



# *The state of play in administrative law 2008*

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## Administrative review of decisions made in excess of jurisdiction: the *Brian Lawlor* principle revisited

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## ADMINISTRATIVE REVIEW OF DECISIONS MADE IN EXCESS OF JURISDICTION: THE *BRIAN LAWLOR* PRINCIPLE REVISITED

### 1. INTRODUCTION

Administrative law is concerned with the control of administrative power and, at least in large part, deals with the processes by which administrative decisions may be challenged or reviewed by a person or persons affected by such decisions.

Our system of administrative law provides for a number of different mechanisms that may be available to review administrative action. Two key aspects of our federal administrative law system are administrative review and judicial review of decisions made pursuant to Commonwealth legislation.

This paper examines one particular aspect of interaction between judicial and merits review processes, and the manner in which these mechanisms of review may impact on one another.

### 2. MERITS REVIEW OR JUDICIAL REVIEW?

- Administrative review (merits review) is the process whereby an administrative decision of the government is reviewed ‘on the merits’; that is the facts, law and policy aspects of the original decision are all reconsidered afresh and a new decision, affirming, varying or setting aside the original decision, is made. Depending on the particular legislation under which a decision is made, decisions may be able to be reviewed internally (usually by a more senior officer) and/or externally (by an independent review tribunal). Merits review involves the capacity to ‘step into the shoes’ of the original decision maker and remake the decision according to the merits of the individual case.
- Judicial review is review by a court of whether or not a decision has been made according to law and legal principles. Courts undertaking judicial review can find a government decision to be unlawful but they cannot ordinarily remake that decision according to their view of the merits of the case.

Whilst these mechanisms of review largely operate independently of each other, the separation is not complete, if only because ‘merits review decisions’ are themselves ordinarily subject to judicial review, as well as the supervisory jurisdiction of courts under specific legislative provisions, such as s.44 of the *Administrative Appeals Tribunal Act 1975*, which provides for ‘appeals’ on a question of law from the Administrative Appeals Tribunal (the Tribunal) to the Federal Court.

Decisions made under Commonwealth legislation are often potentially subject both to merits review and judicial review.

A person aggrieved by a decision usually has a greater prospect of achieving a desired outcome by seeking merits review of the decision, as the person or body conducting the review can re-exercise all of the powers of the original decision-

maker, can make its own findings on the relevant facts, and can substitute what it considers to be the correct and preferable decision for the decision under review. In judicial review proceedings, even if successful, the relief that can ordinarily be obtained by an applicant will be limited to the quashing or setting aside of the decision under review, with the matter being remitted for re-consideration to the original decision-maker, who will often take a view of the facts consistent with the original decision, even if that decision has now been set aside for legal error.

Another potential advantage of merits review over judicial review is that, ordinarily, the jurisdiction exercised by merits review tribunals is a 'no costs' jurisdiction.

Clearly, there is a public interest in decisions being reviewed by the most effective mechanism of review available. Not surprisingly, the approach of both the legislature and the judiciary reflect a preference for directing persons towards effective avenues of review. As an example, under s.10(2)(b)(ii) of the *Administrative Decisions (Judicial Review) Act 1977* a court in the exercise of its discretion may refuse to grant an application where adequate provision is made by a tribunal or another court for the review of the decision (or conduct). Similarly, a court at its discretion may refuse to grant relief under s.39B of the *Judiciary Act 1903* where a more convenient and satisfactory remedy is available.<sup>1</sup>

Questions may arise in particular circumstances as to whether merits review is available in relation to decisions made in excess of jurisdiction, and whether such review can be said to offer an 'adequate alternative remedy'. The 'Brian Lawlor principle' is concerned with these issues.

### 3. THE BRIAN LAWLOR CASE

#### The AAT decision

These proceedings concerned a purported decision by the Collector of Customs, as a delegate of the Minister for the purposes of s.78 of the Customs Act 1901, to revoke a warehouse licence granted to the applicant.<sup>2</sup>

Section 78 of the *Customs Act 1901* at the relevant time provided that:

78. Dutiable goods may be warehoused in warehouses licensed by the Minister.

The applicant sought review of the purported decision by the Administrative Appeals Tribunal, then a fairly new body having been established less than three years earlier. The Tribunal was constituted by its then President, Brennan J.

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<sup>1</sup> *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Ozone Theatres (Aust) Ltd* (1949) 78 CLR 389 at 400; *Re Du Pont (Australia) Limited and Anor. v Comptroller-General of Customs and Ors.* (1993) 30 ALD 829 at 832 and *Wyeth Australia Pty Ltd v Minister for Health and Aged Care* (2000) 61 ALD 372 at 384-5.

<sup>2</sup> *Re Brian Lawlor Automotive Pty Ltd and Collector of Customs (NSW)* (1978) 1 ALD 167.

Two preliminary issues were argued before the Tribunal. First, whether the Collector had power to revoke the licence. Secondly, if the Collector had no power to do so, whether the Tribunal could review the decision of the Collector in purported exercise of such a power.

On the first point, it was conceded by the respondent that there was no express power given in the Customs Act to revoke a warehouse licence. It was argued, however, that s.78 of that Act, when read with s.33(3) of the *Acts Interpretation Act 1901*, empowered the Collector so to act. That section provides as follows:

Where an Act confers a power to make, grant or issue any instrument (including rules, regulations or by-laws) the power shall, unless the contrary intention appears, be construed as including a power exercisable in the like manner and subject to the like conditions (if any) to repeal, rescind, revoke, amend, or vary any such instrument.

It was claimed that the licence was an 'instrument' within the meaning of this section. Alternatively, it was argued that the power to grant a licence carried with it an implied power to revoke such a licence.

In respect of the first issue, the President held that the power of the Minister under s.78 of the Customs Act to grant a licence is not a power to grant or issue an instrument within the meaning of s.33(3) of the Acts Interpretation Act. Nor was it held to be part of Australian law that a power to grant a licence carries with it a power of revocation of that licence. Accordingly, Brennan J concluded that the Collector of Customs had no power to revoke the applicant's licence.

Having reached this conclusion, his Honour went on to consider whether the Tribunal had jurisdiction to review the decision and to make any order in relation to the decision.

It was submitted on behalf of the Collector that the Tribunal's finding in regard to the Collector's action meant that his decision was a nullity. It was therefore not a 'decision' for the purposes of the AAT Act, and no order could be made under that Act in relation to it.

Rejecting this argument, Brennan J held that, where a decision is made beyond power, the legal effect which the decision-maker seeks to achieve is denied; but that says nothing as to whether the decision may be reviewed, quashed, or otherwise affected by order of a court or of an appeal tribunal. The denial of the legal effect desired does not itself prevent the decision from having the effect of enlivening a jurisdiction conferred by law upon a court or appeal tribunal to review, quash or otherwise affect the decision. The right to invoke the jurisdiction depends upon the terms of the law creating that right and conferring jurisdiction to grant relief against the decision in question. Where 'decision' is used in the provisions of the AAT Act relating to a right to apply for review, it is referring to a decision made in fact, and

not to the effect which the decision may have under the power in the 'intended' exercise of which it was made.

His Honour expressed the view that it is manifestly inconvenient to deny a person affected by a decision which is found to be defective on a ground that would enable it to be challenged in a court of law, the right to seek review of that decision before the Tribunal; and held that this manifest inconvenience confirms the Tribunal's jurisdiction to deal with such cases. The power of the Tribunal under s.43 of the AAT Act includes the power to set aside a decision and to make a decision in substitution for the decision to set aside. As the Collector could, in this case, have decided to take no action to revoke the applicant's licence, it was within the Tribunal's power to set aside his decision and determine that no further action be taken in regard to the licence.

### **The judgment on appeal**

The decision of Brennan J was appealed to the Federal Court but, by majority, the appeal was dismissed (Bowen CJ and Smithers J; Deane J dissenting).<sup>3</sup>

The majority, whilst generally agreeing with the approach of Brennan J, preferred to refer to the Tribunal's jurisdiction having arisen where a decision was made in the 'purported' (as opposed to 'intended') exercise of powers conferred by an enactment.

Deane J would have allowed the appeal, in substance holding that the Tribunal did not have jurisdiction to deal with applications which seek what in substance is the exercise of judicial power. His Honour stated:<sup>4</sup>

An administrative tribunal will ordinarily have no authority to transcend the limits of the jurisdiction conferred upon it by hearing an application aimed not at invoking the jurisdiction which it possesses, but at securing an authoritative determination of questions of fact or law anterior to the existence of that jurisdiction. The provisions of the Act do not purport to confer any such authority upon the Administrative Appeals Tribunal. If they did, a serious question would arise as to whether, to that extent, they purported to confer part of the judicial power of the Commonwealth upon an administrative body which was not a court for the purposes of Ch. III of the Constitution.

### **The principle**

The principle for which the *Brian Lawlor* case stands for can be summarised by reference to the judgment of Bowen CJ,<sup>5</sup> who held that an administrative tribunal has jurisdiction provided 'there is a decision in fact and provided further that the decision purports to have been made in exercise of powers conferred by an enactment whether or not as a matter of law it was validly made and whether or not

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<sup>3</sup> *Collector of Customs (NSW) v Brian Lawlor Automotive Pty Ltd* (1979) 24 ALR 307.

<sup>4</sup> *Ibid.* at 343-4.

<sup>5</sup> *Ibid.* at 317.

as a matter of law it was validly made and whether or not action on the basis there was power to make the decision was right or wrong’.

#### 4. SUBSEQUENT AUTHORITIES

The principle was reaffirmed, and to some extent extended, by Full Courts of the Federal Court in *Hospital Benefit Fund (WA) Inc v Minister for Health, Housing and Community Services*<sup>6</sup> and *Secretary, Department of Social Security v Alvaro*.<sup>7</sup>

In the latter case, von Doussa J stated as follows:

In the hierarchy of reviews from original decision-maker to the AAT it was not necessary that there be at the outset an original decision that was in all respects validly made, and at each level of review thereafter another decision that was in all respects validly made. The person or tribunal to whom application for each of the reviews was made had jurisdiction to undertake that review so long as the preceding decision-maker had made what purported to be a decision in exercise of powers conferred by the Act affecting the interests of the person seeking review. It mattered not whether the ground of complaint made about the preceding decision was merely that it is wrong on the merits, or that in law it was not an effective decision because it was made by someone without authority, or in excess of authority, or for improper purposes, or was vitiated through procedural irregularity such as a failure to accord natural justice.

The purpose of a review provided for by the Act is to allow the reviewing authority to correct error and substitute a new decision where error is detected.

The Brian Lawlor principle has been applied by the Tribunal, as well as other merits review tribunals, on numerous occasions and in a variety of circumstances.

#### 5. CURING LEGAL ERROR

Ordinarily a merits review tribunal, standing in the shoes of the decision-maker when reviewing a decision, can make a new decision on the merits of the case and in so doing can ‘cure’ an error which, in the context of a judicial review application, would warrant the primary decision being quashed or declared a nullity.

Obvious examples of errors which may be corrected on merits review include:

- breaches of common law procedural fairness obligations;
- breaches of procedural obligations imposed by statute;
- the taking into account irrelevant considerations;
- the failure to take into account relevant considerations; and
- various types of errors of law, including asking the wrong question or identifying a wrong issue, etc.

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<sup>6</sup> (1992) 111 ALR 1.

<sup>7</sup> (1994) 50 FCR 213.

There is an exception, however, to the general rule, which is best demonstrated by the *Brian Lawlor* case itself.

As the tribunal reviewing a decision on the merits exercises the same powers as the original decision-maker, its jurisdiction and powers cannot exceed those of the original decision-maker. Where the original decision-maker acted in the absence of jurisdiction, as opposed to breaching conditions imposed on the valid exercise of jurisdiction, the review tribunal's powers are also limited by that absence of jurisdiction to make a substantive decision.

Like the Tribunal in the *Brian Lawlor* case, it can set aside the purported decision of the original decision-maker, but it cannot go on to consider and decide whether the warehouse licence should be cancelled on the merits.

## 6. NATURE OF JURISDICTION TO BE EXERCISED ON REVIEW

The nature of the jurisdiction and powers available to a tribunal on review is not always without controversy. As in the *Brian Lawlor* case, issues may arise in the context of specific statutory provisions regarding the existence of powers to make certain decisions. One can also readily envisage circumstances where an issue may arise as to whether a power that was available at one time has now been spent (such as powers that are open to be exercised for limited periods only or where a decision has already been made and the primary decision-maker purported to re-exercise that power).

As has been demonstrated by a number of decisions in more recent times in the migration law area, however, the real difficulty in applying the Brian Lawlor principle may be in determining whether particular requirements imposed by statute are to be regarded as:

- requirements for the jurisdiction to be enlivened; or
- conditions imposed on the valid exercise of the jurisdiction conferred under the statute.

### Invalid visa application cases

Some of the migration cases I advert to arose in unusual circumstances, principally because of certain provisions in the *Migration Act 1958* aimed at preventing non-citizens from lodging multiple applications for visas whilst remaining in Australia.<sup>8</sup>

More specifically, some of the cases that raise difficult issues in the application of Brian Lawlor principle arose in circumstances where persons having lodged unsuccessful visa applications and having unsuccessfully challenged the primary decisions before a review tribunal on the merits, assert in subsequent legal proceedings that their original application for a visa was not valid, because the form

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<sup>8</sup> *Migration Act 1958* ss.48 and 48A.

on which the application was made was not filled out properly; i.e. some mandatory questions on the form were not properly completed.

In a series of judgments dealing with such circumstances, the Federal Court of Australia held that:

- in circumstances where a visa application was required to be made on an approved form; the approved form required that information be provided by applicants in response to certain questions on the form; and that requirement was not sufficiently complied with, the application for a visa remained inchoate and any decision by a delegate in respect of that application in that form was a nullity;
- the application could be made choate by provision to the Department of the relevant information sought, and if a decision was made by the delegate after the information was received, subject to any other error of law, the delegate's decision was lawful;
- the application could also be made choate by provision of the relevant information after the decision of the delegate;<sup>9</sup>
- however, providing the information to the review tribunal only did not 'cure' the original invalidity of the application for a visa as the application was required to be made 'at an office of immigration'.<sup>10</sup>

Whilst on one view it is difficult to reconcile some of these judgments with each other, the Full Court of the Federal Court in the recent case of *SZGME v Minister for Immigration and Citizenship*,<sup>11</sup> by majority, upheld the distinction drawn by the earlier Full Court judgment in *Li* between circumstances where the 'missing' information was provided to the review tribunal only, and where the information was provided both to the tribunal and the Department.

In so doing, the Full Court confirmed that the merits review process operates, subject to statute to the contrary, on valid and invalid decisions alike. A defect in a decision under review does not prevent a review body exercising powers and discretions of the person who made the decision. The majority held, however, that if an application for a visa is relevantly incomplete, it is invalid; and such invalidity not only renders the decision under review invalid, but the absence of a valid visa application also means that the tribunal does not have authority to review the invalid decision on the merits. The judgment also confirmed that the tribunal does have authority to review the invalid primary decision on the merits if the defect in the visa application is corrected before the tribunal makes its decision, by providing the necessary information to the Department.

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<sup>9</sup> *Yilmaz v Minister for Immigration and Multicultural Affairs* (2000) 100 FCR 495.

<sup>10</sup> *Minister for Immigration and Multicultural Affairs v Li* (2000) 103 FCR 486.

<sup>11</sup> (2008) FCR 487.

This line of authority appears to take a fairly strict approach to the question of how an inchoate application can be made choate; especially when compared with the approach adopted by the courts to the ability of administrative review proceedings to cure other procedural defects.<sup>12</sup>

### **Invalid visa cancellation cases**

A case in point is another line of authority from the Federal Court of Australia, which deals with decisions to cancel visas in circumstances where the delegate's power to cancel the visa can be validly exercised only once proper notice of the intention to cancel has been given, but mandatory procedures relating to the giving of such notice were not followed.

The Full Court of the Federal Court of Australia held in a number of matters which arose in similar circumstances<sup>13</sup> that, whilst the delegate's decision was clearly affected by jurisdictional error, the decision was still reviewable on the merits by the review tribunal, and that such a review cured the defect in the decision of the delegate. In reaching this conclusion, the Court held that the procedural defect in the process of decision-making at the primary level did not, as a matter of construction, affect the 'jurisdiction' or power of the tribunal to review the delegate's decision.

### **Discussion**

Arguably, the distinction between these lines of authorities is rather subtle. It can be readily accepted that, where there is an underlying absence of power to make a decision, a review tribunal cannot, by reason only of a purported decision having been made by a person, acquire jurisdiction that is simply not there. As was noted earlier, the *Brian Lawlor* matter is a good example of such a case.

On the other hand, whilst it is clear that in the absence of an application (meaning valid application) for a visa there is no room for the exercise of any power to make a relevant decision, there appears to be little justification for taking the view that the requirement for a visa application to be lodged at an 'office of immigration' cannot be substantially satisfied by the lodgement of an inchoate application at such an office, or by provision of the information which would complete the application to the review tribunal or review authority, especially where it is otherwise accepted that the

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<sup>12</sup> It is noted that one would expect that a person who sought review on the merits of a decision to refuse a visa application may be denied relief in judicial review proceedings as an exercise of discretionary power, even if able to establish relevant error in the decision, on the basis that his/her previous conduct is inconsistent with the relief sought. This may not be a satisfactory answer in the circumstances, however, where, irrespective of any order of the Court, a duty is created under legislation to consider valid applications for a visa.

<sup>13</sup> *Zubair v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 139 FCR 344; *Minister for Immigration and Multicultural and Indigenous Affairs v Ahmed* (2005) 143 FCR 314; *Uddin v Zubair v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 149 FCR 1.

application can be made complete by the provision of information at a later date, and even after the delegate has made his/her decision.

This approach appears to be contrary to general thrust of the Brian Lawlor principle, which serves to facilitate a practical approach to the mechanism provided in our system of administrative law for review of decisions on the merits.

Indeed, the most significant benefit of the Brian Lawlor principle is that it provides a practical approach to the availability of different mechanisms of review, and removes the need in many instances for multiplicity of proceedings where the primary decision may have been affected by legal error, but what is ultimately sought to be achieved is a different decision on the merits.

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