
Impact of migration law on the development of Australian administrative law

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The constitutionalisation of federal administrative law and the resurrection of “jurisdictional error” as its unifying principle in the last 12 to 15 years track a significant and important doctrinal development. Legislative changes to the structure of the migration law in the same period have had an appreciable influence upon that development. This article chronicles and explains the episodes of structural change by the legislature and the High Court’s on-going responses to the shifts in the statutory framework.

INTRODUCTION

It is trite to observe that the last 25 years have seen an explosion in the volume of administrative law litigation in Australia. It is equally trite to observe that litigation on the subject of migration law has been by far the largest contributor to the overall volume of administrative law litigation in Australia, particularly in the Federal Court but also in the High Court. The statistics are stark and need no elaboration. Litigation on the subject of migration law in the year ended 30 June 2008 accounted for roughly 23% of all cases commenced in the Federal Court (including by way of appeal),¹ 45% of all cases determined by single judges of the Federal Court,² and 18% of cases determined by the Full Court.³ In the same year in the High Court litigation on the subject of migration law accounted for 63% of all special leave applications⁴ and about 75% of all matters determined by the court that might fairly be classified as matters of administrative law.⁵ There have been other times in the last 25 years when the equivalent figures have been considerably higher.⁶ Equivalent figures for the year ended 30 June 1983 are barely statistically significant.⁷

There is also no novelty in the observation that litigation on the subject of migration law has from time to time during the last 25 years given rise to a degree of tension between the Federal Court, and to a lesser extent the High Court, on the one hand and the Commonwealth Executive and the

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¹ Calculated on the basis of other statistics in Federal Court of Australia, *Annual Report 2007-08*, App 5.

² Calculated on the basis of the proportion of cases in the relevant database of cases maintained by AustLII in which one of the parties in the name of the case was the Minister for Immigration.

³ Calculated on the basis of the proportion of cases in the relevant database of cases maintained by AustLII in which one of the parties in the name of the case was the Minister for Immigration.

⁴ Calculated on the basis of other statistics in High Court of Australia, *Annual Report 2007-08*, p 19.

⁵ See *SZFDE v Minister for Immigration & Citizenship* (2007) 232 CLR 189, *SZATV v Minister for Immigration & Citizenship* (2007) 233 CLR 18; *SZFDV v Minister for Immigration & Citizenship* (2007) 233 CLR 51 (migration cases); *X v APRA* (2007) 226 CLR 630 (non-migration case).

⁶ For instance, in the year ended 2003-04 litigation on the subject of migration law accounted for roughly 49% of all cases commenced in the Federal Court (including by way of appeal), 46% of all cases determined by single judges of the Federal Court and 54% of cases determined by Full Courts.

⁷ For instance, in the year ended 30 June 1983 litigation on the subject of migration law accounted for only 6% of all cases determined by the Federal Court.



Commonwealth Parliament on the other. That tension has been the subject of academic commentary.⁸ It has also been the subject of commentary in the popular press.⁹

Surprisingly less frequently the subject of observation is what can be described without exaggeration as the fundamental change that has occurred in the substance of administrative law doctrine in Australia during the second half of that 25-year period.¹⁰ It is a change that can be seen to have been driven by the High Court. And it is a change that can be seen to have unfolded for the most part in direct response to changes in the legislative structure of the migration law. It is that change that I want to identify and to chronicle.

The principal elements of the change in the substance of administrative law doctrine that has occurred in Australia in the last twelve to fifteen years can be identified in brief terms, which I will develop later, as:

- its repatriation;
- its constitutionalisation;
- its identification, and resurrection or at least resuscitation of “jurisdictional error” as its unifying principle;
- its definition or redefinition of jurisdictional error to encompass breach of any legislative condition said to define the ambit of the power or authority of an administrator; and
- its tendency in practice, by a process that is essentially one of statutory interpretation, to imply a fairly wide and ever expanding range of legislative conditions breach of which will give rise to jurisdictional error in the absence of a tolerably clear manifestation of legislative intention to the contrary.

Those elements of Australian administrative law doctrine as we now know it can be seen to have evolved in the case law of the High Court in the context of a number of fairly distinct stages in the development of the legislative structure of migration law. There are four or perhaps five of those stages. Some of them overlap. The four or five stages can, for convenience, be identified by the shorthand labels of:

- first, discretion;
- then, prescription;
- next, limitation;
- later, privation; and
- now, perhaps, for want of a better contemporary description, targeted tinkering.

Let me attempt to tell the story.

FIRST: DISCRETION

Administrative discretion was the hallmark of migration law in Australia from its inception in 1901 continuously until 1989. The migration legislation which existed in various forms from 1901 until 1958 had a central and notorious discretion.¹¹ It prohibited the immigration into the Commonwealth of any person who failed to pass a dictation test in any European language. The particular European language was in each case to be chosen not by the person seeking entry but by the Commonwealth officer or State or Territory police officer who as a matter of unconfined discretion was empowered to direct the person to take the test.¹²

⁸ See, eg McMillan J, “Federal Court v Minister for Immigration” (1999) 22 *Australian Institute of Administrative Law Forum* 1.

⁹ See, eg “And So It Goes On: Pollies v Lawyers”, *Canberra Times*, 1 January 1999; Craven G, “Unhealthy Contempt”, *The Australian*, 5 June 2002; “Keeping the Spotlight Switched On”, *Canberra Times*, 3 June 2003.

¹⁰ See, however, McMillan J, “Judicial Restraint and Activism” (2002) 30 *Fed L Rev* 335; Beaton-Wells C, “Australian Administrative Law: The Asylum Seeker Legacy” (2005) *Public Law* 267; Kirk L, *Privative Clauses and the Federal Parliament* (Paper presented at the Gilbert + Tobin Centre of Public Law Constitutional Law Conference, Sydney, 21 February 2003), http://www.gtcentre.unsw.edu.au/publications/papers/docs/2003/84_LindaKirk.pdf.

¹¹ *Immigration Restriction Act 1901* (Cth) amended in 1912 to become *Immigration Act 1901* (Cth).

¹² *Chia Gee v Martin* (1906) 3 CLR 649.



The *Migration Act 1958* (Cth) created a whole new legislative structure but retained within that structure a central element of administrative discretion. The basic structure of the Act remained intact despite its amendment in 1983 to become anchored in the legislative power of the Commonwealth Parliament to make laws with respect to “aliens”¹³ rather than the legislative power to make laws with respect to “immigration”.¹⁴ As it existed in and from 1983 until 1989,¹⁵ the central elements of the *Migration Act* were that:

- a non-citizen who entered or remained in Australia without an entry permit became a prohibited non-citizen (ss 6(1), 7(3));
- the grant or withholding of an entry permit was a matter within the unconfined discretion of a Commonwealth officer or State or Territory police officer save that a non-citizen could not be granted an entry permit after entry into Australia unless one or more specified conditions were fulfilled (ss 6(5), 6A), one of those conditions being the existence of a determination by the Minister that the non-citizen had the status of a refugee within the meaning of the Refugee Convention (s 6A(1)(c)); and
- the deportation of prohibited non-citizens (s 18), together with some other non-citizens who had been convicted of offences (s 12), was a matter within the unconfined discretion of the Minister.

The federal system of administrative law, insofar as it provided for the judicial review of administrative action, was seen at this stage to be based principally in the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (ADJR Act) which had entered into force at the end of 1980. The Act was part of the reason for the Federal Court being created in 1977.¹⁶ The whole design of the ADJR Act was to provide a simplified procedure for obtaining in the Federal Court what was termed an “order of review” of any decision of an administrative character made under any Commonwealth enactment other than those classes of decision specifically excluded by Sch 1.

The precise form of an order of review was something that in each case was committed to discretion of the Federal Court (s 16), but it included centrally an order in the nature of the distinctly non-constitutional common law writ of certiorari quashing or setting aside the decision under review (s 5). The making of an order of review was to occur on one or more specified grounds. The specified grounds were understood to reflect the grounds traditionally available for judicial review at “common law” and only minimally to alter some of them.¹⁷ It was commonly understood that the most significant alteration was in respect of the ground of “error of law” which was to be available whether or not the error appeared “on the face of the record” (s 5(1)(f)).

Another ground, expressed in the traditional language of the common law, was “that a breach of the rules of natural justice had occurred in connection with the making of the decision” (s 5(1)(b)). Yet another, reflecting the well-understood and frequently repeated language of the English Court of Appeal in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223,¹⁸ was that the making of the decision was an “improper exercise of power” in that it was “an exercise of power that [was] so unreasonable that no reasonable person could have so exercised the power” (s 5(2)(g)). There were grounds that the person who purported to make the decision “did not have jurisdiction to make the decision” (s 5(1)(c)) and that the decision “was not authorised” by the enactment pursuant to which it was purported to be made (s 5(1)(d)). But they were just two amongst many and the orthodox view was that they were directed to specific limitations on power.¹⁹

¹³ *Constitution*, s 51(xix).

¹⁴ *Constitution*, s 51(xxvii). See *Nolan v Minister for Immigration & Ethnic Affairs* (1988) 165 CLR 178; *Re Minister for Immigration & Multicultural Affairs; Ex parte Te* (2002) 212 CLR 162.

¹⁵ *Migration Act 1958* (Cth) (reprint No 2) as at 31 May 1985.

¹⁶ *Federal Court of Australia Act 1976* (Cth) commenced on 1 February 1977.

¹⁷ See, eg, *Kioa v West* (1985) 159 CLR 550 at 576 (Mason J); *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 357 (Mason CJ).

¹⁸ See also *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 41.

¹⁹ *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 378 (Toohey and Gaudron JJ).



In 1983 there was an amendment to the *Judiciary Act 1903* (Cth) inserting a new section to confer original jurisdiction on the Federal Court in statutory terms which mirrored the original jurisdiction conferred on the High Court by s 75(v) of the *Constitution*. The jurisdiction conferred by the new s 39B was to grant what we now know as a constitutional writ of prohibition or mandamus or an injunction to an officer of the Commonwealth. But the reason for that amendment was not explained in constitutional terms. It was explained partly in terms of allowing practically for remitter from the High Court to the Federal Court of matters commenced in the original jurisdiction of the High Court under s 75(v) of the *Constitution* and partly in terms of creating symmetry between the scope of the jurisdiction conferred on the Federal Court and the scope of the jurisdiction from which State courts were expressly excluded by the ADJR Act.²⁰

As it happened, like federal administrative law litigation in general, administrative law litigation on the subject of migration law in and for the decade or so after 1983 proceeded almost exclusively under the ADJR Act. And it was as appeals from decisions of the Full Court of the Federal Court under the ADJR Act that the High Court came to deal with migration law in the second half of the 1980s, most prominently in *Kioa v West* (1985) 159 CLR 550, *Chan v Minister for Immigration & Ethnic Affairs* (1989) 169 CLR 379, and *Haoucher v Minister for Immigration & Ethnic Affairs* (1990) 169 CLR 648. In *Kioa* and *Haoucher* it was held that a breach of the rules of natural justice had occurred in connection with the making of the decision by the Minister in the exercise of his discretion to deport. In *Chan* it was held that an exercise of power by the Minister to determine, for the purpose of fulfilling a condition for the grant of an entry permit, that a particular non-citizen had not the status of a refugee within the meaning of the Refugee Convention was so unreasonable that no reasonable person could have so exercised the power.

Two things are remarkable about the High Court migration decisions of the late 1980s. The first is that, in deciding *Kioa* and *Haoucher* on the ground of breach of the rules of natural justice (re-labelled as denial of procedural fairness), and in deciding *Chan* on the ground of *Wednesbury* unreasonableness, the High Court was very much leading the way in the development and utilisation of those grounds. It was doing so in a manner that can be seen to have marched pretty much in step with the Federal Court. It was doing so in a manner that can be seen to have marched pretty much in step with contemporary developments in comparable common law countries. The same can be said of the more controversial decision in *Minister for Immigration & Ethnic Affairs v Teoh* (1995) 183 CLR 273, given just a few years later. *Teoh* was another natural justice migration case that arose under the ADJR Act. By the time it was being criticised by members of the High Court in *Re Minister for Immigration & Multicultural Affairs; Ex Parte Lam* (2003) 214 CLR 1, *Teoh* had been picked up and applied by common law courts in several other countries including the United Kingdom and New Zealand.²¹

The other thing that is remarkable about the High Court migration decisions of the late 1980s is that, along with the significant non-migration administrative law decisions of the same period in *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 and *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321, they proceeded without apparent need for reference to any overarching theory of judicial review. What was explained to be occurring in each case was the utilisation, explication and development of grounds for the review of an administrative decision that were derived from the common law and that had been picked up in the procedurally streamlined provisions of the ADJR Act.

Notably absent from any significant administrative law decision of the High Court or the Federal Court at any time in the 1980s is any reference at all to a notion of “want” or “excess” of jurisdiction

²⁰ Commonwealth, House of Representatives, *Debates*, 21 September 1983, p 1046 (Lionel Bowen, Minister for Trade).

²¹ *R v Secretary of State for the Home Department; Ex parte Ahmed* [1999] Imm AR 22 (CA); *R v Uxbridge Magistrates' Court Ex parte Adimi* [2001] QB 667 at [56] (Brown LJ) (Div Ct); *Musaj v Secretary of State for the Home Department* [2004] ScotCS 119 at [23] (Lady Smith); *In the Matter of Phillips (A Minor)* [2000] NIQB 38 (Carswell LJ); *Re T* [2000] NI 516; *Elika v Minister of Immigration* [1996] 1 NZLR 741.



or any use of the language of “jurisdictional error”. The High Court just last year²² traced the terminology of want and excess of jurisdiction to a judgment of Sir Owen Dixon in 1938.²³ It also pointed out that the term “jurisdictional error” seems first to have made its way into the *Commonwealth Law Reports* in a submission of Dr Coppel QC, as counsel before the High Court in an industrial case in 1954.²⁴ But the only use of the term “jurisdictional error” in any judgment of the High Court at any time before the 1990s occurs in passing references in judgments of each of Lionel Murphy in 1983, Sir Harry Gibbs in 1985, Sir Ronald Wilson in 1986, and Sir Anthony Mason in 1987.²⁵ The only uses that I have been able to find in any judgment of the Federal Court in the same timeframe occurs in passing references in a judgment delivered by Smithers J in 1979 and in two judgments delivered by Gummow J, one in 1988 and the other in 1989.²⁶

This is not to say that either the concept or the usage of “jurisdictional error” was novel; quite the contrary, they had an ancient lineage.²⁷ But the ancient distinction between jurisdictional error and non-jurisdictional error was commonly understood to have been swept away in the United Kingdom in *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147 and, although the status of *Anisminic* in Australia had not been squarely addressed by the High Court, the question of its status was for most practical purposes overtaken by the enactment of the ADJR Act. Jurisdictional error played no part in the significant development of administrative law that occurred in the first decade or so of the operation of the ADJR Act. If there was any fundamental and vexing distinction in Australian administrative law in the 1980s, it lay not in any distinction between a jurisdictional error and a non-jurisdictional error but in the distinction between an error of law and an error of fact.

THEN: PRESCRIPTION

The structure of the *Migration Act* underwent a radical transformation in 1989.²⁸ There was introduced into that Act for the first time a system for the merits review of migration decisions. At the same time, the administrative discretions which had been central to its structure were for the most part replaced by the prescription of decision-making criteria. Those two features – merits review and prescription of decision-making criteria – were retained and to a significant degree expanded in subsequent iterations of the Act.

Accommodating minor changes in its structure and terminology that were to occur shortly afterwards,²⁹ and acknowledging the existence of exceptions and anomalies, the central elements of the *Migration Act* as it came to exist in and after 1989 were:

- a non-citizen who entered or remained in Australia without a visa became an unlawful non-citizen (s 14);
- a visa could be granted only on application (s 45);
- the grant or withholding of a visa was no longer a matter of discretion but of duty the performance of which was to turn on whether or not the Minister (or delegate or review tribunal) was satisfied that the applicant met the criteria prescribed for the grant of the visa for which application was made; that is to say:

²² *Commissioner of Taxation v Futuris Corporation Ltd* (2008) 237 CLR 146 at [5].

²³ *Parisienne Basket Shoes Pty Ltd v Whyte* (1938) 59 CLR 369 at 389.

²⁴ *R v Kirby; Ex parte Transport Workers' Union of Australia* (1954) 91 CLR 159 at 168.

²⁵ *R v Coldham; Ex parte Australian Workers' Union* (1983) 153 CLR 415 at 423 (Murphy J); *R v Gray; Ex parte Marsh* (1985) 157 CLR 351 at 371, 374 (Gibbs CJ); *Public Service Board (NSW) v Osmond* (1986) 159 CLR 656 (Wilson J); *Jackson v Sterling Industries Ltd* (1987) 162 CLR 612 at 616 (Mason CJ).

²⁶ *Collector of Customs (NSW) v Brian Lawlor Automotive Pty Ltd* (1979) 41 FLR 338 at [50], [52] (Smithers J); *Wiest v Director of Public Prosecutions* (1988) 23 FCR 472 at 527 (Gummow J); *Re Jack O'Toole v Charles David Pty Ltd* (1989) 29 IR 1 at 37 (Gummow J).

²⁷ Going back, at least, to *Colonial Bank of Australasia v Willan* (1874) LR 5 PC 417.

²⁸ *Migration Legislation Amendment Act 1989* (Cth).

²⁹ The explanation which follows is based on the section numbers and terminology (particularly “visa” and “satisfaction”) as appearing in the *Migration Act 1958* (Cth) (reprint No 5) as at 30 September 1994.



- if the decision-maker was satisfied, the visa was to be granted;
- if the decision-maker was not satisfied, the visa was to be withheld (s 65); and
- the detention and deportation of an unlawful non-citizen was similarly no longer a matter of discretion but a matter of duty (s 198).

The 1989 reforms were expected at the time to result in a decrease in the number of applicants for entry into Australia pursuing what was described by the Minister in his Second Reading Speech as “the costly and lengthy route of judicial review”.³⁰ But their focus was on the enhancement of the transparency and accountability of the administrative decision-making process. The reforms left entirely undisturbed the general provisions of the ADJR Act and the *Judiciary Act* which allowed for judicial review of migration decisions by the Federal Court.

When a migration case under the ADJR Act next came before it in 1996 in an appeal from a decision of the Full Court of the Federal Court, the High Court was nevertheless at pains to make the point that the fundamental changes that had occurred in the structure of the *Migration Act* had resulted in similarly fundamental changes in the nature and scope of the judicial review of decisions made under it. *Minister for Immigration & Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 was a refugee case, in some respects similar to *Chan*, in which the Full Court had found delegates of the Minister to have made errors of law. The High Court strongly disagreed. The joint judgment of four of its members characterised the Full Court as having “developed what appears to be a false line of authority as to the proper scope of judicial review in such cases” (at 263). It went on by way of introduction to state (at 263-264):

the major changes to the legislative and regulatory scheme between *Chan* and the decisions giving rise to the present appeal take on a special significance. Rather than a raw “determination” of refugee status under the [*Migration Act* as it had existed at the time of *Chan*], [the Act as it then existed] required that the Minister be “satisfied” of refugee status before a determination was made. The significance of this change in the respective roles of the Minister and a court reviewing a Minister’s decision will be examined later. It is enough to indicate here that a decision which determines that “refugee status” exists differs in nature and quality from one recording the satisfaction of the decision-maker that this is the case. The significance of the change in the legislative scheme since *Chan* appears to have been insufficiently appreciated by the Full Court.

Turning later to an examination of what it had identified as the change in the respective roles of a Minister and a court reviewing a Minister’s decision, the joint judgment did two things which were to foreshadow much of what was to come over the ensuing decade. The first was for the first time collectively to endorse (at 272) a statement made by Sir Gerard Brennan in 1990 in the non-migration case of *Attorney-General (NSW) v Quin* (1990) 170 CLR 1 at 35-36, to the effect that:

[t]he duty and jurisdiction of [a] court to review administrative action [did] not go beyond the declaration and enforcing of the law which determines the limits and governs the exercise of [an administrator’s] power.

That statement would feature with increasing prominence in almost every subsequent administrative law judgment of the High Court.³¹ It does not use the language of jurisdictional error, but it quite clearly expresses the underlying concept. What is more significant is that the statement provides, in effect, a constitutional justification – based squarely on the separation of judicial power – not only for the existence of judicial review for jurisdictional error but for confining judicial review to the policing of jurisdictional error.³² Sir Gerard Brennan had himself first started using the term “jurisdictional error” in a State industrial case in 1991.³³

The term had then been used in a joint judgment of five members of the High Court in 1995 in the non-migration case of *Craig v South Australia* (1995) 184 CLR 163 at 179, to describe a circumstance

³⁰ Commonwealth, Senate, *Debates*, 5 April 1989, p 922 (Robert Ray, Minister for Immigration, Local Government and Ethnic Affairs).

³¹ See, eg, *Corporation of the City of Enfield v Development Assessment Commission* (1999) 199 CLR 135 at 153 (Gleeson, Gummow, Kirby and Hayne JJ).

³² Gageler S, “The Legitimate Scope of Judicial Review” (2005) 26 Aust Bar Rev 303.

³³ *Public Service Association (SA) v Federated Clerks’ Union* (1991) 173 CLR 132 at 141.



in which a writ of certiorari might issue at common law. What was said in *Craig* had been something of a sleeper at the time and it was still not to assume particular significance until the next stage to which I will come. It involved an endorsement of Lord Diplock's view³⁴ that a statutory power conferred on an administrator is ordinarily, and as a matter of presumption, interpreted as requiring that power to be exercised on a correct understanding of the applicable law. The application of that presumption was said to have particular resonance in the Australian constitutional setting. On this basis it was said that an administrator ordinarily falls into jurisdictional error justifying the grant of certiorari where an error of law causes the wrong question to be asked, irrelevant material to be taken into account, or relevant material to be ignored, and perhaps even where an error of law causes an erroneous finding to be made or a mistaken conclusion to be drawn (at 179).

A month after *Craig*, and six months before *Wu Shan Liang*, "jurisdictional error" had been used by three members of the court as a description of a case where "there [had] been a breach of the legislative conditions which, pursuant to s 77 of the *Constitution*, so define the ambit of the powers or authority of the Federal Court" as to justify the very rare case of a grant of prohibition by the High Court directed to the Federal Court under s 75(v) of the *Constitution*.³⁵ The term was set to be launched into the modern administrative law mainstream.

The second prescient thing done in the joint judgment in *Wu Shan Liang* was to point out that the relevant power of the Minister was now "expressly conditioned upon the Minister being 'satisfied' that a person was a refugee as defined" and to go on to point to a line of cases preceding the enactment of the ADJR Act in which courts had reviewed a state of satisfaction which a statute required a decision-maker to have formed before taking some action in the exercise of a statutory power.³⁶ The formation by a decision-maker of a state of satisfaction having a quality or characteristics which would enable it to withstand review of that nature was very soon to assume the mantle of a "jurisdictional fact".

NEXT: LIMITATION

The next stage in the development of the legislative structure of the *Migration Act* had already commenced before *Wu Shan Liang* was decided. Legally and practically, it was to prove to be the most difficult.

Reforms enacted in 1992,³⁷ the commencement of which were delayed until 1994,³⁸ contained provisions which, for the first time since the enactment of the ADJR Act, were aimed at curtailing the scope of judicial review in the Federal Court. The "government's clear intentions in relation to controlling entry to Australia", the Minister had said in his Second Reading Speech in 1992, were to be ensured by "[c]redible independent merits review" and were not to be "eroded by narrow judicial interpretations".³⁹

The newly inserted Pt 8 of the *Migration Act*, as it was then to stand from 1994 to 2001, in substance did the following:

- it provided that, despite s 39B of the *Judiciary Act* and by implication the ADJR Act, the Federal Court had no jurisdiction in respect of a decision made under the *Migration Act* other than that which Pt 8 itself conferred (s 485);
- it limited the decisions reviewable by the Federal Court under Pt 8 essentially to decisions which were the product of merits review or for which no merits review was available (s 475);
- in relation to those decisions which were reviewable by the Federal Court, it allowed the Federal Court to make an order similar in nature to an order of review under the ADJR Act (s 481); and

³⁴ *Re Racal Communications Ltd* [1981] AC 374 at 383.

³⁵ *Re McJannet; Ex parte Minister for Employment, Training & Industrial Relations (Qld)* (1995) 184 CLR 620 at 653.

³⁶ *Minister for Immigration & Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 274-276.

³⁷ *Migration Reform Act 1992* (Cth).

³⁸ *Migration Laws Amendment Act 1993* (Cth).

³⁹ Commonwealth, House of Representatives, *Debates*, 4 November 1992, p 2620 (Gerry Hand, Minister for Immigration, Local Government and Ethnic Affairs).



- most significantly, it specified grounds of review in terms considerably more restrictive than those set out in the ADJR Act and in terms that specifically excluded breach of the rules of natural justice (other than in a case of actual bias) and that the decision involved an exercise of power that was so unreasonable that no reasonable person could have so exercised the power (s 476(1), (2)).

Amongst the grounds which were allowed to remain available under Pt 8 was the ground that procedures required by the *Migration Act* to be observed in connection with the making of the decision were not observed (s 476(1)(a)). That ground was initially relied upon in a series of decisions of the Federal Court, in combination with generally expressed requirements for merits review tribunals created under the Act to “act according to substantial justice and the merits of the case” (ss 353, 420), in effect to grant relief for any substantive failure of procedural fairness. The same ground was subsequently relied on in a series of decisions in the Federal Court, in combination with other requirements for merits review tribunals created under the Act to set out reasons for their decisions (ss 368, 430), in effect to grant relief for any substantive deficiency in the reasoning or findings of fact on which a decision was based.

The High Court was unimpressed. It put a stop to the first approach in *Eshetu v Minister for Immigration & Multicultural Affairs* (1999) 197 CLR 611. It put a stop to the second approach in *Minister for Immigration & Multicultural Affairs v Yusuf* (2001) 206 CLR 323. In *Minister for Immigration & Multicultural Affairs v Jia Legeng* (2001) 205 CLR 507, it separately put a stop to an expansive view of the available ground of actual bias.

Perhaps unwittingly included amongst the grounds which were allowed to remain available under Pt 8 were grounds, expressed in identical terms to two of the many in the ADJR Act, that the person who purported to make the decision “did not have jurisdiction to make the decision” (s 476(1)(b)) and that the decision “was not authorised” (s 476(1)(c)) by the *Migration Act*. These seemingly innocuous grounds transposed from the ADJR Act were ultimately to prove Pt 8’s undoing.

But there was another, probably unavoidable, flaw in the scheme of Pt 8 as it then existed. There was a restriction on the grounds of review available in the Federal Court but there was not, because there could not be, any restriction on the grounds of review available in the original jurisdiction of the High Court. Matters commenced in the original jurisdiction of the High Court could still be remitted to the Federal Court but the Federal Court in dealing with a remitted matter was restricted to the same grounds of review as would have been available had the matter been commenced in the Federal Court. The consequence of this bifurcated system, the constitutional validity of which was challenged but upheld by a narrow majority of the High Court in *Abebe v Commonwealth* (1999) 197 CLR 510, was a duality of proceedings.

The same decision could, and therefore would, either simultaneously or sequentially be made the subject of an application to the Federal Court under Pt 8 and of an application for prohibition or mandamus in the original jurisdiction of the High Court under s 75(v) of the *Constitution*. Any remitter of an application for prohibition or mandamus by the High Court could only ever be partial because it could never extend to the excluded grounds. What therefore occurred in practice was that the High Court became for more than five years a trial court for the determination of procedural fairness and *Wednesbury* unreasonableness cases. To complicate things even further, where a matter dealt with in the Federal Court under Pt 8 was the subject of a grant of special leave to appeal to the High Court, the subsequent appeal was often heard concurrently with an application for prohibition or mandamus in the original jurisdiction of the High Court under s 75(v) of the *Constitution* independently challenging the procedural fairness or reasonableness of the underlying decision.

Such was then the setting for jurisdictional error to come of age. Its final evolution took the following path.

In *Eshetu*, not in the appeal but in a concurrent application for prohibition in the original jurisdiction of the High Court under s 75(v) of the *Constitution*, the sole ground as framed by the prosecutor was that the decision was “so unreasonable that no reasonable [decision-maker] acting within jurisdiction and according to law, would have come to such a decision”. Gummow J writing separately, made it clear that he considered the ground so framed not only to violate the principle



stated by Sir Gerard Brennan in *Quin* but, on a proper analysis, to be a contradiction in terms. He pointed out that, under the *Migration Act*, the power or jurisdiction of the decision-maker to grant a visa depended on the decision-maker in fact reaching a state of satisfaction that the prescribed criteria were met. The existence of such a state of satisfaction was therefore a statutory criterion to be met before the decision-maker was empowered and obliged to grant the visa. He then collected a comprehensive line of authority in the High Court, commencing with *R v Connell; Ex parte Hetton Bellbird Collieries* (1944) 69 CLR 407, and including *Foley v Padley* (1984) 154 CLR 349, standing for the proposition that a statutory criterion of that nature is ordinarily to be interpreted as impliedly requiring the satisfaction of the decision-maker to be both reasonable and founded on a correct understanding of the law. A reasonable and legally correct state of satisfaction was in that sense a jurisdictional fact. If the jurisdictional fact did not exist, the decision-maker would be acting in excess of jurisdiction.

The court could determine whether or not a decision-maker's satisfaction was in fact reasonable and legally correct and, if it found as a fact that the decision-maker's satisfaction was not reasonable and legally correct, it could grant prohibition to restrain an excess of jurisdiction. *Wednesbury* unreasonableness had nothing to do with it: that was a doctrine concerned only with discretionary decisions.⁴⁰ This characterisation of a statutory requirement for satisfaction as a jurisdictional fact was then rapidly taken up by other members of the High Court in a series of migration and non-migration cases.⁴¹ And his Honour's approach to *Wednesbury* unreasonableness was also soon endorsed by other members of the High Court, one consequence of which was to leave very little, if any, scope for the operation of the specific exclusion of the *Wednesbury* unreasonableness ground from Pt 8.⁴²

Then in *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82, the High Court entertained its first migration case since *Kioa* in which prohibition was sought in the original jurisdiction of the High Court under s 75(v) of the *Constitution* on the ground of want of procedural fairness. The application was met by a fairly heroic argument on the part of the Minister that prohibition was, at the time of the establishment of the *Constitution* in 1900, available only to correct a jurisdictional error and that procedural fairness was a more recent invention of the common law breach of which would not give rise to an error of that nature. The response of at least five members of the High Court was in essence as follows. Prohibition and mandamus were indeed writs which were available at common law respectively to restrain the usurpation or to compel the exercise of a jurisdiction and in that sense to correct jurisdictional error.

Translated to s 75(v) of the *Constitution*, prohibition and mandamus have been since 1900 "constitutional writs" serving the constitutional purpose of ensuring that Commonwealth officers remain within the jurisdictional limits imposed on them whether by the *Constitution* or by statute. The Minister was therefore correct in saying that jurisdictional error was the sole basis on which the constitutional writ of prohibition might issue. But jurisdictional limits imposed by statute are both express and implied. Procedural fairness should be seen as arising by way of implication from statute. So too should *Wednesbury* unreasonableness. The result is that a Commonwealth officer who fails to afford procedural fairness in the exercise of a statutory power (or who exercises a statutory discretion in a manner that is wholly unreasonable) exceeds jurisdiction in a manner that is able to attract the constitutional writ of prohibition, the actual issue of the writ being in every case a matter of judicial discretion.

The result of *Aala* was thereafter firmly to entrench jurisdictional error as the sole basis on which what were now the constitutional writs of prohibition and mandamus might issue.⁴³ The result had the pleasing qualities of simplicity and coherence of principle. Not only was judicial review for

⁴⁰ *Eshetu v Minister for Immigration & Multicultural Affairs* (1999) 197 CLR 611 at [121]-[147].

⁴¹ See, eg *Minister for Immigration & Multicultural Affairs v Jia Legeng* (2001) 205 CLR 507 at [73]; *City of Enfield v Development Assessment Commission* (1999) 199 CLR 135 at [34]; *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540 at [183]; *Minister for Immigration & Multicultural Affairs v SGLB* (2004) 207 ALR 12 at [37].

⁴² *Appellant S106/2002 v Minister for Immigration and Multicultural Affairs* (2003) 198 ALR 59 at [64]-[73].

⁴³ But see *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57 at [211]-[212] (Kirby J).



jurisdictional error, and jurisdictional error alone, justified and required by the general and basal constitutional principle articulated by Sir Gerard Brennan in *Quin*; it was also justified and required by the express terms of s 75(v) of the *Constitution*. To grant prohibition to restrain a Commonwealth officer acting on a decision which manifests jurisdictional error is to do no more than the constitutional duty of a court to declare and enforce the law. That is because, as was soon to be explained in *Minister for Immigration & Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597, when the nature of jurisdictional error is properly understood, it could readily be seen 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” (at [51] per Gaudron and Gummow JJ).

At the same time, the scope of jurisdictional error was beginning to assume a protean, almost organic, nature. The jurisdictional error was to prove to be a highly flexible concept. The theory was that what was involved at root in each case was the search for transgression of some express and implied limitation on the scope of a statutory conferral of power. But implied limitations were fairly readily to be found. In particular, the standard requirement of the *Migration Act* for a decision-maker to reach a state of satisfaction would go on to give rise to jurisdictional error not only where a decision-maker reached a state of satisfaction on the basis of an error of law, or reached a state of satisfaction that could not reasonably be reached, but also where a decision-maker arrived at a primary finding of fact by an illogical process of reasoning⁴⁴ or failed at the factual level to understand the nature of the case being put.⁴⁵ It was said that the distinction between jurisdictional and non-jurisdictional error simply did not turn on the distinction between error of fact and error of law.⁴⁶ Moreover, it was repeatedly said that categories of jurisdictional error not only could overlap but could never be stated exhaustively.⁴⁷

The death knell for Pt 8 as it had been introduced in 1994 was finally sounded in *Yusuf* when, despite no issue being raised between the parties, three members of the High Court expressed the view that the grounds that the person who purported to make the decision “did not have jurisdiction to make the decision” and that the decision “was not authorised” by the *Migration Act* encompassed any jurisdictional error including but not limited to an error of law of the kind identified in *Craig*.⁴⁸ The date of the decision in *Yusuf* was 31 May 2001.

LATER: PRIVATION

September 2001 was a significant month in many ways. Relevantly to the present story, September 2001 saw the enactment of amendments to Pt 8 of the *Migration Act* which had been proposed in 1997 but were awaiting debate by the Senate when Parliament was prorogued in August 1998.⁴⁹ The amendments commenced on 2 October 2001.

Part 8, as it now came to be amended on and from 2 October 2001, did away entirely with the old limited grounds of review. It reinstated (s 475A) the jurisdiction of the Federal Court under s 39B of the *Judiciary Act*, but not under the ADJR Act,⁵⁰ to review what were now to be described as “privative clause decisions” other than those capable of merits review. Echoing the language of the ADJR Act, and subject to some immaterial exceptions, the definition of a privative clause decision was essentially that of a decision of an administrative character made under the *Migration Act* (s 474(2)). The centrepiece of the new Pt 8 was the privative clause itself (s 474(1)). It said:

A privative clause decision:

⁴⁴ *Minister for Immigration & Multicultural & Indigenous Affairs v S20/2002* (2003) 198 ALR 59 at [34] (McHugh and Gummow JJ).

⁴⁵ *Dranichnikov v Minister for Immigration & Multicultural Affairs* (2003) 197 ALR 389.

⁴⁶ See, eg *Re Minister for Immigration & Multicultural Affairs; Ex parte Applicant S20/2002* (2003) 198 ALR 59 at [53]-[60].

⁴⁷ See, eg *Minister for Immigration & Multicultural Affairs v Yusuf* (2001) 206 CLR 323 at [82].

⁴⁸ *Minister for Immigration & Multicultural Affairs v Yusuf* (2001) 206 CLR 323 at [81]-[85].

⁴⁹ *Migration Legislation Amendment Bill (No 5) 1997*.

⁵⁰ *Administrative Decisions (Judicial Review) Act 1977* (Cth), Sch 1 para (da).



- (a) is final and conclusive; and
- (b) must not be challenged, appealed against, reviewed, quashed or called into question in any court; and
- (c) is not subject to prohibition, mandamus, injunction, declaration or certiorari in any court on any account.

Of course, the privative clause could not mean what it said. But then it was never meant to mean what it said. There had been many privative clauses in Commonwealth legislation before that had for the most part been systematically deleted around the time of the enactment of the ADJR Act⁵¹ and there had been a well-settled way of interpreting them. Sir Owen Dixon had said in *R v Hickman; Ex parte Fox* (1945) 70 CLR 598 at 616:

It is, of course, quite impossible for the Parliament to ... impose limits upon the ... authority of a body which it sets up with the intention that any excess of that authority means invalidity, and yet, at the same time, to deprive [the High Court or any other court having jurisdiction to grant the writ] of authority to restrain the invalid action ... by prohibition.

Sir Owen continued by explaining that the way to read a privative clause was (contrary to its language) not as limiting the jurisdiction of a court but as expanding the jurisdiction of the decision-maker to the effect that “any decision ... which upon its fact appears to be within power and is in fact a bona fide attempt to act in the course of its authority, shall not be regarded as invalid”. That explanation had come by 1960 to be regarded as “classical”.⁵² By 1983 it was said to have been “established by a long course” of authority.⁵³ That is the sense in which it was quite clear that the Parliament intended that the privative clause was to be read. In the language of the Explanatory Memorandum:

The intention of the provision is to provide decision-makers with wider lawful operation for their decisions such that, provided the decision-maker is acting in good faith, has been given the authority to make the decision concerned ... and does not exceed constitutional limits, the decision will be lawful.

Modestly construed, in accordance with that evident parliamentary intention, the privative clause might not have permitted a decision-maker under the *Migration Act* to breach or ignore specific and “inviolable” limitations spelt out in that Act but it ought at the least have prevented the implication of limitations other than an implication of good faith. That is, in essence, how a majority of the Full Court of the Federal Court came to read it in *NAAV v Minister for Immigration & Multicultural & Indigenous Affairs* (2002) 123 FCR 298. But the authority of *NAAV* was to be short-lived.

In *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 the *Hickman* principle was – as the High Court has most recently put it – “placed ... in perspective”.⁵⁴ Possibly because of the way in which issue was joined in that case, there was no exploration of the middle ground. The issue joined was basically one of constitutional validity: the plaintiff in proceedings in the original jurisdiction of the High Court under s 75(iii) of the *Constitution* contended that the privative clause should be read literally and was invalid and the Commonwealth contended in response that the privative clause should not be read literally but went so far as validly to operate to confer on a decision-maker absolute power to decide whether or not a visa was to be granted subject only to compliance with the three *Hickman* provisos. The resolution of those two extremes, according to the High Court, lay not in either a literal or expansive reading of what the privative clause did but in a taking a strict approach to that to which it applied. The resolution was that the privative clause decisions to which the privative clause applied were to be read as limited to decisions that were not affected by jurisdictional error. Far from expanding the jurisdiction of the decision-maker (even to the point of removing implied limitations) the privative clause itself had nothing to say on the topic of jurisdictional error (at [71]-[78], [83]

⁵¹ See, eg *Australian Federal Police Act 1979* (Cth), s 57 (Cth), repealed by the *Industrial Relations (Consequential Provisions) Act 1988* (Cth). The Report of the Commonwealth Administrative Review Committee, established in October 1986 under the chairmanship of the Hon Mr Justice Kerr and presented to Parliament in 1971, had recommended among other things that, in general, privative clauses should not be retained in Commonwealth legislation.

⁵² *Coal Miners' Industrial Union v Amalgamated Collieries of Western Australia Ltd* (1960) 104 CLR 437 at 455 (Menzie J).

⁵³ *R v Coldham; Ex parte Australian Workers' Union* (1983) 153 CLR 415 at 418 (Mason ACJ, Brennan J).

⁵⁴ *Commissioner of Taxation v Futuris Corporation Ltd* (2008) 237 CLR 146 at [70].



(Gaudron, McHugh, Gummow, Kirby and Hayne JJ)). As was soon confirmed in other cases, all of the express and implied limitations on the decision-maker's jurisdiction to make a decision remained. The privative clause cut in only where those limitations were shown not to have been transgressed.⁵⁵ The result was to render the privative clause effectively redundant.

The most satisfactory justification for the result in *Plaintiff S157/2002* appears to me to be that articulated in the separate judgment of Gleeson CJ. The justification amounts to the *Hickman* double-speak principle having given way to more modern principles of statutory interpretation. One was that, in a case of ambiguity, a court should favour a construction which accords with Australia's international obligations. Another is 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 in unmistakable and unambiguous language. His Honour did not suggest that the application of these principles meant that the Parliament could not achieve what it obviously set out by the privative clause to achieve. What he said was that their application meant that for the Parliament to achieve the result that it wanted, the Parliament would need to face up squarely to the question of the scope of the powers it was choosing to confer and to articulate its intention to expand those powers clearly on the face of the legislation. Although Gleeson CJ did not quite say it, that must be because an entitlement at least to the observance of fair procedures in administrative decision-making should now be treated as one of the "basic rights of the individual" which is not to be taken away by statute in the absence of express language or necessary implication (at [30], [37]).

The practical consequence of *Plaintiff S157/2002* was to return the Federal Court to a position in some respects quite similar to that which had existed before 1992. The jurisdiction of the Federal Court with respect to the judicial review of migration decisions was now general in the sense that there was no legislative restriction on the grounds of review upon which it was able to proceed. In another respect, the position was quite radically different. The radical difference was that the ADJR Act had been swept away in favour of review under s 39B of the *Judiciary Act* and that review under s 39B of the *Judiciary Act* – mimicking s 75(v) of the *Constitution* – had become review for jurisdictional error alone.

NOW: TARGETED TINKERING

There have been numerous amendments to the *Migration Act* since 2001 but none which affect its basic structure.

The privative clause remains, but it is a dead letter. The ADJR Act still has no application. Section 39B of the *Judiciary Act* still applies, but subject to a limitation of the jurisdiction of the Federal Court effected by s 476A of the *Migration Act*. This limitation mirrors a grant of jurisdiction, equivalent to the High Court's s 75(v) jurisdiction, to the Federal Magistrates Court under s 476 of the *Migration Act* such that the Federal Magistrates Court is now the primary forum for judicial review of migration decisions.⁵⁶ In practice, the statutory derivatives of s 75(v) jurisdiction, in one form or another, are utilised to review decisions made under the *Migration Act* on almost a daily basis. The jurisdiction of the High Court under s 75(v) of the *Constitution* hovers, unimpaired and unimpairable, but is now rarely invoked. There have been some changes to the procedures applicable to migration litigation including by limiting⁵⁷ or attempting to limit⁵⁸ the time in which applications for judicial review must be made. But none of those limitations amount to much. A kind of equilibrium has been reached.

⁵⁵ *Minister for Immigration & Multicultural & Indigenous Affairs v SGLB* (2004) 207 ALR 12; Beaton-Wells C, "Judicial Review of Migration Decisions: Life After S157" (2005) 33 Fed L Rev 142.

⁵⁶ Importantly, the Federal Court maintains jurisdiction, to the exclusion of the Federal Magistrates Court, to review privative clause decisions and purported privative clause decisions of the AAT and of the Minister personally; s 476B renders remittal by the High Court conformable to the distribution of jurisdiction between Federal Court and Federal Magistrates Court that is effected by ss 476, 476A.

⁵⁷ *Migration Act 1958* (Cth), ss 477, 477A as amended by *Migration Litigation Reform Act 2005* (Cth).

⁵⁸ *Migration Act 1958* (Cth), s 486A as amended by *Migration Litigation Reform Act 2005* (Cth); *Bodraduzza v Minister for Immigration & Multicultural Affairs* (2007) 228 CLR 651.



The most ambitious of the amendments that have been made since 2001 have been the continuations of attempts, ongoing for some time, to spell out expressly and with precision just what the procedural limitations on decision-makers are intended to be. These attempts have met with mixed success. The experience has been that rigidity brings the risk not only of unfairness but occasionally of absurdity;⁵⁹ flexibility brings the risk of uncertainty and administrative inconvenience; and getting the appropriate balance is not particularly easy. No similar attempt has yet been made to spell out, expressly and with precision, what are to be the limitations on substantive powers and duties. A requirement for satisfaction on the part of a decision-maker still generally remains. Implied limitations continue to be found. Their transgression continues to lead to jurisdictional error.

CONCLUSION

Does the story have a moral and does it have a sequel? I am not really sure of the answer to either of those questions.

In *Lam*, McHugh and Gummow JJ went out of their way to distance Australian administrative law from recent developments in English administrative law which they saw as apparently being concerned “with the judicial supervision of administrative decision-making by the application of certain minimum standards now identified by the English common law”.⁶⁰ In Australia, they said, “the existence of a basic law which is a written federal constitution, with separation of the judicial power, necessarily presents a frame of reference which differs from both the English and other European systems”.⁶¹ The tectonics underlying that continental drift are complex. As to the extent and permanency of the gulf, it is probably too soon to tell.

Where we seem to have arrived for the time being in Australia is that the judicial review of administrative action has come to be seen to be anchored not in the developing common law but in the fairly rigid Australian constitutional structure: its existence mandated and its scope constrained by the separation of judicial power. It is all about the policing of jurisdictional error; and the policing of jurisdictional error amounts to nothing more or less than keeping administrative decision-makers within the express or implied limits of the jurisdiction conferred on them by statute. Within jurisdiction is power, outside jurisdiction is error and invalidity. The distinction between jurisdictional and non-jurisdictional error in this way “manifests the separation between the judicial power and the legislative function of translating policy into statutory form and the executive function of administration of those laws”.⁶² To the judges the law; to the others the merits.

But can it really all be as simple as that? There was perhaps a hint of scepticism in the painfully accurate definition of post-*Plaintiff S157/2002* jurisdictional error given by the Full Court of the Federal Court in *SDAV v Minister for Immigration & Multicultural & Indigenous Affairs* (2003) 199 ALR 43 at [27] per Hill, Branson and Stone JJ:

The statement that a particular error is a “jurisdictional error” is a statement of conclusion. The conclusion is that, be the error one of omission or commission, some essential or indispensable requirement for jurisdiction has not been met ... The error may be easy to detect (manifest error) or more difficult but, either way, an action or decision is either one which falls within the decision maker’s lawful authority or it is not. If it falls within the decision maker’s lawful authority then the error is made “within jurisdiction”. If it does not fall within the decision maker’s lawful authority then the error is a “jurisdictional error” and as such it cannot be a valid action or decision.

Keeping administrative decision-makers within the express limits of the lawful authority given to them by statute is as uncontroversial as it is mechanical. Keeping administrative decision-makers within the limits that are implied into the terms by which lawful authority is given to them by statute

⁵⁹ As revealed, eg by *SAAP v Minister for Immigration & Multicultural Affairs* (2005) 228 CLR 294 and addressed in the *Migration Amendment (Review Provisions) Act 2007* (Cth).

⁶⁰ *Re Minister for Immigration & Multicultural Affairs; Ex Parte Lam* (2003) 214 CLR 1 at [73].

⁶¹ *Re Minister for Immigration & Multicultural Affairs; Ex Parte Lam* (2003) 214 CLR 1 at [76].

⁶² *Re Minister for Immigration & Multicultural Affairs; Ex parte S20/2002* (2003) 198 ALR 59 at [59] (McHugh and Gummow JJ).



is more problematic. What are the limits to be implied? By what standards are implications to be drawn? Is truly value-free implication possible? Is it even desirable? Can the result in *Plaintiff S157/2002* itself be adequately explained except by reference to values? Under the rubric of jurisdictional error, we have perhaps already reached the point where some limitations on power will be implied by way of presumption in the absence of a tolerably clear manifestation of legislative intention to the contrary. If so, what is it precisely that gives rise to the relevant presumption? These are questions for courts and for commentators.

A question for the Parliament may well be whether what is currently left to implication ought not now be expressed. After all, it is in everyone's interest for administrative decision-makers clearly to be made aware of their jurisdictional limits before those limits have been transgressed. If so, would there not be some utility in spelling out just what those limits happen to be, perhaps in some code or charter of administrative rights and responsibilities or at least in some new part of the *Acts Interpretation Act 1901* (Cth)? And if we were to do that, how different would the list look from the now almost forgotten list of grounds in the ADJR Act?

