

# A DISCUSSION OF THE DUTY AND JURISDICTION OF THE COURTS TO REVIEW ADMINISTRATIVE DECISIONS

JAMES BLACKWELL\*

The duty and jurisdiction of the court to review administrative action do not go beyond the declaration and enforcing of the law which determines the limits and governs the exercise of the repository's power. If in doing so, the court avoids administrative injustice or error, so be it; but the court has no jurisdiction simply to cure administrative injustice or error. The merits of administrative action, to the extent that they can be distinguished from legality, are for the repository of the relevant power and, subject to political control, for the repository alone...If courts were to postulate rules ostensibly related to limitations on administrative power but in reality calculated to open the gate into the forbidden field of merits of its exercise, the functions of the courts would be exceeded.<sup>1</sup>

## I INTRODUCTION

The courts have always recognised that judicial review should not amount to the court exercising an administrative discretion legally reposed in a decision-maker. The orthodox view is that the court's role, in performing judicial review of administrative decisions, is to assess whether a decision is legal rather than whether it constitutes the right or preferable outcome. The above statement made by Brennan J in *Attorney General v Quin*<sup>2</sup> appears to highlight this limitation on the function of the courts in judicial review. However, establishing the appropriate ambit of judicial review of discretionary administrative decision-making has proven to be one of the most contentious and problematic areas of administrative law. Courts and academic writers alike have sought relentlessly, yet with little success, to resolve the seemingly intractable dilemma of the limits of judicial review and the appropriate institutional relationship between the courts and the administrative branch of government.

This article will firstly examine the accuracy of Brennan J's statement by comparing it with the views of other experts. Importantly, the reasoning preventing courts from making judgements based on the validity of the facts will be analysed. The degree to which merits review and legal review overlap, or whether such a distinction exists at all, is also a valid issue for discussion. This is often where the confusion lies in the courts given the fine line, and difficulty in defining between, which facts form the merits of the

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\* BBus/LLB Student, Faculty of Law, QUT.

<sup>1</sup> *Attorney-General v Quin* (1990) 170 CLR 1, 35-36 (Brennan J).

<sup>2</sup> *Ibid.*

case and which facts go to the legality of the issue. Finally, the essay will discuss what advantages lie in leaving merits review for administrative tribunals and whether in rectifying decisions based on the merits of the case, courts are breaching the separation of powers doctrine. Conversely, what advantages lie in allowing the courts the flexibility to apply merits review will be considered in determining what the courts' role should be in this review process.

## II THE LEGALITY-MERITS DISTINCTION: THE COURTS' INTERPRETATIONS

Brennan J's comment suggests that the court's jurisdiction, in terms of reviewing administrative action, goes no further than the legality of the decision.<sup>3</sup> In his view, the court cannot make any ruling based on the merits of a case. His Honour went on to say: 'If the courts were to assume a jurisdiction to review administrative decisions which are "unfair" [on the merits...they] would be assuming a jurisdiction to do the very thing which is to be done by the repository of an administrative power'.<sup>4</sup> In *Peko-Wallsend*, Mason J similarly said: 'It is not the function of the court to substitute its own decisions for that of the administrator by exercising a discretion which the legislature has vested in the administrator'.<sup>5</sup> Based on these authorities, it appears the High Court staunchly rejects the proposition that judicial review may be based on merits review.

There is, however, evidence to suggest that the High Court condones the use of merits based review in some circumstances. Mason CJ in *Australian Broadcasting Tribunal v Bond*<sup>6</sup> delineated the extent of the jurisdiction of the Federal Court under the *Administrative Decisions (Judicial Review) Act 1977*(Cth) ('ADJR Act') to review findings of fact. His Honour<sup>7</sup> concluded that such findings of fact are reviewable 'for error of law'<sup>8</sup> and on the ground 'that there was no evidence or other material to justify the making of the decision'.<sup>9</sup>

Prima facie Mason CJ's remarks may proffer a more flexible approach to that suggested in *Peko-Wallsend*. However, the two approaches are not inconsistent. Mason CJ in *ABT v Bond* is advocating the review of facts for errors of law, he is not necessarily advocating review on the merits. Conversely it cannot be discerned from Brennan and Mason JJ's statements in *Peko-Wallsend* that they would not take the approach that Mason CJ suggests in *Bond*. Rather their Honours' comments demonstrate the overlap between factual review and legal review.

This overlap highlights the problem for courts in finding the elusive line between factual errors that go to the merit of the decision and errors of law.<sup>10</sup> Judicial review necessarily involves some consideration of a decision's merits – most obviously, review

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<sup>3</sup> Ibid.

<sup>4</sup> Ibid 37-38.

<sup>5</sup> *Minister for Aboriginal Affairs v Peko-Wallsend* (1986) 162 CLR 24, 40-41.

<sup>6</sup> (1990) 170 CLR 321.

<sup>7</sup> With whom Brennan, Toohey and Gaudron JJ agreed.

<sup>8</sup> *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321, 328; *Administrative Decisions (Judicial Review) Act 1977* (Cth) s 5(1)(f).

<sup>9</sup> *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321, 355; *Administrative Decisions (Judicial Review) Act 1977* (Cth) s 5(1)(h).

<sup>10</sup> M Crock and H Gibian, 'Before the High Court: Minister for Immigration and Ethnic Affairs v Eshetu' (1998) 20(3) *Sydney Law Review* 457, 469.

on the grounds of *Wednesbury*<sup>11</sup> unreasonableness requires consideration of the substantive basis of the decision. Some argue that ‘irrationality’ or ‘unreasonableness’, has always authorised substantive review of the merits of the decision.<sup>12</sup> Similarly, Gummow J in *Eshetu*<sup>13</sup> held that a decision-maker’s reasons are subject to review for ‘reasonableness’.<sup>14</sup> This ‘would permit review in cases where the satisfaction of the decision-maker was based on findings which were not supported by some probative or logical grounds’.<sup>15</sup> Kirby J further endorses the view that illogical factual findings are errors of law.<sup>16</sup> Likewise, Mason and Deane JJ have clearly established that a finding of fact based on ‘no evidence’ is an error of law.<sup>17</sup> Consideration of the substance of decisions is also evident in other grounds of review: the jurisdictional fact doctrine, principles of relevancy and the ‘no evidence’ rule all require consideration of the basis of decisions.<sup>18</sup> Therefore, clear authority also exists indicating that the High Court will often find an error of law where a decision-maker’s findings cannot be substantiated by evidence or where the decision is unreasonable. Thus the merits of a decision must be reviewed.

#### A What is causing the confusion in the courts?

It is apparent given these contrasting authorities that there is a great deal of confusion when it comes to defining the limits of judicial review. As Bennett suggests, this confusion is evident in the lower courts given the regularity with which the High Court must reassert the legality-merits distinction.<sup>19</sup> The lower courts may be forgiven for permitting such a discrepancy given that the distinction is probably not mutually exclusive.<sup>20</sup> For example, in *Eshetu*<sup>21</sup> Davies J noted that there was nothing ‘inherently improbable’ about Mr Eshetu’s story and his testimony was ‘the evidence of someone who was speaking from recollection and it included details which a person fabricating a story would have been unlikely to include’.<sup>22</sup> That is, there was an error of law on the basis of a perceived disjuncture between the evidence presented and the findings of the tribunal. Crock and Gibian point out, that as is so often the case in matters of this kind it is possible to characterise this aspect of the Federal Court’s ruling in either of two ways.<sup>23</sup> Some will see the decision as one that is confined to the merits of the Refugee Review Tribunal (‘RRT’) decision. Others will see in the majority judgements the identification of a reviewable legal error in the tribunal’s fixation on one ‘factual matrix’ to the exclusion of other matters that were critical to the assessment of Mr Eshetu’s claim to be a refugee.<sup>24</sup> Cane identifies three categories of decision-making

<sup>11</sup> *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223.

<sup>12</sup> J Caldwell, ‘Judicial Review: Review on the merits?’ (1995) *New Zealand Law Journal* 343, 343.

<sup>13</sup> *Minister for Immigration and Ethnic Affairs v Eshetu* (1999) 197 CLR 611.

<sup>14</sup> *Ibid* 646.

<sup>15</sup> *Ibid*.

<sup>16</sup> *Azzopardi v Tasman UEB Industries Ltd* (1985) 4 NSWLR 139; *X v Commonwealth* (1999) 167 ALR 529, 561-562.

<sup>17</sup> *ABT v Bond* (1990) 170 CLR 321.

<sup>18</sup> J McMillan, ‘Recent Themes in Judicial Review of Executive Action’ (1996) 24 *Federal Law Review* 347, 377-385.

<sup>19</sup> D Bennett, ‘Balancing Judicial Review and Merits Review’ (2000) 53 *Administrative Review* 3.

<sup>20</sup> P Cane, ‘Merits review and judicial review – the AAT as a Trojan horse’ (2000) *Federal Law Review* 213.

<sup>21</sup> *Minister for Immigration and Ethnic Affairs v Eshetu* (1999) 197 CLR 611.

<sup>22</sup> *Ibid* 628.

<sup>23</sup> Crock and Gibian, above n 11, 468.

<sup>24</sup> *Minister for Immigration and Ethnic Affairs v Eshetu* (1999) 197 CLR 611, 628.

tasks in such cases: issues of law, issues of fact and issues of policy. He goes so far as to argue that a decision-maker will often have a choice about which category to place a particular issue in given the porous nature of the boundaries of these categories.<sup>25</sup> This can clearly be seen in the example from *Eshetu*.<sup>26</sup> How does a court know in which category to place a certain issue? The cynic would agree with Lord Denning's remark in *Pearlman v Keepers and Governors of Harrow School*<sup>27</sup> that the choice of approach will be determined by whether or not a person is moved to advocate the quashing of the decision made.<sup>28</sup> However, it is unlikely that a court would accept this means of classification. The High Court must create a reliable framework which resolves the complication.

Clarity of the legality-merits distinction is essential, so as to ensure that the court has not supplanted the discretionary judgement of the administrator.<sup>29</sup> This sentiment, and the supporting rationale, reverberates through both *MIEA v Guo*<sup>30</sup> and *MIEA v Wu Shan Liang*.<sup>31</sup> By combining these cases it is clear that a non-interventionist approach in the review of administrative decisions emerges.<sup>32</sup> *MIEA v Guo*<sup>33</sup> highlights the difficulties associated in separating administrative decisions made *intra vires* which in the individual circumstances may appear unjust, from those that should be set aside on the appropriate and orthodox basis of constituting an error of law. Yet despite the High Court's identification of the need for clarity in identifying suitable cases for review, the exact scope of review of factual findings for unreasonableness still remains unclear.<sup>34</sup> Simply restating the merits-legality distinction, as Brennan J has done in the given statement, fails to confront the extent to which judicial review does permit consideration of the substance of administrative decisions. It does not even attempt to delineate those decisions which are suitable for judicial consideration from those which are not. The approach in the High Court in *MIEA v Wu Shan Liang*,<sup>35</sup> *MIEA v Guo*,<sup>36</sup> and *Attorney General v Quin*<sup>37</sup> represents little more than an appeal for judicial self-restraint.<sup>38</sup> Following these cases the High Court appears no closer to defining the boundaries of judicial review. As McLachlan argues:

Self-restraint as a mechanism for delineating the scope of review is wholly objectionable. Either review lies or it does not. Resort to some intuitive judgement that review is inappropriate does nothing to delimit or explain the boundaries of review.<sup>39</sup>

<sup>25</sup> Cane, above n 20, 220.

<sup>26</sup> *Minister for Immigration and Ethnic Affairs v Eshetu* (1999) 197 CLR 611.

<sup>27</sup> [1978] 3 WLR 736.

<sup>28</sup> *Ibid*, 744.

<sup>29</sup> P De Losa, 'Tribunal decisions under judicial review: the High Court's decision in *Minister for Immigration and Ethnic Affairs v Guo* and another' (1998) 3(1) *Newcastle Law Review* 104, 109 (1997) 191 CLR 559.

<sup>30</sup> (1996) 185 CLR 259.

<sup>31</sup> P De Losa, above n 27, 111

<sup>32</sup> (1997) 191 CLR 559.

<sup>33</sup> G Farulla-Airo, 'Rationality and judicial review of administrative Action' (2000) 24(3) *Melbourne University Law Review* 567.

<sup>34</sup> (1996) 185 CLR 259.

<sup>35</sup> (1997) 191 CLR 559.

<sup>36</sup> (1990) 170 CLR 1.

<sup>37</sup> Crock and Gibian, above n 11, 470.

<sup>38</sup> J McLachlan, 'Substantive Fairness: Elphantine Review or Guiding Concept?' (1991) 2 *Public Law Review* 12, 21.

What is required is the development of an approach that manifests a more detailed understanding of the strengths and weaknesses of administrative, as opposed to judicial decision-making, in order to establish appropriate areas of competence.<sup>40</sup> By adopting this approach the courts will understand what areas of administrative decision-making should not be questioned. In this manner a better understanding of the courts' role will be achievable.

### III COURTS' ROLE IN JUDICIAL REVIEW

#### A *Advantages of leaving merits review for administrative tribunals*

Brennan J has indicated reasons why the courts should resist engaging in merits review. Legitimate questions exist concerning the aptitude and competence of courts to re-examine factual investigations undertaken by primary decision-makers or merits review tribunals.<sup>41</sup> Also an extreme workload would be placed on the courts if they were faced with the task of reassessing the substance of administrative decisions.<sup>42</sup>

In *MIEA v Wu Shan Liang*,<sup>43</sup> Kirby J identifies the decision-maker's advantages in evaluating evidence such as directly hearing the evidence and submissions as well as having experience in the application of the relevant administrative rules.<sup>44</sup> In this regard, the adversarial process of judicial review may be inappropriate for the task of reassessing many administrative decisions. In *Attorney General v Quin*<sup>45</sup>, Brennan J also noted that '...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...'.<sup>46</sup> This is especially so in areas such as migration, where specialist tribunals exist allowing applicants to seek review on the merits. In such areas, judges do not have the same knowledge as the members of the tribunal, who have an in depth understanding of the specificities of that field. Therefore, courts are not in a position to make the policy decisions referred to by Brennan J.

#### B *Is there a breach of the separation of powers doctrine and the rule of law?*

As Bennett suggests, Brennan J's statement in *Quin*<sup>47</sup> 'serves to highlight the central importance of the separation of powers to the maintenance of the distinction between the legality and the merits of decision-making'.<sup>48</sup> The courts have a role within the tripartite allocation of powers, as do executive bodies. It is for the courts to rule on judicial matters and for tribunals in the executive to make the merits-based decisions. It is imperative for the proper function of government that courts refrain from intruding into areas committed to other branches of government.<sup>49</sup> As such there are strong

<sup>40</sup> Crock and Gibian, above n 11, 469.

<sup>41</sup> Ibid.

<sup>42</sup> M Aronson and B Dyer, *Judicial Review of Administrative Action* (1996) 261-262.

<sup>43</sup> (1996) 185 CLR 259.

<sup>44</sup> Ibid, 292.

<sup>45</sup> (1990) 170 CLR 1.

<sup>46</sup> Ibid, 37.

<sup>47</sup> Above n 1.

<sup>48</sup> D Bennett, 'Balancing judicial review and merits review' (2000) 53 *Administrative Review* 3, 5.

<sup>49</sup> E J Morzone, 'EARC Issues Paper No. 14 – A View against an Administrative Appeals Division of the Supreme Court or District Court of Queensland' (April 1992) *Queensland Law Society Journal* 143, 143.

constitutional arguments against allowing the judiciary to interfere with executive decision-making. Judges are neither popularly elected nor accountable to the electorate. The proper place for policy making in a democratic society is the representative institution elected by and responsible to the people.<sup>50</sup> For example, Hutchinson and Monahan have portrayed the rule of law, and judicial review processes in particular, as necessarily undemocratic, undermining movement towards participatory democracy ‘by moving political questions into a forum of specialist legal discourse’.<sup>51</sup> Alternatively they advance a weaker claim that while current western political structures allow for too little citizen participation, judicial review of legislative or executive decisions is intrinsically less democratic than other possible methods of accountability, such as political accountability.<sup>52</sup> On these grounds too, it would appear that judicial intervention of a merits-based decision is unacceptable.<sup>53</sup> The rationale here being that the fusion of the roles of the judiciary and the executive is contradictory to the rule of law.

### C *Appropriateness of allowing courts to conduct judicial review of a merits review body*

One may argue that it is necessary for judicial review to take place given the high stakes involved with many cases. For example, members of the RRT may develop expertise because of the specialist nature of the cases they hear. But there are also benefits in review by an independent judiciary whose expertise is more generalised.<sup>54</sup> Such specialised nature inherent in tribunals can often lead to the development of ‘institutional mindsets’ in tribunal members.<sup>55</sup> This is a natural response where individuals are presented with a series of cases that bear many similarities. For example refugee cases, with their regular references to torture and traumas can lead to ‘the denigration of experiences that may shock an outsider less inured to stories of pain and hardship’.<sup>56</sup> The generalist expertise and detachment of the court can be of importance in such matters. Similarly, Legomsky also points out that courts can play an important role in encouraging independence and integrity by forcing care in the adjudicative process.<sup>57</sup>

### D *The need for public confidence*

Conversely, these contentions can be countered with assertions that the interests of the community at large in the efficient operation of the administrative process are of equal importance.<sup>58</sup> Both the High Court<sup>59</sup> and the United States Supreme Court<sup>60</sup> have asserted that the legitimacy of judicial review depends in part on retaining the confidence of the public in judicial process, especially in relation to the judiciary’s

<sup>50</sup> Ibid.

<sup>51</sup> A Hutchinson and P Monahan, *The Rule of law: ideal or ideology* (1987).

<sup>52</sup> Ibid.

<sup>53</sup> Cane, above n 20, 215.

<sup>54</sup> Crock and Gibian, above n 11, 471.

<sup>55</sup> S Legomsky, ‘Political Asylum and the Theory of Judicial Review’ (1989) 73 *Minnesota Law Review* 1205, 1208.

<sup>56</sup> Crock and Gibian, above n 11, 471.

<sup>57</sup> Legomsky, above n 51, 1210.

<sup>58</sup> N Sidebotham, ‘Shaking the foundations: Dicey, fig leaves and judicial review’ (2000) 8(3) *Australian Journal of Administrative Law* 90, 91.

<sup>59</sup> *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104, 197 (McHugh J).

<sup>60</sup> *Planned Parenthood of Southeastern Pennsylvania v Casey* 505 US 833, 864-869 (1992).

independence and impartiality.<sup>61</sup> The best way a court can deal with such a situation is not to attempt to make a change to the substantive outcome of a case (Judicial review exercises little control over the substance of decisions, it is merely that bureaucrats and governments are very conscious of its presence).<sup>62</sup> Rather the court should return the case to the decision-maker for reconsideration.<sup>63</sup> Though if Australia is sincere about wishing to provide a fair mechanism of review, the courts must not shrink from their responsibility to examine thoroughly the determinations of tribunal officials. Especially in the refugee cases and those dealing with asylum seekers, where decisions can quite literally be matters of life or death. As Crock and Gibian note, 'For the unpopular and vulnerable refugee claimant, the safeguards provided by an independent judiciary have never been more important'.<sup>64</sup>

#### IV CONCLUSION

Can a court intervene if it does not approve with the decision of a administrative tribunal merely because it disagrees with the outcome? Traditionally, and according to the separation of powers doctrine, courts may only make rulings on errors of law. As Brennan J notes 'there is no error of law simply in making a wrong finding of fact'.<sup>65</sup> In essence, the 'legality-merits distinction' is designed to stop the courts from 'standing in the shoes' of the primary decision-maker, as a merits review body does.<sup>66</sup> Whilst the principles of human rights may appear to take a regressive step throughout the review process this can surely be only seen as a result of the tribunal process which is currently in place.<sup>67</sup> However, though this may be at the heart of the cases involving refugees, the real issue to be discussed here is the role of the courts in judicial review. Clearly there is a curtailment of the recent trend of the Federal Court to involve itself, under the pretence of judicial review, in the merits-based review process. Rather, it appears from the authorities that this power is, or should be vested solely in the hands of the administrator. The author holds the same view.

What is required is the development of an approach that makes clear to the courts the boundaries of their decision-making powers. A more in depth understanding by the courts of the role of administrative tribunals and the advantages in leaving fact-based decisions to such tribunals is the key to solving this problem. By making the distinction more clear to judges and emphasising the importance of strict compliance, the courts are less likely to cross the borders of the separation of powers, and Australia's tripartite system of government will function more effectively.

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<sup>61</sup> J Kirk, 'Rights, Review and Reasons for Restraint' (2001) 23(1) *Sydney Law Review* 19, 30.

<sup>62</sup> D Feldman, 'Democracy, the rule of law & judicial review' (1990) *Federal Law Review* 19, 19.

<sup>63</sup> Caldwell, above n 13, 346.

<sup>64</sup> Crock and Gibian, above n 11, 472.

<sup>65</sup> *Waterford v Commonwealth* (1987) 163 CLR 54, 77.

<sup>66</sup> D J Galligan, *Discretionary Powers: A legal Study of Official Discretion* (1986) 143.

<sup>67</sup> P De Losa, above n 27, 112.