power? I have no doubt that the answer is: none. Judicial review provides no remedies to protect interests, falling short of enforceable rights, which are apt to be affected by the lawful exercise of executive or administrative power. If it were otherwise, the courts would be asserting a jurisdiction, in protection of individual interests, to override the law by which a power to affect those interests is conferred on the repository.[98]
>
> 18. The consequence is that the scope of judicial review must be defined not in terms of the protection of individual interests but in terms of the extent of power and the legality of its exercise. In Australia, the modern development and expansion of the law of judicial review of administrative action have been achieved by an increasingly sophisticated exposition of implied limitations on the extent or the exercise of statutory power, but those limitations are not calculated to secure judicial scrutiny of the merits of a particular case.[99]
>
> 20. If it be right to say that the court's jurisdiction in judicial review goes no further than declaring and enforcing the law prescribing the limits and governing the exercise of power, the next question immediately arises: what is the law? And that question, of course, must be answered by the court itself. In giving its answer, the court needs to remember that the judicature is but one of the three co-ordinate branches of government and that the authority of the judicature is not derived from a superior capacity to balance the interests of the community against the interests of an individual. The repository of administrative power must often balance the interests of the public at large and the interests of minority groups or individuals. The courts are not equipped to evaluate the policy considerations which properly bear on such decisions, nor is the adversary system ideally suited to the doing of administrative justice: interests which are not represented as well as interests which are represented must often be considered. Moreover, if the courts were permitted to review the merits of administrative action whenever interested parties were prepared to risk the costs of litigation, the exercise of administrative power might be skewed in favour of the rich, the powerful, or the simply litigious.
>
> 21. Some advocates of judicial intervention would encourage the courts to expand the scope and purpose of judicial review, especially to provide some check on the Executive Government which nowadays exercises enormous powers beyond the capacity of the Parliament to supervise effectively. Such advocacy is misplaced. If the courts were to

[97] *AG (NSW) v Quin* (1990) 170 CLR 1, [1990] HCA 21, per Brennan J at [19] of Brennan J's judgement.

[98] *Quin*, at [16] of Brennan J's judgement.

[99] *Quin*, at [18] of Brennan J's judgement.

assume a jurisdiction to review administrative acts or decisions which are "unfair" in the opinion of the court - not the product of procedural unfairness, but unfair on the merits - the courts would be assuming a jurisdiction to do the very thing which is to be done by the repository of an administrative power, namely, choosing among the courses of action upon which reasonable minds might differ: see *Secretary of State for Education and Science v. Tameside Metropolitan B.C.* (1977) AC 1014, at p 1064, and *Council of Civil Service Unions v. Minister for the Civil Service* (1985) AC 374, at pp 414-415. … The courts - above all other institutions of government - have a duty to uphold and apply the law which recognizes the autonomy of the three branches of government within their respective spheres of competence and which recognizes the legal effectiveness of the due exercise of power by the Executive Government and other repositories of administrative power. The law of judicial review cannot conflict with recognition of the legal effectiveness of the due exercise of power by the other branches of government.

22. If judicial review were to trespass on the merits of the exercise of administrative power, it would put its own legitimacy at risk. The risk must be acknowledged for a reason which Frankfurter J. stated in *Trop v. Dulles* (1958) 356 US 86, at p 119:

> "All power is, in Madison's phrase, 'of an encroaching nature.' ... Judicial power is not immune against this human weakness. It also must be on guard against encroaching beyond its proper bounds, and not the less so since the only restraint upon it is self-restraint."[100]

3. DETENTION

3.1. Given the interweaving of policy matters in the Migration jurisdiction, it is difficult to think of an adequate means of safeguarding both the Australian community and asylum seekers without a detention regime in order to maintain the integrity of the whole mix of policies. Given the requirements on a democratic and responsible government in a continent as large as Australia to balance a very wide range of often conflicting interests and needs and to be accountable for its migration policy and its attitude towards the Australian community, as well as for the expenditure of taxpayers' money, it is again difficult to see any viable alternative to a detention regime. While I have no data on which to base this view, perhaps the existence of a detention regime may well deter unlawful entrants and unlawful over-stayers. If the discussion in paragraphs 2.4.2-2.4.4 is sound, then there would appear to be no basis for allegations of breaches of international law in the establishment of such a regime.

3.2 However, as the government is accountable for the operation of the detention centres to the Australian people, then it seems clear, particularly in the light of the *Palmer Report*, that the contracting-out of the running of these centres has not been a success.

3.3 It is the government that is responsible for these centres. It should be transparently and clearly accountable for them. In order for this to occur, the government itself should operate and maintain any such detention centres, and documentation concerning them, while protecting individual privacy and security matters, should be made publicly available. The contracting-out system is opaque. It is by no means certain to what extent DIMIA knows

[100] *Quin*, at [20]-[22] of Brennan J's judgement.

what occurs in the centres; it is by no means clear that the government currently has any timely mechanism for responding to problems in such centres, and under the contract it is most likely prevented from certain action. As it is, the government wears the flak from any failures or perceptions of failures in the running of these centres. While it is also clear that it is difficult to recruit personnel for distant centres, the government should establish its own protection and maintenance, and perhaps medical service for the centres. The government should be clearly and unequivocally responsible to the Australian people for these centres, and the contract should be rescinded or bought out.

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29 July 2005.

Attachment A

Amendments to Migration Act 1958

Compiled from Table of Acts and Table of Amendments in Notes to the *Migration Act 1958*.

An asterisk indicates an Act which amended the Migration Act, but which either has no current application, or a tangential operation.

Amending Act Number and Year
1964
87, 1964*
1966
10, 1966
1973
16, 1973*
216, 1973
1976
91, 1976
1979
117, 1979
118, 1979*
1980
89, 1980*
175, 1980
1981
61, 1981
1982
51, 1982*
1983
73, 1983*
112, 1983
1984
22, 1984*
72, 1984
123, 1984*
165, 1984
1986
71, 1986*
102, 1986*
168, 1986
1987
86, 1987*
104, 1987*
133, 1987*
141, 1987
1988
5, 1988*
38, 1988
49, 1988*
151, 1988
1989
59, 1989
61, 1989*

159, 1989*
180, 1989*
1990
37, 1990*
1991
70, 1991*
86, 1991
196, 1991
198, 1991*
1992
24, 1992
84, 1992
85, 1992
175, 1992*
176, 1992
184, 1992
213, 1992
220, 1992*
235, 1992*
1993
59, 1993
1994
14, 1994
20, 1994*
60, 1994*
136, 1994
1995
1, 1995
19, 1995*
85, 1995*
100, 1995*
102, 1995
110, 1995
140, 1995*
175, 1995*
1996
25, 1996*
43, 1996*
1997
27, 1997
92, 1997*
118, 1997*
150, 1997*
205, 1997
1998
113, 1998
114, 1998
1999
34, 1999
89, 1999
146, 1999*
160, 1999
161, 1999*
175, 1999

2000
9, 2000
25, 2000
28, 2000
137, 2000
166, 2000*
168, 2000
2001
33, 2001
58, 2001
85, 2001*
97, 2001*
105, 2001*
126, 2001
127, 2001
128, 2001
129, 2001
130, 2001*
131, 2001
134, 2001
157, 2001
2002
10, 2002*
35, 2002
42, 2002*
60, 2002
64, 2002*
65, 2002
2003
3, 2003*
5, 2003*
10, 2003*
41, 2003
75, 2003
90, 2003
99, 2003
122, 2003*
2004
2, 2004
25, 2004*
48, 2004
64, 2004*
2005
7, 2005
38, 2005
79, 2005
99, 2005*
(Migration Litigation Reform 2005)
Total
115