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TAKING THE BRAKES OFF: APPLYING PROCEDURAL FAIRNESS TO ADMINISTRATIVE INVESTIGATIONS

*Daniel Stewart**

This paper was awarded the 1997 AIAL Essay Prize in Administrative Law.

> "The heart of the matter is that democracy implies respect for the elementary rights of men, however suspect or unworthy; a democratic government must therefore practise fairness; ... No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it. Nor has a better way been found for generating the feeling, so important to a popular government, that justice has been done."
>
> Frankfurter J in *Joint Anti-fascist Refugee Committee v. MacGrath* 341 US 123 at 129 (1950)
>
> All power is, in Madison's phrase, 'of an encroaching nature'... Judicial power is not immune against this human weakness. It also must be on guard against encroaching beyond its proper bounds, and not the less so since the only restraint upon it is self-restraint.
>
> Frankfurter J in *Trop v. Dulles* 356 US 86 at 119 (1958)

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Introduction

In 1963, in the case of *Testro Bros Pty Ltd v. Tait,*[1] a majority of the High Court held that there was no obligation on inspectors to accord a company under investigation for suspected insolvency the benefits of natural justice. In 1990, 27 years of evolution in the principles of natural justice, or procedural fairness as it is now often referred to,[2] led to the case of *Annetts v. McCann,*[3] where a majority of the High Court held that "[i]t is beyond argument that the view of the majority in [*Testro*] would not prevail today".

This evolution in procedural fairness has been associated with an increased judicial activism in protecting the interests of individuals. As a result, the question of whether natural justice applies has focused on the interference with those interests as a justification for judicial interference in the administrative process. In *Kioa v. Minister for Immigration and Ethnic Affairs,*[4] in what has been accepted as an authoritative statement of the law,[5] Mason J held that:

> [t]he law has now developed to a point where it may be accepted that there is a common law duty to act fairly, in the sense of according procedural fairness, in the making of administrative decisions which affect rights, interests and legitimate expectations, subject only to the clear manifestation of a contrary intention.[6]

As this statement illustrates, the obligation of procedural fairness derives from the common law, is subject to a clear manifestation to the contrary, and, most importantly, arises due to the effect of the

decision on an individual.[7] In this way, procedural fairness has been applied to protect individual rights and interests, including personal liberty, status, preservation of livelihood and reputation, proprietary rights and interests and legitimate expectations.[8]

The expansion of the notion of procedural fairness and the range of interests affected can be illustrated by the introduction and exponential development of the notion of legitimate expectations.[9] In *Attorney-General (NSW) v. Quin*[10] Mason CJ held;

> [a] legitimate expectation may be created by the giving of assurances ... the existence of a regular practice ... the consequences of denial of the benefit to which the expectation relates ... or the satisfaction of statutory criteria. ... [It] may consist of an expectation of a procedural right, advantage or opportunity.[11]

The inclusion of legitimate expectations has meant that there is no need for there to be an effect on an existing legally enforceable right, interest, privilege or benefit.[12] Legitimate, in this context, refers only to the need for "positive grounds which are sufficient to render it objectively justifiable"[13] and indeed may be little more than a requirement that the expectation be reasonable.[14] There is no need for the expectation to be held by the individual in their private capacity but rather may be one accruing to the public or class of people in general or based on some official or legitimate action.[15]

However, the obligation of procedural fairness "does not give substantive protection to any right, benefit or privilege that is the subject of the expectation".[16] It is not based on an expectation that procedural fairness should have been complied with.[17] The legitimate expectation derives from a circumstance "which suggests that, in the absence of some special or unusual circumstance, the person will obtain or continue to enjoy a benefit or privilege".[18] In *Breen v. Amalgamated Engineering Union*[19] it was suggested by Lord Denning that a legitimate expectation arose due to a belief that the applicant would benefit unless "there were good reasons against him". Therefore, the concept of legitimate expectations emphasises that the obligation to accord procedural fairness derives from the circumstances in which that right or interest is being denied and not the nature of the right or interest expected. However, it does not suggest the type of bodies on which the obligations may be placed nor the basis on which the obligation is imposed. A legitimate expectation merely describes the circumstances in which procedural fairness has been applied. It cannot be used as the basis on which to impose the obligations of procedural fairness.

The expansion in the range of interests protected by procedural fairness led Mason J to suggest that "[t]he critical question in most cases is not whether the principles of natural justice apply. It is: what does the duty to act fairly require in the circumstances of the particular case?"[20] McHugh J in *Minister for Immigration and Ethnic Affairs v. Teoh*[21] has built on this to suggest that the rational development of this area requires procedural fairness to be applicable to all "administrative and similar decisions made by public tribunals and officials".[22] Similarly, Deane J has stated:

> the law seems to me to be moving towards a conceptually more satisfying position where common law requirements of procedural fairness will, in the absence of clear contrary legislative intent, be recognised as applying generally to government executive decision-making.[23]

If these views are accepted, the nature of the interest affected would only be considered in determining the content or extent of the obligation.

However, these broad propositions about the application of judicial review and procedural fairness lack any integrated or

principled basis or justification. In many ways these recent views have merely come to reflect the position of earlier this century. In 1911, Lord Loreburn LC in *Board of Education v. Rice*[24] stated that the obligation of natural justice was a "duty lying upon everyone who decides anything".[25] This statement echoes those in *Wood v. Woad,*[26] where natural justice was "applicable to every tribunal or body of persons invested with authority to adjudicate upon matters involving civil consequences to individuals",[27] and in *Fisher v. Keane*[28] where natural justice was applied to "any other body of persons who decide upon the conduct of others".[29] Therefore, the question then as now is: in what circumstances will the brake of procedural fairness *not* be applied to administrative action?

This question arises in two areas: to what bodies or institutions, especially those outside the government or the executive, should the principles of procedural fairness be applied; and at what point in the administrative process should the obligations of procedural fairness arise. These two areas are not distinct. Both require consideration of the changing institutional structures of society, recognition of the influence of these structures and the interests they affect, and of the role of the courts in reacting to and developing this environment.

This paper is concerned with the second of these two areas in attempting to examine the boundaries of the application of procedural fairness. Chapter one considers the influence of the public / private dichotomy on administrative law. This dichotomy is responsible for the emphasis the court places on the individual in defining the ambit of judicial review. Illustrating the inefficacy of this dichotomy suggests that, as a basis at least for procedural fairness, this is inadequate. Chapter two examines an alternative basis for procedural fairness in the assessment of discretionary decisions, based on principles of rationality and participation. It will be argued that use of these principles demonstrates how procedural fairness can be used to enhance the operation of the bodies it is applied to as well as the interests of individuals. Chapter three examines how the emphasis on individuals has led to inconsistencies in the application of procedural fairness to administrative investigations. It applies the theory developed in the previous chapters to consider how the question should be approached in future.

CHAPTER ONE

Judicial Review

Procedural fairness originated from the principle that no one shall be condemned unheard.[30] Today it has developed into perhaps four distinguishable components: a person should know the case against them and have a chance to respond; any hearing should be by an impartial adjudicator; any decision has to be based on logically probative evidence;[31] and the decision-maker has a duty to inquire into matters which are centrally relevant.[32] Procedural fairness forms one of the elements of administrative law whereby courts undertake judicial review of administrative agencies. Administrative law, in turn, constitutes one of the "general principles which govern the exercise of powers and duties by public authorities".[33]

The word 'public' in this context has been used primarily to refer to government-related administration. Many of the remedies available in administrative law are restricted to control of government duties and powers.[34] Procedural fairness is therefore seen as an aspect of 'public law', regulating the relations between individuals and the state.[35] However, procedural fairness has been used to invalidate decisions of purely domestic or non-government bodies,[36] and remedies of injunction and declarations traditionally applicable to disputes between individuals

in their private capacity have been incorporated into administrative law.[37] This raises the question of whether 'public' is in some sense delimiting or determinative, or whether it is merely descriptive of the areas in which judicial review is applicable.

This chapter examines the influence of the distinction between public and private on the development of a theoretical basis for judicial review in general and procedural fairness in particular. Implicit reliance on this distinction has led to emphasis by the courts on the effect on the individual. It will be argued, however, that this reliance should be reconsidered in the same way as the distinction has been blurred by changing social structures and recognition of alternative prescriptive foundations.

The rule of law

The scope of judicial review, especially in relation to procedural fairness, has expanded over the last half of this century.[38] This increase has been seen as a response to the diminution in legislative control over executive power[39] that has accompanied the growth of the welfare state and government regulation. As Galligan suggests:

> the State, in order to achieve a variety of social goals, has taken control of wider spheres of social and economic activity, so the legal framework has become increasingly characterised by the combination of broad statutory provisions and the vesting in officials of wide discretionary powers. ... [The] emphasis has moved from private rights, guaranteed by explicit legal norms and enforceable by legal institutions, to a system in which power is exercised by officials according to a wide sense of the public interest, which includes, but is much wider than the personal interests of individuals.[40]

In response, administrative law has fashioned increasing means of judicial redress for the individual, whilst trying to avoid "the exercise of legal control itself [becoming] discretionary, sectional and subjective in the same way as the institutions that it seeks to control".[41]

Judicial intervention has been justified through a normative view of the rule of law. This concept, popularised through the work of A V Dicey, involves the absolute supremacy of, and the equal subjection of all classes to, the ordinary law of the land as administered by the ordinary law courts.[42] As a result of this ordinary law, the constitution governing the relations between individual and state is not the source but the consequence of the rights of individuals, as defined and enforced by the courts.[43] In this way, Dicey argued that the social, political or economic status of an individual was by itself no answer to legal proceedings,[44] and hence there was no need for anything similar to the then continental conception of 'administrative law'. Public power beyond that of ordinary law was legitimated through parliament, the courts merely supplementing ministerial authority to give effect to parliamentary intent.[45] This is still the foundation of review based on the principles of *ultra vires*, the courts ensuring that "a public ... body that has been granted powers, whether by statute, order in council, or some other instrument, must not exceed the powers so granted".[46] In this way:

> [m]uch of the doctrinal complexity which besets nineteenth and twentieth century administrative law can indeed be explained as the result of the tensions between the policing [of the boundaries of legislative intent] and adherence to a strict requirement of a private right as a pre-condition of natural justice, standing or substantive review.[47]

However, the expansion in the social and economic role undertaken by the state and the increase in broad grants of discretionary power that accompanied it inevitably led to criticism of this basis for judicial intervention.[48] As Craig suggests:

> [t]he idea that there is an interest in securing the efficacious discharge of regulatory legislation was no part of this model, except in so far as it was viewed

> as a natural correlative of the proper maintenance of external judicial supervision delimiting the boundaries of the legislative will.[49]

The courts also reacted to a perceived ineffectiveness of ministerial control of the executive[50] by placing emphasis on the prevention of arbitrary or oppressive uses of discretionary power in order to protect the rights and interests of individuals.[51] The intervention of the courts came to be based on, and seen by them as necessary to protect, the rights and interests of individuals. The 'rule of law' had become a means by which the courts could subject the government to compliance with judicial authority so as to limit the exercise of public power to protect the interests of individuals.[52] Judicial review was seen as a method of independent adjudication of a citizen's rights and "one of the checks and balances indispensable to our democratic constitutional structure."[53] The application of procedural fairness as "a duty upon anyone who decides anything"[54] was implicitly based upon, and hence restricted to, prevention of interference with individual interests.

Public v. Private

The rule of law, as a justification for review by a non-elected judiciary, has been criticised as undemocratic. Even if democracy is redefined to mean that no one person or body should have absolute power in a society,[55] the rule of law has allowed judges to take it upon themselves to demarcate the 'public' from the 'private' sphere to determine what is subject to judicial review. It can be argued that this demarcation has given rise to much of the rhetoric behind protection of the individual against the state.[56] Placing priority on the private rights of individuals has led "towards increasing judicial supervision of public bodies in order to protect the free exercise of personal liberties by those affected by the public power".[57] Restrictions upon the autonomous rights of individuals must then be justified in some way. Public bodies, it is argued, carry with them the inherent capacity to restrict this autonomy and hence must act only when authorised.[58] The balance between private power and the public interest is then achieved through the interaction of liabilities and intervention,[59] between so-called private and public law.

However, this demarcation has also been used in the application of the principles of judicial review to areas outside government. Procedural fairness has been applied to expulsion from a privately owned racecourse due to the public nature of the activities being conducted,[60] and to the conduct of sporting associations which promote public interests.[61] The courts have not, however, extended procedural fairness to the exercise of private rights in respect of property by such bodies [62] or to review of decisions made under contracts validly entered into by government and statutory bodies.[63] In these cases, characterisation as public has therefore depended on the nature of the relationship between the parties and the activities being pursued, rather than on the nature of the parties themselves.[64] Where the relationship between the parties has effects beyond the parties themselves the courts have intervened to preserve the autonomous private sphere of the individuals concerned.

Even in the context of government action, however, the growth in bureaucratic structures and diffusion of decision and policy-making power has led to the distinction between public and private becoming increasingly blurred.[65] Conceptions of the public interest have been reassessed through theories of interest-group pluralism - competition amongst interest groups - and the capture of self-interested bureaucratic officials.[66] Accompanying this has been the "widespread perception that so called private institutions were acquiring coercive power that had formerly been reserved to government".[67] The traditional private-law sense of individual rights has also been

challenged through the distribution of government funds in the form of welfare payments, government contracts, and licences which have come to be regarded as the 'New Property'.[68] These have all influenced the development of administrative law through recognition of the diversity of interests that are now at stake. As Galligan suggests, the courts:

> seem to be coming to realise ... that much administrative decision-making is not of the State v. Individual kind, but is a process for deciding upon courses of action of a continuing and positive nature, which may affect many interests, community, group or individual.[69]

The question then becomes whether administrative law is to remain principally concerned with the protection of the individual against state power or should attempt to ensure the proper representation of interests in the administrative process.[70]

In criticising the public/private dichotomy and the role it plays in administrative law, commentators such as Sampford and Airo-Farulla point out the similarities between public and private institutions in terms of their functions and effects. They suggest that any distinction serves only as a formalistic criterion, obscuring the need for appropriate processes applicable to all institutional structures. As Sampford suggests:

> Anglophone legal theory does not take non-state institutions seriously. It does not address the existence of bureaucratic power of managers and the abuses to which it can give rise. It does not address the purposes for which the institutions are supposed to exist and how they might be structured to fulfil them. Above all it does not address the key questions about how institutions might be best structured to achieve their purpose.[71]

This position recognises that institutions are not merely an encroachment upon an individual's autonomy or a "symptom of despotic power"[72] but serve to benefit both community and individual interests. Using public law as a limitation only upon state power serves to perpetuate the view of government as intrusive in nature whilst ignoring the influence of non-government institutions. Ignoring the positive functions of all such institutions "is like saying that the essence of a motor car is its brakes".[73] Therefore, if administrative law is to move away from the public/private divide it has to recognise that "the point is to have institutions that are capable of achieving certain ends and to give them the power to achieve those ends".[74] It is the interaction between the interests of these institutions, in terms of their provisions of a benefit going beyond that of an individual and the interests of individuals themselves, which should be the basis of public law.

Dangerous supplements

The recognition of the legitimacy and benefit of state power forms the basis of what Loughlin terms a 'functionalist' style of public law.[75] Proponents of this style "view law as part of the apparatus of government" and hence focus "upon law's regulatory and facilitative functions".[76] The rights of individuals are viewed as emanating from the state and liberty is seen in the positive sense as the capacity or ability to do or enjoy something.[77] This is distinguished from the ideology inherent in the rule of law as described above, or what Loughlin terms a Normativist style. This views individuals as prior to and separate from the state and hence liberty as the absence of external constraint, created and preserved through the rule of law.[78]

These idealised views reflect the inadequacies in drawing *a* distinction between public and private. To borrow the terminology of Derrida,[79] conceptions of public and private are *dangerous supplements* to each other, each dependent on yet threatened by the other. Private refers to the sphere of the self, but we can define ourselves only through

relationships with the world in which we live. Humans are social beings who cannot be abstracted from a particular social and historical context.[80] Public is usually associated with ideas of impersonality, of commonness, and the perspective of universality rather than particularity. But any reference to what we share collectively must take account of the individual components that make up the collectivity and must acknowledge the private interests.[81] Therefore, any dichotomy between public and private cannot be successfully delineated. As the functions and operations of the various institutional structures prevalent in society take on divergent and overlapping roles, any distinction becomes increasingly blurred. Any justification of judicial intervention based on a public / private dichotomy is open to criticism.

Conclusion

Sir Gerard Brennan has suggested that:

> [t]he political legitimacy of judicial review depends ... on the assignment to the Courts of that function by the general consent of the community. The efficacy of judicial review depends ... on the confidence of the general community in the way in which the Courts perform the function assigned to them. Judicial review has no support other than public confidence.[82]

However, such a statement is meaningless in any single instance without some ground on which to base, maintain or ascertain that confidence. Even if one accepts a Dworkinian approach[83] which minimises the emphasis on judicial discretion through the application of some coherent and integrated set of principles, the question becomes: on what principles is that application to be made? The Normativist philosophy suggests that judicial review is a means to protect individual autonomy from arbitrary or oppressive exercises of discretionary power but, as outlined above, this has led to reliance on dichotomies of public and private interests. Such a dichotomy can no longer serve as a valid justification. As Oliver concludes, any common law basis for judicial review should facilitate:

> a general theory about the exercise of power: the doctrine[s of judicial review] may apply to power whatever its source, if it affects vital private interests, or is in the 'public domain', whether in public or private hands.[84]

This general theory has to recognise the institutional structure of contemporary society. Judicial intervention should be based on the interaction between the interests of these institutions in terms of their provision of a public benefit and the interests of individuals. Development of the principles upon which to base judicial intervention would then begin with an examination of the function and operation of the various institutional structures in which the bodies under question operate.

CHAPTER TWO

Procedural fairness

Chapter one argued that judicial review cannot be justified purely on the basis of the public nature of the body concerned. Administrative law should go beyond placing a brake on public authorities and recognise the institutional structures in which it operates and of which is part. In this way a body of law governing the nature of the decision-making function and the influence and exercise of power can be developed. This chapter considers the application of procedural fairness in the context of these conclusions. It will look at the exercise of discretionary power and the basis on which it attracts the obligation of procedural fairness. A theory of the application of procedural fairness will then be developed through notions of rationality and participation, which can be used to preserve, without explicit discovery, the institutional structures in which it operates whilst recognising the influence of such structures on the individuals affected.

The nature of discretionary power

In *R v. Electricity Commissioners; Ex parte London Electricity Joint Committee Co. (1920) Ltd,*[85] Aitkin J stated:

> [w]herever any body of persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially, act in excess of their legal authority, they are subject to the controlling jurisdiction of the [superior courts].[86]

A similar classification of the nature of the decision-making body can be seen in the way the courts imposed the requirements of natural justice on the basis of a duty to act judicially.[87] However judicial, and later quasi-judicial,[88] in this context[89] effectively referred to "an act done by competent authority, upon consideration of facts and circumstances, imposing liability and affecting the rights of others".[90] The distinction was eventually seen as creating arbitrary limits upon the application of natural justice,[91] and it "is now clear that the obligation to observe the principles of natural justice attaches whether the authority is judicial or administrative."[92]

Subjecting a body to review on the basis of it "having the duty to act judicially" can be criticised in the same way as subjecting a body to review based on its public nature. Relying on the nature or classification of a body ignores its functions and undermines any means to ascertain the legitimacy or otherwise of any exercise of power. As Sir Anthony Mason has suggested, "[t]he availability of judicial review may ultimately depend, not so much on the character of the decision-maker, as on the nature and subject matter of the decision that is made."[93] It is the exercise of discretionary power that attracts judicial review through the application of procedural fairness; the nature of the body is relevant only in determining the extent or content of that application.

Discretionary power is used here to describe a capacity or authority, beyond that possessed by an individual,[94] to adjudicate upon matters involving consequences for individuals.[95] As Kitto J in *Testro Bros. Proprietary Limited v. Tait,*[96] after referring to the decision in *Ridge v. Baldwin,* stated;

> [o]f course it is not every statutory power to do an act to the prejudice of another which [gives rise to the obligation of procedural fairness]. ... The reason is that there is no duty to decide anything upon inquiry. It is the *duty of antecedent decision upon some question* that makes the analogy of judicial powers at once appropriate and compelling.[97]

He then concludes that it is the authority to make an inquiry and a judgement or conclusion as a result of that inquiry, a "power to determine and decide",[98] that implies the requirement of procedural fairness.[99] The source of this power, whether prerogative, statutory or contractual, public or private, is not critical. Through exercising the power to affect the interests of others a decision-maker is concerned with applying or considering those interests in some way. To be reviewable the decision or exercise of power under question must have been made at the discretion of the decision-maker in the exercise of some capacity or entitlement to determine the interests of others. To constitute an exercise of discretionary power the act must be definitive[100] or *determinative* of the question being considered.[101]

The exercise of this power is not of itself illegitimate. As argued in chapter one, discretionary power can be seen as an element of the functioning of institutions which seek to enhance a positive conception of the liberty of individuals. Exercising such power in a way that affects an individual does not constitute an encroachment upon the autonomy of individuals in a way inevitably arbitrary or oppressive. However, the capacity or entitlement to affect others carries with it the potential for abuse. Procedural

fairness is an attempt to ensure the accountability of the exercise of discretionary power to prevent this potential.

Sampford suggests that there are four bases on which the exercise of discretionary power can be legitimated - democracy, the market, protection of human rights,[102] and what may be termed altruism.[103] However, questions relating to the market or altruism in its various forms, which may in some way validate any substantive outcome, or the institutional structures giving rise to that outcome, are unlikely to be acceptably determined in a court of law. As Sir Gerard Brennan suggests:

> judicial decision-making is a syllogistic process, involving major and minor premises of law and fact. Application of policy is different, calling for balancing of interests of the individual and the community at large, a process for which the adversary system is ill-equipped.[104]

The limitations of this adversarial process reflect the motivation for the delegation of discretionary decision-making to a body capable of considering and balancing various and often largely undefined interests. Judicial intervention has to recognise its relative unsuitability to take over this function. It is almost axiomatic that judicial review is concerned "not with the decision but with the decision-making process" and unless the court observes that restriction on its power it will "under the guise of preventing abuse of power, be guilty itself of usurping power".[105] Therefore, any limitations imposed by the courts on discretionary decision-makers has to be separated from the ultimate function of that body so as to prevent the undermining of that function. These limitations on the arbitrary or abusive use of discretionary power should be consistent with considerations of democracy and the provision of human rights so as to utilise and complement the adversarial focus of the courts.

Rationality

Galligan responds to the suggestion that there are no fixed principles preventing the arbitrary selection of competing values in the exercise of discretionary power by asserting that "it is an assumption of modern jurisprudence and political theory that a condition of the legitimacy and justifiability of the exercise of any government power is that decisions be rational".[106] By this it is meant that "decisions are based on reasons which explain and justify any exercise of power in terms of some set of wider policies and purposes".[107] Any discretionary decision-making power is therefore limited by a requirement that it not be arbitrary, that there be some reasons for the decision outside the particular decision or decision-maker in question.

Rationality is only one justification on which to base any particular exercise of power. However, having some reasoned basis is inherent in the legitimation of interference with an individual's interests, where that legitimation derives from some justification going beyond the particular parties concerned. Notions of consistency, generality, continuity and proportionality may also be inherent in reasoned decision-making.[108] Having a justification removed from the subjective interests of the decision-maker is implicit in the suitability of review as opposed to the re-making of any decision. Rationality requires that the decision be made on a reasoned rather than personal basis - the obligation of impartiality - on logically probative evidence, and after inquiring into relevant matters.

Rationality in this context[109] also requires participation in the decision-making process in order to ensure that the exercise of discretion is not completely determined through a competition of sectoral interests or through the self interest of the decision-maker. In this way any decision can reflect the values and interests of the community in which the

decision is made. Galligan, in the context of the exercise of government policy, refers to participation as requiring that:

> the decision-maker have before him a full view of the public interests bearing upon the exercise of his power and that the citizen exercise his rights of citizenship in helping to shape the ends of power.[110]

This reasoning can just as easily be extended to the exercise of discretionary power generally. It is where a decision-maker is empowered to make decisions on the basis of the interests of others, that those affected should have some chance to participate in the decision-making process in order to ensure the rationality of that decision.[111] In this way, the concept of participation represents a recognition of the *bounded rationality* of decision-makers.[112] They cannot consider every consequence of their decision but in order to ensure that the consequences they are considering have some relevance, and are correctly founded, decision-makers should allow those people likely to be affected the opportunity to have some bearing on the decision. Procedural fairness should be required to ensure the accuracy of the reasons, and not the reasoning, involved in a decision.

Equality

Galligan tentatively suggests that ideas of equality are inherent in any form of rationality which requires that like cases be treated similarly.[113] He argues that differences in treatment between individuals should be based on reasoned considerations. If a decision is to single out an individual for differential treatment, then any reasoned justification would have to include considerations personal to that individual. However, equality is also implicit in the notions of democracy and human rights that Sampford employs.[114] Hence, if any exercise of discretionary power is to be consistent with these principles, it would have to provide some means by which those individuals being considered could participate in the decision-making process.

The case for participation can, however, be put on a wider basis than this. If Brennan's views are accepted,[115] the legitimacy of judicial review ultimately rests on the general consent of the community. Analogously, any exercise of discretionary power should ultimately stand for legitimation before the community of interests it is meant to serve. Participation can then be seen as a means of securing access for the community of interests to the decision-maker. The competing interests of many sectors of society must be capable of equal representation in the ultimate decision and hence in the decision-making process if they are to be resolved in a continuing and positive manner.[116]

Participation in the application of government policy or function itself can also be seen as an aspect of the democratic process, ensuring that citizens are able to influence and review government decisions and that their views are represented. Furthermore, participation in this sense may also be seen as an aspect of an individual's right to citizenship.[117] This may be extended beyond the institutions of government and, as Sampford accepts, it suggests that

> participation in institutions is essential for the fulfilment of human personality and hence a very important individual right ... [which] means that human rights laws should seek to ensure that institutions serve those purposes by providing participation rights.[118]

Participation can therefore be seen as enabling a process of self-realisation[119] through involvement in the institutional structures of society. As argued in chapter one, this interaction between individual and institutional interests, should be reflected in any justification for judicial review. Rationality and the resultant requirements of participation provide that

justification for the imposition of procedural fairness.

Therefore, any obligation of procedural fairness which requires the participation of the person affected in the decision under review should be based on the reasons being considered in that decision-making process. Establishing that an individual should be heard requires establishing that the decision-making process involves a consideration of the interests of that individual. In other words, the decision must be made, at least in part, on the basis of reasons personal to that individual. It is only when the decision-maker has to make a determination, based on or reflecting considerations personal to the individual affected, that the obligation of procedural fairness arises.[120] Participation ensures that considerations personal to an individual are sourced in some way from that individual.

Judicial application

This conclusion is at least consistent with the approach of the courts to the application of procedural fairness. In *Kioa*[121] Mason J held that providing the applicant with notice of the intention to make a deportation order might serve "only to facilitate evasion and frustrate the objects of the statute"[122] and hence, where deportation is based solely on the fact that the person has been declared a prohibited immigrant, natural justice does not require such advance notice. However, he then states:

> it may be otherwise where the reasons for the making of the order travel beyond the fact that the person concerned is a prohibited immigrant and *those reasons are personal to him*, as, for example, where they relate to his conduct, health or associations.[123]

Brennan J, in the same case, after inferring procedural fairness from the manner in which the individual's interests are apt to be affected by the decision, goes on:

> It does not follow that the principles of natural justice require the repository of a power to give a hearing to an individual whose interests are likely to be affected by the contemplated exercise of the power in cases where the repository is *not bound and does not propose to have regard to those interests* in exercising the power.[124]

As these statements suggest, it is only where the decision under question has been based on, or reflects considerations personal to, an individual that the obligations of natural justice are imposed. They should not be imposed merely because an individual is affected.

There has been little need for explicit recognition of such a limit in the decisions natural justice has traditionally been concerned with. Taking into account adverse information about an applicant in deportation cases,[125] denying the renewal of a licence,[126] terminating employment,[127] or depriving someone of property[128] or liberty[129] are all situations which have given rise to requirements of procedural fairness when the decision-maker has singled out an individual on considerations personal to them. Even if it is accepted that legitimate expectations extend the range of interests attracting procedural fairness, this involves objectively ascertainable criteria which are overridden or applied on the basis of the particular applicant in question.[130] It has only been where the reasons for the decision relate to the person affected that the courts have extended the principles of natural justice to ensure that the person is able to participate in the decision.

The relationship between the reasons for the decision and the individual concerned has, however, been explicitly considered by the courts through the concepts of standing and justiciability. These concepts relate to the appropriateness of any particular application for judicial review: standing concerning why *this* individual should be before them and seeking redress;[131] justiciability concerning whether *any* applicant should be entitled

to relief.[132] The similarity of the tests adopted has meant that the relationship between these concepts and the application of natural justice has become confused,[133] the courts struggling to reconcile ensuring the legitimacy of administrative action with the suitability of the judicial process for review.

The relationship between standing and procedural fairness can be seen through appreciating that each is concerned with participation in the decision-making process.[134] Procedural fairness provides access to the administrative process; standing enables access to the judicial review of that process.[135] As Brennan J suggests:

> [i]f a power is apt to affect the interests of an individual in a way that is substantially different from the way in which it is apt to affect the interests of the public at large, the repository of power will ordinarily be bound or entitled to have regard to the interests of the individual before he exercises the power.[136]

In this way Brennan J equates the interests which attract natural justice to those that provide standing.[137] However, recent developments in the rules of standing have concerned particular individuals or groups representing the interests of others or indeed the community at large.[138] In these cases the courts have examined how the body seeking review represents the interests which are the subject of the decision in question, so as to ensure that the applicant is in some way distinct from the community generally[139] and has more then a "mere intellectual belief or concern".[140] Questions of efficiency may dictate that the applicant be the one *best* able to represent the interests being considered, but ultimately the question comes down to the proximity of the applicant to the reasons for the decision under review.[141]

Similarly, justiciability, or reviewability, is a concept used by the courts where the decision involves considerations beyond that of the effect on a single individual, usually of a policy or polycentric nature.[142] It questions "whether the nature of a decision or decision-maker makes the judicial review inappropriate".[143] Just as the courts have rejected any classification of judicial or administrative in the applicability of procedural fairness, the question of justiciability is not dependant on a classification of the decision in question.[144] The emphasis has instead been placed on whether there are "factors personal to the applicant"[145] being considered. As Wilson J states in *FAI Insurance Ltd v. Winneke*:[146]

> if it were the fact that a decision affecting an individual is dictated by the application of a principle of government policy, with the result that *considerations personal to the individual* do not and could not influence the outcome, then there is no applicable principle of fairness which requires more than that the individual in question be informed of that overriding policy consideration. ... Of course, in a democracy there are ways and means of challenging government policy but the processes of judicial review cannot be harnessed to that end.[147]

The question is whether the decision was to be made "principally, if not exclusively, by reference to considerations relating to the applicant".[148]

For example, in *R v. Collins*[149] Stephen J, although not deciding the matter, would have distinguished the case where a licence may be granted on the basis of a report from the case where a decision is made to increase the total number of licences available and hence reduce the value of those remaining. He suggested that simply having an adverse effect on individual interests was not enough when the characteristics of the person who held the licences were not a consideration in the decision. In *Minister for the Arts, Heritage and Environment v. Peko-Wallsend Ltd*[150] it was held by Wilcox J that justiciability overlapped with the circumstances which attract natural

justice.[151] Therefore, as the question in that case of whether a decision to seek world heritage listing "did not relate essentially to the personal circumstances of any individual",[152] it was held that no obligation of natural justice was implied. Similarly in *Nashua Australia v. Channon,*[153] it was held that natural justice did not apply to a decision to revoke a tariff concession as it depended "on matters appertaining to the goods themselves in relation to tariff policies and considerations applied by the Department" rather than on factors "personal to the applicant".[154]

The courts have therefore recognised that the obligations of natural justice will not accrue to every decision which disadvantages or affects individuals.[155] The presence of factors personal to the applicant removes the impediments of standing and justiciability in the same way it suggests the obligation of procedural fairness, demonstrating that the individual or interest is being singled out for consideration in some way and so should be able to participate in the decision-making process, including review by the courts.

Conclusion

This chapter has argued that the obligations of procedural fairness may apply to the exercise of any power to determine or decide, whatever the source of that power or the classification of the body exercising it. Requirements of impartiality, probative evidence and possibly even the duty to inquire into relevant considerations can be derived from principles of rationality and equality whenever this power is exercised on some principled basis beyond that of the subjective values of the decision-maker. If a decision involves or is made on the basis of some reason or factor personal to the individual affected, then that individual should have an opportunity to know and respond in some way to those reasons, and hence participate in the decision-making process. The singling out of an individual should be based on considerations personal to, and sourced directly from, that individual.

In this way, concepts of procedural fairness, standing and justiciability condition the entitlement or capacity of the decision-maker to affect the interests of the individual. When this entitlement is exercised in a manner which reflects considerations specific or personal to an individual, it gives rise to a correlative right to have the requirements of procedural fairness met. The appropriateness of the courts as a means of redress is then inherent in the application of procedural fairness and further restrictions in terms of standing or justiciability are not required. Where the decision involves considerations going beyond those of an individual or a particular interest, then there is little principled justification for the participation of that individual or representative in the decision-making process.

CHAPTER THREE

Investigations

The first two chapters have suggested that, despite the expanding ambit of procedural fairness, there should remain limitations on its application. This chapter applies the conclusions reached previously to the application of procedural fairness in investigations, which in this context refers to any process involving an inquiry, examination or search to gather information. This area highlights the difficulty of using the effect on the individual to reconcile the protection of individual interests with the functioning of administrative agencies. However, if procedural fairness is imposed on the basis of the justifications outlined above, then a more principled and consistent approach can be adopted.

Prejudicial effect

Administrative decisions, especially those made by government agencies, are rarely made by one individual but are increasingly institutional in nature, involving formal and informal tiered decision-making and integrated appeal structures.[156] It is partly in recognition of the potential of natural justice to impose undue burdens on this administrative process,[157] that the courts have applied natural justice only to the decision-making process "in its entirety".[158] However, the question then becomes: what is to be considered a 'decision' for the purposes of procedural fairness?[159] In other words, at what stage in the decision-making process should procedural fairness be accorded? This question is especially relevant to the application of procedural fairness to investigations which are often an intermediate step in any administrative process.

The emphasis on the rights and interests of individuals has led various judges to state that, in order for natural justice to be required, the effect on the individual needs to be "direct and immediate".[160] The expansion of the range of interests to which the courts have applied procedural fairness has meant that any direct effect includes harming a person's reputation.[161] As Brennan J states:

> natural justice is required to be observed whenever a statutory authority contemplates a publication which would affect reputation by diminishing the estimation in which the bearer of the reputation stands in the opinion of others.[162]

Similarly, where the instigation of the investigation is based on some previous finding or upon accusatory criteria, and hence may affect the person's reputation, it may be subject to procedural fairness.

However, the courts have also suggested that such a direct effect is not required. It was held in *Koppen v. Commissioner for Community Relations*[163] that "[t]he question remains whether the dictates of procedural fairness apply to the exercise of statutory powers which do not culminate in a decision which affects rights, interests or legitimate expectations".[164] In this way the courts have looked at the prejudicial effect of the decision in question.[165] In *Testro Bros v. Tait*,[166] in dissenting on a different interpretation of the legislation, Kitto J held that:

> [t]he general conclusion seems justified that an inquiry may be of the character that implies a necessity to allow a person affected a fair opportunity to be heard, notwithstanding that an adverse report will do no more than expose him to a possibility not previously existing of a deprivation of rights by the exercise of a discretionary power by another authority. The reason is that the report itself prejudices the rights by placing them in a new jeopardy.[167]

This statement was cited with approval by Mason J in *FAI Insurances v. Winneke*.[168]

The possibility of a new jeopardy was applied in *R v. Criminal Injuries Compensation Board; Ex parte Lain*[169] where the court held that natural justice was available "even though the decision is merely a step as a result of which legally enforceable rights may be affected",[170] and even though there may be "some subsequent condition to be satisfied before the determination can have any effect upon such legal rights or liabilities".[171] That subsequent condition included a later determination by another tribunal.[172] Similarly, in *Brettingham-Moore v. St Leonards Municipality*,[173] it was held that the obligations of natural justice accrued to the making of a report which was a condition precedent before any further action could be taken. Therefore, procedural fairness may apply to any "step in the process"[174] which could prejudice the individual affected.

Determine and decide

However, the courts have held that "not every inquiry or investigation has to be conducted in a manner that ensures procedural fairness."[175] In *Mahon v. Air New Zealand Ltd,*[176] it was held that natural justice was required by a Royal Commission only before reporting on an investigation. In *National Companies and Securities Commission v. News Corporation Ltd,*[177] Gibbs CJ held that *Mahon* was not applicable to a body which makes no findings or report, on which point Brennan J agreed.[178] *Mahon* and *News Corp* were referred to in *Annetts v. McCann,*[179] where Mason CJ, Deane and McHugh JJ made it clear that the rules of natural justice "apply to public inquiries whose findings of their own force could not affect a person's legal rights or obligations".[180] Brennan J held that obligations of procedural fairness applied generally, subject to any contrary intention, to "statutory inquiries in which the inquisitor is authorised to publish findings that might reflect unfavourably on a person's conduct".[181]

Therefore, a decision to conduct an investigation or the conduct of the investigation itself short of a point where unfavourable findings may be made against a particular person, has been held by the courts to not require procedural fairness.[182] Where there is no direct effect there must be a finding of some sort which exposes the individual to the potential of such an effect. The decision-maker in question must have contributed in some positive way to prejudicing or affecting the individual. The difficulty of distinguishing direct effect has, however, confused the matter. In drawing the "fine line between making a finding and merely reporting the results of an investigation",[183] the courts have resorted to balancing the prejudice to the individual against the investigatory function of the body.[184] As Spender J states, "[t]he fact that certain investigators are not required to accord natural justice may be justified because the efficient conduct of public affairs requires that these bodies not be unduly burdened or delayed".[185] However the expansion of the ambit of the interests protected has meant that "[a] court today should be slow to exclude any statutory tribunal from a duty to observe natural justice fully, in the absence of plain words in the statute necessarily having that effect".[186] This approach is consistent with the recognition that acting on a reasoned basis, and allowing the participation of individuals considered in the decisions of administrative bodies, is as much a part of their function as having to act efficiently or quickly.[187]

The requirement for a finding is, however, merely a need for there to be some antecedent decision or determination as a necessary condition for the application of procedural fairness. Investigations are often used to discover evidence or find the reasons for or against a particular decision. It is only where the product of the investigation is applied in some way or used in reaching a conclusion or determination that the need for some reasoned basis accrues and the application of procedural fairness becomes appropriate. As Davies J suggests, "procedural fairness ... is a precondition of decision-making, not of conduct which does not decide anything, even on a provisional basis."[188] Merely collecting or collating evidence to be used in a decision, although prejudicial to a person, would not be an exercise of discretionary power.[189] It is the input or reasons employed by the decision-maker in reaching a conclusion which is definitive of the issue before it, and not the act of investigation, which gives rise to a possible application of procedural fairness.

Considerations personal

The difficulty associated with applying procedural fairness to investigations or inquiries comes about because they are only an intermediate step before there is

any direct effect on the person's interests. Applying procedural fairness on this basis requires breaking up the decision-making process to determine at what stage any effect occurs. This difficulty is compounded where there may be an opportunity for the person affected to participate at a later stage or when the investigation or report comes to be acted upon. Whether there has been a finding or determination may not be known to the individual until a further step is taken, or the process is challenged on suspicion that such a finding is possible. The investigation may only relate to whether some act *may* have been committed,[190] or may determine the probity of evidence or reasons to be used in a later decision, yet still prejudice an individual in some way. How then do you determine how 'unfavourable' a finding must be?

The courts have held that the decision-maker may be obliged to give the party an opportunity to participate at each stage where the ultimate decision-maker takes account of a new matter or considers aspects of the report which the party affected has not had the opportunity to deal with,[191] where there is an immediate and irreparable effect on the interests of the party, where the functions of the bodies differ and do not form part of the same decision-making process,[192] or where any subsequent decision does not supersede or put aside the earlier one. Therefore, whilst stating that the obligation of procedural fairness accrues to the decision-making process "in its entirety",[193] the courts have distinguished what constitutes a 'decision', on the basis of the effect on the person involved.

A different approach has been taken with appeals. Where there is available a full statutory right of appeal, the courts regard it as an indication of the intention of parliament that the appeal provide the only means of redress.[194] To do this, the right of appeal must in effect supersede the original decision, involving no additional financial or other burden or prejudice, a need for speedy resolution of the matter, and no irrevocable effects of the immediate decision.[195] Therefore, integrated decision-making processes have been recognised only to the extent set out by legislation and only 'cures' the obligation of procedural fairness where there is no irremediable detriment, burden or prejudice to the individual affected prior to some subsequent opportunity to participate.[196]

However, the courts have gone beyond the possible or direct effect on the individual and examined the reasons for the decisions at later stages of the process. For example, in *South Australia v. O'Shea*,[197] it was held that the decision not to release a prisoner against the recommendation of the parole board did not require procedural fairness.[198] Despite its direct effect, it was held that the decision was based on considerations of the public interest and not anything personal to the individual. Similarly, in *Haoucher v. Minister for Immigration, Local Government and Ethnic Affairs*,[199] the Minister was required to afford procedural fairness before rejecting the recommendation of the AAT and deporting the applicant on the ground of exceptional circumstances, where those circumstances were in part personal to the applicant, namely his risk of recidivism and ability to return to his country of origin. In this way the courts have looked to the particular determination rather than the stage at which it is made. Where the later stages in the decision-making process are removed from making determinations reached on the basis of considerations personal to the applicant, there is no need for the obligations of procedural fairness to be accorded to those later stages.

If procedural fairness is not required in later stages in the decision-making process, where factors personal to the individual are not being considered, then it should not be applied to intermediate stages on the same basis. It is this

examination of the reasons for the decision and their relation to the individual involved that formed the conclusions in the previous chapter. These conclusions are applicable independently of the stage at which they are applied. Where a determination is made about an individual or a conclusion is reached on the basis of reasons personal to an individual, procedural fairness would require that the individual be allowed to participate in the decision-making process. In this way there is no need for the courts to attempt to dissect the decision process to determine the independent effect of each interdependent stage.

For example, in *Edelsten v. Health Insurance Commission,*[200] the question arose of whether there was any obligation to provide procedural fairness prior to recommending that the Commission investigate possible over-servicing by Dr Edelsten. These recommendations were authorised to be made given the appearance of possible over-servicing in the information before the decision-makers. The Commission in turn was empowered to determine whether there was actually over-servicing through a process including participation by Dr Edelsten. Therefore, the earlier recommendation and previous investigation by those bodies did not involve determining any question personal to Dr Edelsten, but merely examined the possibility of such a determination being made. They were not definitive of any question which related to Dr Edelsten. In these circumstances, there was no requirement of procedural fairness until that determination commences. The court however, though primarily concerned with the operation of the *Administrative Decisions (Judicial Review) Act 1977* (Cth),[201] felt that the recommendations were only preliminary and therefore there was no effect on Dr Edelsten's interests. This was despite the fact that the recommendations exposed Dr Edelsten to the Commission and having to defend himself against the subsequent chance of penalty, an effect that other cases have considered warrants procedural fairness.

Edelsten illustrates both the subtlety of the investigations process and the difficulty of determining when an individual has been adversely affected. Clearly, Dr Edelsten had an interest in not being the subject of a Commission investigating his activities. However, imposing the burden of procedural fairness on the recommendations may have undermined the function of the administrative structure in place.[202] Imposing procedural fairness on the basis of the reasons for the decision would allow the participation of individuals at a stage in which factors personal to them are being considered, giving individuals the chance to defend their interests whilst enhancing the functioning of the decision-making process.

Conclusion

The traditional judicial emphasis on using procedural fairness to protect the interests of individuals against administrative action has been extended to investigations. This has meant that procedural fairness has been imposed at any stage in the decision-making process that has an immediate effect on recognised interests or prejudices those interests by exposure to an effect that was not previously possible. The courts have recognised the institutional processes that are involved in administrative bureaucracy, but how far the courts are willing to intrude into this process, given the effect that any one step may have in the outcome for the individual, is a question that still remains.

However, if the nature and function of procedural fairness as represented in the preceding chapters is accepted, this intrusion of the courts would be conditioned upon the particular determination or conclusion rather than the proximity of the effect on the individual. Ultimately, any identifiable stage in a decision-making process may

involve some prejudice to an individual by its role in leading to the final outcome. Requiring the participation of individuals possibly affected by that final outcome at every stage may undermine both the efficiency and purpose of that process. Decisions based on the appearance of objectively determined criteria, considerations of a wider public interest,[203] or preliminary reports or collations of information from other sources should be left to the agencies concerned. It is only where a determination or finding is made, based on or reflecting considerations involving matters personal to an individual, that procedural fairness should be implied.

CHAPTER FOUR

Conclusion

This paper has examined the conditions which determine whether natural justice will be applied, or rather not applied, to administrative action. When used in this way, what is meant by administrative action has not been defined by the courts but merely illustrated through the context in which it is used. The difficulties of deriving a principled basis on which to apply the requirements of natural justice results from this inability to define the terminology being used without reference to any explicit and particular context. The object of this paper may therefore be described as examining what actions should be subject to procedural fairness. Given the suggestion that procedural fairness is a "duty lying upon everyone who decides anything",[204] this amounts to describing what can be considered a 'decision', on the basis that procedural fairness is then universally applied to it.

Attempting to classify a decision on the basis of the public nature of the decision-maker neither determines nor justifies the application of procedural fairness. Conceptions of what is 'public' derive from conceptions of what is 'private', which in turn is a view of which interests of individuals should not be interfered with. Such a dichotomy requires without explanation that the legitimacy of the decision-maker's function or existence depends on its subjection to judicial review. Any objective justification of such a dichotomy is also undermined by the increasing interaction and overlap of the institutions of society.

Similarly, imposing procedural fairness on the basis of the presence of discretionary power to affect individuals fails to recognise that such power is not of itself arbitrary or oppressive. The institutions that exercise this power fulfil a positive function, the legitimacy of which cannot be determined by the courts solely on the basis of interference with the autonomy of an individual which may accompany it. It is the interaction between the interests of these institutions, in terms of their provisions of a benefit going beyond that of an individual and the interests of individuals themselves, which should be the basis of administrative law.

In seeking to avoid the "judicialisation of administrative procedure"[205] and strike a balance between the needs of practical administration and the procedures of judicial review, the courts have looked to the nature of the body in question. However, locating the point of balance in an ability to affect the interests of individuals merely returns to the public / private dichotomy and ignores the accepted role of the institutions in question. It is the adjudicative nature of any action of a body empowered, beyond that of an individual, to determine and decide that gives rise to the analogy with judicial processes that procedural fairness represents. It is the drawing of a conclusion on the basis of reasons beyond those of the decision-maker that requires impartiality in the making of that conclusion. And it is the recognition of the bounded rationality of the decision-maker and the need to make a reasoned rather than a subjective decision that requires the participation of the interests being

determined which procedural fairness provides.

Requiring participation in the decision-making process recognises the interaction of individual and institutional interests. It ensures that the singling out of an individual or any inequality of treatment is based on reasons personal to that individual whilst placing before the decision-maker the community of interests being considered and determined by them. It is only when discretionary power is exercised on a basis that reflects matters specific to an individual that the correlative right of procedural fairness arises to ensure participation in the exercise of that power. Once this is determined, there is no need for the concepts of standing and justiciability. The fact that the exercise of power is based on factors personal to the applicant indicates both the suitability of that applicant and the appropriateness of judicial intervention through the application of procedural fairness.

On this basis, there is no need for the courts to attempt to define the interests which should be protected, or to classify the nature of the bodies which should be subject to the obligations of procedural fairness. These are instead relevant only to the question of the content of the obligation, or the extent of the participation in the decision-making process, where they can be flexibly considered in the context of the functions of the body in question once procedural fairness is applied.[206] Similarly, there is no need for the proximity of the decision to the final outcome of the decision-making process to be determined. Procedural fairness applies at any stage at which there is a determination which reflects or is made on the basis of matters personal to an individual. Merely collecting evidence is not determinative of the issues involved. Investigations are not reviewable unless they are instigated on the basis of, draw conclusions from, or are determinative of some question or finding relating specifically to the personal circumstances of the individual.

Participation in the decision-making process, as reflected in the principles of procedural fairness, follows from the proximity of the individual's personal interests to the decision-making process. Considerations of policy or the public nature of the decision, or indeed the frustration of the legislative intent, indicate that the decision is not to be based on considerations personal to an individual, and hence participation by that individual would not enhance or facilitate the decision-making process. The implication of procedural fairness in these circumstances, merely because of the effect the decision has or may have on the individual, operates only as a brake on the institutional structures within which the decision is made and on which the decision is based. Procedural fairness is a common law duty to allow the participation of individuals in the decision-making process. It should be used by the courts to enhance rather than undermine the administrative action it seeks to regulate. It's time to take the brakes off.

Endnotes

1 (1963) 109 CLR 353, hereafter referred to as *Testro*.

2 See eg. *Kioa v. Minister for Immigration and Ethnic Affairs* (1985) 159 CLR 550; 62 ALR 321 at 346 per Mason J (hereafter referred to as *Kioa*).

3 (1990) 65 ALJR 167; 170 CLR 596; 97 ALR 177 (hereafter *Annetts*).

4 Above n.2.

5 See *Koppen v. Commissioner for Community Relations* (1986) 67 ALR 215 at 220 (hereafter *Koppen*); *South Australia v. O'Shea* (1987) 73 ALR 1 at 5 (hereafter *O'Shea*); *Annetts* above n.3 at 168.

6 *Kioa* above n.2 at ALR 346.

7 The courts have referred to 'individual' as including "artificial persons or entities" with little discussion (see *Haoucher v. Minister for Immigration, Local Government and Ethnic Affairs* below n.12 at ALD 578 per Deane J). However, note that in *Bond Corp Holdings v. Sulan* (1990) 8 ACLC 562 it was held that the presumption that Parliament has intended not

to interfere with the common law rights of individuals had limited application to corporations. The privilege against self-incrimination has also recently been removed from corporations (see *Environmental Protection Authority v. Caltex Refining Co. Pty Ltd* (1993) 178 CLR 477 and *Trade Practices Commission v. Abbco ice Works* (1994) 123 ALR 503). Whether similar considerations may apply to procedural fairness is not explicitly considered here. For an analysis of the distinction between the legal treatment of organisations see Dan-Cohen, M. *Rights, Persons and Organisations*, University of California Press, Berkeley, 1986.

8 *Kioa* above n.2 at CLR 584, ALR 345 per Mason J. Note that Brennan J rejected the concept of legitimate expectation, suggesting "it is not the kind of individual interest but the manner in which it is apt to be affected that is important for determining whether the presumption is attracted" (*Kioa* at ALR 323).

9 See generally Churches, S. "Justice and Executive Discretion in Australia" [1980] PL 397. The concept of legitimate expectations was introduced by Denning J in *Schmidt v. Secretary of State for Home Affairs* [1969] 2 Ch 149 at 170.

10 (1990) 170 CLR 1; 93 ALR 1 (hereafter *Quin*).

11 *Ibid* at ALR 13, citations have been removed.

12 *Kioa* above n.2 at ALR 345 per Mason J; *Haoucher v. Minister for Immigration, Local Government and Ethnic Affairs* (1990) 169 CLR 648; 19 ALD 577 at 597 per McHugh J (hereafter *Haoucher*). See generally Allars, M. *Introduction to Australian Administrative Law*, Butterworths, Sydney, 1990 at 238.

13 Tate, "The Coherence of 'Legitimate Expectations' and the Foundations of Natural Justice" (1988) 14 *Mon Uni Law Rev* 15 at 48-49, quoted with approval in *Minister for Immigration and Ethnic Affairs v. Teoh* (1995) 69 ALR 423 at 437 per Toohey J, and at 445 per McHugh J (hereafter *Teoh*).

14 See *Teoh* above n.13 at 432 per Mason CJ and Deane J; *Attorney-General of Hong Kong v. Ng Yuen Shiu* [1983] 2 WLR 735; *Cole v. Cunningham* (1983) 49 ALR 123 and see generally Flick, G. *Natural Justice, Principles and Practical Application* (2nd ed) Butterworths, Sydney, 1984 at 35-36.

15 Churches, S. above n.9 at 409-411.

16 *Teoh* above n.14 at 450 per McHugh J, see eg. *Quin* above n.10 at CLR 21-22 per Mason CJ, at 39-41 per Brennan J; *Haoucher* above n.12 at CLR 651-652 per Deane J.

17 See *Quin* above n.10 at ALR 40 per Dawson J, citing *Durayappah v. Fernando* [1967] 2 AC 337 at 349; see also *Teoh* above n.16 at 433.

18 *Haoucher* above n.12 at CLR 682; ALR 598; See also *Teoh* above n.13 at 445; *Kioa* above n.2 at CLR 583.

19 [1971] 2 QB 175, cited with approval in *Haoucher* above n.12 at 596-7 per McHugh J.

20 *Kioa* above n.2 at ALR 347.

21 Above n.13.

22 *Ibid* at 444-5.

23 *Haoucher* above n.12 at 578-9, as cited in *Annetts* above n.3 at 168.

24 [1911] AC 179.

25 *Ibid* at 182.

26 (1874) LR 9 Ex 190.

27 *Ibid* at 196.

28 (1878) 11 Ch D 363.

29 *Ibid* at 363.

30 Flick, G. above n.14 at 26.

31 *Minister for Immigration and Ethnic Affairs v. Pochi* (1980) 31 ALR 666. See eg. *Australian Broadcasting Tribunal v. Bond* (1990) 170 CLR 321 at 356 per Mason J; *Mahon v. Air New Zealand* [1984] AC 808 at 821 (Hereafter *Mahon*).

32 See *Secretary, Dept of Social Security v. O'Connell & Sevell* (1992) 38 FCR 540; *Minister for Aboriginal Affairs v. Peko-Wallsend Ltd* (1986) 162 CLR 24 at 45-46; *Village Roadshow Corporation Ltd v. Sheehan* (1987) 75 ALR 539; *Century Metals and Mining N L v. Yeomans* (1989) 100 ALR 383. The classification of any such duty as an aspect of procedural fairness was questioned in *Teoh* above n.13 by Mason CJ and Deane J (at 432). Gaudron (at 440) and Toohey (at 437) JJ supported the requirement.

33 Wade, H.W.R. *Administrative Law* (5th Ed) Clarendon Press, Oxford, London, 1982 at 5.

34 *Ibid* at 548.

35 See Airo-Farulla, G. "'Public' and 'Private' in Australian Administrative Law" (1992) 3 PLR 186 at 187.

36 See discussion below at text accompanying n.60.

37 See Allars, M. above n.12 at 34.

38 See eg. *Annetts* above n.3 at ALJR 168.

39 Sir Gerard Brennan, "The Purpose and Scope of Judicial Review" in Taggert, M. (Ed) *Judicial Review of Administrative Action in the 1980's*, Oxford University Press, London, 1986 at 19.

40 D.J. Galligan "Judicial Review and the Textbook Writers" (1982) 2 OJLS 257, at 257.

41 *Id.*

42 Dicey, A.V. *The Law of the Constitution* (10th Ed), MacMillan, London, 1959 at 198-199. Note that it is not suggested here that this is the only conception of 'the rule of law' but is merely presented as representative of the Australian approach. See eg. Lev, D. "Judicial Authority and the Struggle for an Indonesian Rechstaat" (1978) 13 Law & Society 1.

43 *Ibid* at 198-199.

44 Heuston, R.V. *Essays in Constitutional Law* (2nd Ed), Stevens, London, 1964 at 32-34.

45 See Craig, P. "Dicey, Unitary, Self-Correcting Democracy and Public Law" (1990) 106 LQR

105 at 119; McMillan, J. "Conflicting Values in Administrative Law and Public Administration", paper presented to the 1993 AIAL/IPAA National Conference, at 5-6.

46 Oliver, D. "Is the Ultra Vires Rule the Basis of Judicial Review?" 1987 PL 543 at 544.

47 Craig, P. above n.45 at 120.

48 See eg. Galligan, D. above at text preceding n.40 and Craig, P. above n.45 at 138-140.

49 Craig, P. above n.45 at 119.

50 See eg. Mason, A. "Administrative Review: The Experience of the First Twelve Years" (1989) 18 FLR 122; Brennan, G. above n.39.

51 See Galligan, D. *Discretionary Powers*, Oxford University Press, England, 1986 at 199-206 and see generally Craig, P. above n.45.

52 See McMillan, J. above n.45 at 1.

53 Mason, A. above n.50 at 130.

54 See text at n.24 above.

55 Cranston, R. *Law, Government and Public Policy*, Oxford University Press, Melbourne, 1984 at 85.

56 For a criticism of the judicial reliance on protection from public bodies in terms of the anomalies in the cases see Oliver, D. above n.46.

57 Sampford, C. "Law, Institutions and the Public/Private Divide" (1990) 20 FLR 185 at 187.

58 See Raz, J. *The Authority of Law* Clarendon, Oxford, 1979 at 61, 72, 75-77.

59 See Stone, C. "Corporate Vices and Corporate Virtues: Do Public/Private Distinctions Matter?" (1982) 130 UPLR 1441 at 1453.

60 See *Forbes v. New South Wales Trotting* (1979) 143 CLR 242.

61 See *McInnes v. Onslow-Fane* [1978] 1 WLR 1520.

62 *Heatley v. Tasmanian Racing and Gaming Commission* (1977) 137 CLR 487 at 511 (hereafter *Heatley*).

63 See *Post Office Agents Assoc Ltd v. Australian Postal Commission* (1988) 84 ALR 563; *General Newspapers Pty Ltd v. Telstra Corporation* (1993) 117 ALR 629; and see generally Airo-Farulla, G. above n.35 at 190-191; O'Brien, D. "Judicial Review in the Commonwealth - Proposals for reform" (1989) 63 *Law Institute Journal* 718; Allars, M. "Private Law but Public Power: Removing Administrative Law Review from Government Business Enterprises" (1995) 6 PLR 44.

64 Airo Farulla, G. above n.35 at 188.

65 *Ibid* at 187.

66 See eg. Peltzman, S. "Toward a More General Theory of Regulation" (1976) 2 *Journal of Law and Economics* 211.

67 Horowitz, M. "The History of the Public/Private Distinction" (1982) 130 *Uni of Penn LR* 1423 at 1423.

68 Craig, P. *Administrative Law*, Sweet & Maxwell, London, 1983 at 34-35. The term 'New Property' was introduced by Reich, C.A. "The New Property" (1964) 73 *Yale L.J.* 733.

69 Galligan, D.J. above n.40 at 274.

70 Cane, P. "The Function of Standing Rules in Administrative Law" [1980] PL 303 at 327.

71 Sampford, C. above n.57 at 206.

72 Loughlin, M. *Public Law and Political Theory*, Oxford University Press, New York, 1992 at 168-169.

73 Sampford, C. above n.57 at 203.

74 *Id.*

75 Loughlin, M. above n.72.

76 *Ibid* at 60.

77 *Ibid* at 61. See also Galligan, D. above n.51 at 205-6.

78 See eg. Hayek, *The Road of Serfdom*, George Routledge & Sons Ltd, London, 1944 at 54.

79 Derrida, J. *Of Grammatology* (Translated by Spivak, G.) Johns Hopkins University Press, Baltimore, 1976 at 141-164. For a general discussion on this terminology see Culler, J. *On Deconstruction*, Cornell University Press, Ithaca NY, 1982 at 85-98.

80 Loughlin, M. above n.72 at 96; See also Note "Civic Republican Administrative Theory: Bureaucrats as Deliberative Democrats" (1994) 107 *Harv Law Rev* 1401 at 1402-1403.

81 For a similar analysis in terms of objectivity and subjectivity see Frug, G. "The Ideology of Bureaucracy in American Law" (1984) 97 *Harv Law Rev* 1277 at 1289-1292.

82 Brennan, G. above n.39 at 18.

83 This refers to the general approach outlined in the work of Ronald Dworkin. See in general *Taking Rights Seriously*, Harvard University Press, Cambridge, 1978 and *Laws Empire*, Belknap Press, Cambridge, Mass, 1986.

84 Oliver, D. above n.46 at 576 and see generally Bayne, P. "The Common Law Basis of Judicial Review" (1993) 67 ALJ 781 at 784.

85 [1924] 1 KB 171.

86 *Ibid* at 205.

87 See *Cooper v. The Board of Works for the Wandsworth District* (1883) 14 CB (NS) 180, 143 ER 414.

88 See Wade, H.W.R. above n.33 at 450.

89 As opposed to the terminology relevant to separation of judicial powers of the Chapter III Courts required by the Constitution. See *R v. Kirby, ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254, on appeal (1957) 95 CLR 529. For a recent discussion on the interpretation of 'judicial' powers for the purpose of Chapter III of the Constitution see *Brandy v. Human Rights and Equal Opportunity Commissioner* (1995) 69 ALJR 191; 127 ALR 1.

90 *R v. Dubin Cpn* (1878) 2 L.R. Ir. 371 at p.376 per May CJ, approved by the Privy Council in *Everett v. Griffiths* [1921] 1 AC 631 at 683.

See generally Wade, H.W.R. above n.33 at 447-450.

91 *Ridge v. Baldwin* [1964] AC 40.

92 *Bread Manufacturers of NSW v. Evans* (1981) 38 ALR 93 at 103 per Gibbs CJ, citing *Twist v Randwick Municipal Council* (1976) 136 CLR 106 at 112-113 and *Heatley* above n.62 at 498-9. See also *Kioa* at CLR 620 per Brennan J.

93 Sir Anthony Mason, above n.50 at 124.

94 Oliver, D. above n.46 at 549.

95 *Cooper v. Wansdworth Board of Works* above n.87; *Wood v. Woad* above n.26 at 196, and see generally Flick, G. above n.14 at 26, 32.

96 Above n.1.

97 *Ibid* at 369, emphasis added.

98 *R v. Legislative Committee of the Church Assembly; Ex parte Haynes*-Smith [1928] 1 K.B. 411 at 419 per Salter J, cited with approval in *Ridge v. Baldwin* above n.91 at 948 per Lord Reid; *Testro* above n.1 at 369 per Kitto J. See also *Board of Education v. Rice* above n.24 at 182.

99 *Testro* above n.1 at 370, quoting Lord Lyndhurst in *Capel v. Child* (1832) 149 ER 235 at 242 as quoted in *Smith v. The Queen* (1878) 3 App Cas 614 at 624, and citing *Cooper v. Wandsworth District Board of Works*, above n. 87; *Sydney Corporation v. Harris* (1912) 14 CLR 1 ; *Delta Properties Pty Ltd v. Brisbane City Council* (1955) 95 CLR 11 and *The Commissioner of Police v. Tanos* (1958) 98 CLR 383.

100 See Wade, H.W.R. above n. 33 at 506.

101 See Mason, A. above n.50 at 124.

102 This refers to the indefeasible rights of autonomy necessitated by human dignity or respect. See generally the view of Immanuel Kant, eg. Kant, I. *Foundations of the Metaphysics of Morals*, Beck, L. (ed), Bobbs-Merrill, Indianapolis, 1959.

103 Eg. charity, fraternity, affection or caring. See Sampford, C. above n.57 at 219-221.

104 Brennan, G. above n. 39 at 20.

105 *Chief Constable of the North Wales Police v. Evans* [1982] 1 WLR 1155 at 1173 per Lord Brightman.

106 Galligan, D. above n.40 at 271.

107 *Id.*

108 *Ibid* at 272; Jowell, J. and Lester, A. "Beyond *Wednesbury*: Substantive principles of Administrative Law" 1987 PL 368 at 375-376.

109 Note that this is distinct from the 'rationality' doctrine as used in the US, which refers to the deference of the courts in determining whether an administrative agency is acting within its authority. See *Chevron, U.S.A. Inc. v. NRDC* (1984) 467 US 837 and generally Scalia, A. "Judicial Deference to Administrative Interpretation in the Law" [1989] Duke LJ 511 at 511. For a suggested application of this doctrine in Australia see Bayne, P. "Who is in Charge? Do we need a Rationality Test for Questions of Law?" (1991) 66 CBPA 77.

110 Galligan, D.J. above n.40 at 271.

111 See *John v. Rees* [1969] 2 All ER 274 at 309.

112 For the use of this term in relation to review on the grounds of failing to consider relevant considerations and considering irrelevant considerations see Beatson, J. "'Public' and 'Private' in English Administrative Law" (1987) 103 *Law Quart Rev* 34 at 37.

113 Galligan, D.J. above n.40 at 272-273.

114 See above at text accompanying n.103.

115 See above at text accompanying n.82.

116 See Galligan, D.J. above n.40 at 274; Allars, M. "Standing: The Role and Evolution of the Test" (1991) 20 FLR 83 at 110.

117 Galligan, D. above n.40 at 270-271.

118 Sampford, C. above n.57 at 221.

119 See Note "Civic Republican Administrative Theory: Bureaucrats as Deliberative Democrats" above n.80 at 1404.

120 See Churches, S. above n.9 at 413-416.

121 Above n.2.

122 *Ibid* at ALR 348.

123 *Id*, emphasis added.

124 *Ibid* at ALR 374, emphasis added.

125 Eg. *Kioa* above n.2.

126 Eg. *FAI Insurance Ltd. v. Winneke* (1982) 41 ALR 1.

127 Eg. *Ridge v. Baldwin* above n.91.

128 Eg. *Cooper v. The Board of Works for the Wandsworth District* above n.87.

129 Eg. *Johns v. Release on Licence Board* (1987) 72 ALR 469.

130 See discussion above at text accompanying n.9.

131 Cane, P. above n.70 at 310.

132 *Id.*

133 See Allars, M. above n.12 at 308. For the confusion between standing and justiciability see *Australian Conservation Foundation Inc. v. Commonwealth* (1980) 146 CLR 493 at 554 per Murphy J; *Right to Life Association (NSW) Inc v. Secretary, Department of Human Services and Health* (1995) 128 ALR 238 at 269. See also the discussion below.

134 Participation in the original decision has been held to give rise to an interest sufficient to grant standing; *US Tobacco Co. v. Minister for Consumer Affairs and Others* (1988) 83 ALR 79; *Australian Institute of Marine and Power Engineers v. Secretary, Department of Transport* (1988) 71 ALR 73; *Telecasters North Queensland Limited v. Australian Broadcasting* Tribunal (1988) 82 ALR 90; *Sinclair v. Mining Warden at Maryborough* (1975) 132 CLR 473 and see generally Electoral and Administrative Review Commission (Qld) report on *Judicial Review of Administrative Decisions and Actions*, December 1990 at 75-76.

135 Allars, M. "Standing: The Role and Evolution of the Test" (1991) 20 FLR 83 at 98.
136 *Kioa* above n.2 at CLR 621; ALR 373.
137 See also *Ainsworth v. Criminal Justice Commission* (1992) 106 ALR 11 at 30; *Onus v. Alcoa of Australia Ltd* (1981) 149 CLR 27 at 75-76; Allars, M. above n.135 at 98-99.
138 See eg. *Australian Conservation Foundation v. Minister for Resources* (1989) 19 ALD 70; *Right to Life Association* above n.133; *Shop Distributive & Allied Employees Association v. Minister for Industrial Affairs* (1995) 69 ALJR 558; *Tasmanian Conservation Trust Inc. v. Minister for Resources* (1995) 37 ALD 73, 127 ALR 580; *North Coast Environment Council Inc. v. Minister for Resources* (1994) 36 ALD 533, 127 ALR 617; 85 LGERA 270; *Alphapharm Pty Ltd v. Smithkline Beecham (Aust) Pty Ltd* (1994) 49 FCR 250; 32 ALD 71; 121 ALR 373.
139 See *Australian Conservation Foundation v. The Commonwealth* (1980) 146 CLR 493 at 526, 547; *Onus v. Alcoa of Australia Ltd* (191) 147 CLR 27
140 *Australian Conservation Foundation v. The Commonwealth* above n.139 at 530 per Gibbs J.
141 See eg. *Onus v. Alcoa of Australia Ltd* above n.139 at 42 per Stephen J.
142 See eg. *Minister for the Arts, Heritage and Environment v. Peko-Wallsend Ltd* (1987) 75 ALR 218 at 224-226 per Bowen CJ and at 250-254 per Wilcox J (hereafter *Peko*); *O'Shea* above n.5 at 5-7; *Bread Manufacturers of NSW v. Evans* above n.92(1981) 38 ALR 93 at 103; *Nashua Australia Pty Ltd v. Channon* (1981) 36 ALR 215 at 227 and *Salemi v. Mackellar (No.2)* (1977) 14 ALR 1 at 20. See in general Cane, P. *An Introduction to Administrative Law*, Oxford University Press, England, 1986 at 100-102.
143 Allars, M. "Standing: The Role and Evolution of the Test" (1991) 20 FLR 83 at 96.
144 See above n.92.
145 *Nashua Australia v. Channon* (1981) 36 ALR 215 at 227.
146(1982) 41 ALR 1.
147 *Ibid* at 44. Cited in *Peko* above n.142 at 253, emphasis added.
148 *South Australia v. O'Shea* (1987) 73 ALR 1 at 6 per Mason CJ.
149 (1976) 8 ALR 691 at 698-699.
150 Above n.142.
151 *Ibid* at 250.
152 *Ibid* at 253.
153 Above n.145.
154 *Ibid* at 227.
155 See *Peko* above n.142 per Wilcox J at 251.
156 McMillan, J. above n.45 at 11-12.
157 See eg. *O'Shea* above n.5 at 24 per Brennan J; and see generally J Disney, "Access, Equity and the Dominant Paradigm" in J McMillan (ed), *Administrative Law: Does the Public Benefit?*, The Australian Institute of Administrative Law, Canberra, 1992 at 7.
158 *O'Shea* above n.5 at 8 per Mason J, as cited in *Johns v. Australian Securities Commission* (1993) 178 CLR 408 at 473; *Ainsworth v. Criminal Justice Commission* (1992) 106 ALR 11 at 19; *Haoucher* above n.12 at 593.
159 Note that this is a distinct question to that in *Bond v. Australian Broadcasting* Tribunal (1990) 170 CLR 321, where it was determined that a reviewable decision under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) had to be final and operative. Mason J (at 336) indicated that common law remedies were not so limited. See generally McMillan, J. "Developments Under the ADJR Act: the Grounds of Review" (1991) 20 FLR 50 at 69.
160 See *Kioa* above n.2 at ALR 346; *Salemi* above n.142 at 45; *Peko* above n.142 at 249.
161 *Annetts* above n.3 at 168, 170 CLR at 608, 97 ALR 177 at 186; *Ainsworth* above n.158 at 19, 30; *Heatley* above n.62 at 495, 512; *Kioa* above n.2 at CLR 582, 618-619; *Fisher v. Keane* [1879] 11 Ch D 353 at 362-363.
162 *Ibid* at 30; citing *Kioa* above n.2 at CLR 621-2.
163 Above n.5.
164 *Ibid* at 221 per Spender J.
165 See *Johns* above n.150 at 471 per McHugh J; *Annetts* above n.3 at 167, ALR 179; *Romeo v. Asher* 100 ALR 515 at 531; *Balog v. Independent Commission against Corruption* (1990) 169 CLR 625 at 636; *In re Pergamon Press Ltd* (1971) Ch 388 at 399; *R v. Collins* (1976) 8 ALR 691 at 695.
166 Above n.1.
167 *Ibid* at 368.
168 Above n. 126 at 371.
169 [1967] 2 QB 864, cited by Stephen J in *R v. Collins* above n.165 at 696.
170 *Ibid* at 881 per Lord Parker CJ.
171 *Ibid* at 884 per Diplock LJ.
172 *Id.*
173 (1969) 121 CLR 509; [1971] ALR 3, cited by Stephen J in *R v. Collins* above n.165 at 696.
174 *R v. Collins* above n.165 at 697, quoting *R v. Criminal Injuries Compensation Board; Ex parte Lain* above n.169 at QB 884.
175 *Ainsworth* above n.158 at 17.
176 Above n.31.
177 (1984) 52 ALR 417 at 430; 156 CLR 296 at 315-316 (hereafter *News Corp*).
178 *Ibid* at CLR 325-326
179 Above n. 3.
180 *Ibid* at ALJR 179.
181 *Ibid* at ALJR 172.
182 *Bond Corporation Holdings Ltd v. Sulan* (1990) 8 ACLC 562 at 570, and see generally O'Brien, D. "Administrative Review under the Corporations Law and the Australian

Securities Commission Law" [1991] C&SLJ 235 at 245 and Barnes, J. "Administrative Law and the Commercial Litigator" [1991] ABLR 450 at 453-454.

183 *Balog v. Independent Commission Against Corruption* above n.165 at 635.

184 *Ibid* at 636.

185 *Koppen* above n.5 at 223-224. See also *Marine Hull & Liability Insurance Co Ltd v. Hurford* (1985) 62 ALR 253 at 259; de Smith, S.A. *Judicial Review of Administrative Action* (4th Ed by J.M. Evans) Stephens and Sons Ltd, London, 1980 at 190-191; Flick, G. above n.14 at 40-41.

186 *Romeo v. Asher* above n.165 at 533 per Burchett J.

187 See eg. *Johns v. ASC* above n.158.

188 *Edelsten v. Health Insurance Commission* (1990) 96 ALR 673 at 687 (hereafter *Edelsten*).

189 See text above preceding n.100.

190 Eg. *Edelsten* above n.188.

191 *O'Shea* above n.5 at 8, citing *Minister for Aboriginal Affairs v. Peko-Wallsend Ltd* above n.32.

192 *Ainsworth* above n.158 at 20; *Johns* above n.150 at 473-474.

193 *O'Shea* above n.5 at 8 per Mason J. See above n.158.

194 See *R v. Marks; Ex parte Australian Building Construction Employees and Builders Labourers' Federation* (1981) 147 CLR 471 at 484-6; *Marine Hull & Liability Insurance Co Ltd v. Hurford* above n.185 at 264-266.

195 See *Marine Hull & Liability Insurance Co Ltd v. Hurford* above n.185 at 264-265 where Wilcox J cites de Smith, S.A. *Judicial Review of Administrative Action* above n.185 at 193 and Katz, L. 12 *Uni of WA Law Rev* 535 at 542.

196 As well as the references listed in n.185 above see also *Twist v. Ranwick Municipal Council* above n.92.

197 Above n.5.

198 *Ibid* at 17.

199 Above n.12.

200 Above n.188.

201 See n.159 above.

202 See *O'Shea* above n.5 at 24

203 See *O'Shea* above n.5 at 17.

204 *Board of Education v. Rice* above n.24 at 182. See above at text accompanying n.25.

205 Wade, H.W.R. above n.33 at 453 citing *Local Government v. Arlidge* [1915] AC 120.

206 For an illustration of the balancing approach undertaken by the courts in determining the content of procedural fairness, see generally *Mobil Oil Australia Pty Ltd v. Federal Commissioner of Taxation* (1963) 113 CLR 475; *Johns v. Release on Licence Board* (1987) 9 NSWLR 103.

MINISTERIAL CONTROL AFTER CONTRACTING OUT - PIE IN THE SKY?

*Nick Seddon**

These notes formed the basis of an address to an AIAL seminar, "Ministerial Control After Contracting Out", Canberra, 10 March 1997

Introduction

We are to consider how a government department may exercise control over a contractor when a task, formerly performed by the government, is now performed by that contractor. We must necessarily be concerned with only a certain type of contracting out. There is probably no cause for discussion if a function formerly performed by the government for itself - such as servicing of computers - is now contracted out to a private sector company. There is nothing inherently governmental in such a function. There is unlikely to be a need for any form of control, other than the ordinary terms and conditions found in commercial contracts, to ensure that the task is carried out properly.

So we are concerned with the contracting out of those tasks or functions which have traditionally been part of government such as provision of certain types of services to the public, running gaols, running the births, deaths and marriages register, running the land titles office. How can the Minister, through his or her public servants whose job it is to administer the contract, exercise control?

I assume in this seminar that the contractor is truly a contractor, that is, a separate legal entity from the government, either a specially created body which may be a statutory corporation or else a private sector body or person. In other words, I am talking about a contractor other than an in-house team or body.

Can the Minister exercise control after the contract is made?

The contract lawyer always has a very simple answer to every question about what can be done under a contract: it depends what the contract says. This somewhat unhelpful response is a reflection of some very basic principles of contract law. It is inherent in most contracts, so long as they are not controlled by legislation (as many consumer contracts are), that the parties can agree to whatever they like, so long as it is not actually illegal. This idea is fundamental and is very much part of the idea of freedom of contract. It is therefore entirely up to the parties to decide what form of governance and control should apply during the contractual relationship.

It is a corollary of this principle that, generally speaking, what is *not* in the contract cannot be enforced and any attempt, after the contract is made, by one party to attempt to impose an obligation or insist on some requirement which is not mentioned in the contract will be met by a robust reply. This principle is, however, subject to the possibility that the contract may have hidden terms in it, that is, implied terms. But it is extremely difficult to argue for an implied term which is other than some very basic and obvious standard of quality or behaviour. Such

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things as a duty to co-operate in a contract or to perform in a proper manner may be readily read into the contract but as soon as you try to read in an ad hoc term to fix a problem that had not been catered for in the original agreement, it is very difficult.

There are, of course, complications which make this simple principle not so simple. It may be that the terms that have been agreed to are not very clear and there is argument about how they apply or what they mean in a particular context.

Enforceability

In addition there is the problem of enforceability. It seems to be generally assumed by policy makers and those who think that contracting out is the answer to everything, that, once you have got it in a contract, then that is the end of the matter. Very few people who think that things can be done by contract stop to think about how enforceable the contract is. This is a particular problem with some types of government contracts. The law of contract was developed for commercial people and there it does a tolerably good job (though even in ordinary commercial contracts there can be problems of enforcement). The only general remedies are damages and termination. (I leave aside the other remedies of specific performance and injunction which would be very rarely invoked in government contracts.) Termination is useless except in the most dire of circumstances. Damages as a remedy can be almost as useless because of the impossibility of assessment. What has the government lost if a contractor has failed to deliver services to the public or has performed them very badly? What can the government do if a contractor fails to adhere to the contractual requirement that privacy obligations must be observed by the contractor and its staff? It can sack the contractor and start again, but apart from that, there is little that can be done unless the contract has dealt specifically with the problem - to which I now turn.

It is worth noting, whilst on this theme, that of course the affected citizen cannot do anything about poor contractual performance. The citizen has no relationship with the contractor and yet may be met with the unhelpful reply, when a complaint is lodged with the department, that this is the contractor's responsibility. This is, of course, a theme which has been very successfully publicised by the Commonwealth Ombudsman. This problem stems from the strict privity rule. Even in the United States where the rules about privity are not so strict it has been held that the citizen has no right of redress if a company fails to perform: *Martinez v Socoma Companies Inc* 521 P 2d 841 (1974) (contract to provide employment opportunities to disadvantaged people). The privity rule is often misunderstood.

There are of course things that can be done about the problem of enforceability because of the very principle I just mentioned, namely, that you can agree to what you like in a contract. Therefore, if the parties are sufficiently prescient, they may provide for the difficulty of enforcement by building into the contract some extra measures to enhance enforceability. One example of this type of measure is a liquidated damages clause but it is not always suitable. In my experience there is very little by way of clearly thought-through measures for enhanced enforceability in government contracts.

So the answer to the question of how the Minister can control the contractor is: it depends what the contract says. In principle you can simply write it into the contract: "The Minister may give directions to the contractor from time to time as to the following matters ...". But here lies another problem. As a matter of commercial sense, the contractor is going to be concerned about any provision in

the contract which is open-ended and which could have the effect of changing the nature of the task. A sensible contractor either will not agree to open-ended commitments or will jack up the price in an attempt to cater for the risk or will insist on a clause in the contract which specifies that an increase in the scope of work means an increase in the amount of money. Of course, lots of contractors are not sensible and they will agree to almost anything in order to get government work. But even so, it is not to the Commonwealth's advantage to have a contractor which finds that it simply cannot perform the task. So although the contractor may *agree* to be bound by ministerial directions, there may be practical constraints on what the Minister can actually direct.

The possibility of contract becoming a constraint on a Minister's freedom to exercise discretions and direct policy is not beyond the bounds of possibility. Despite the existence of the doctrine of executive necessity which allows the government to break a contract without paying compensation if it must do so for policy reasons, a Minister might be constrained not to take advantage of this privilege if it would thwart the whole purpose of contracting out in the first place or would possibly even result in the contractor having to be compensated. To explain the last point, it is not in fact part of the law of executive necessity that the government must pay compensation (despite a suggestion to the contrary by Mason J in *Ansett Transport Industries (Operations) Pty Ltd v the Commonwealth* ((1977) 139 CLR 54 at 76, 77) but it may be that either the contract provides for compensation (as for example in the termination for convenience clause commonly used by the Commonwealth) or possibly legislation could so provide. For example, in the UK under the *Deregulation and Contracting Out Act 1994* subsection 73(2), if the Minister decides to revoke the contracting out arrangement, the contract is repudiated by the Minister rather than frustrated. This means of course that the government would have to pay damages. Such a liability may act as a disincentive to ending the contracting out arrangement.

MINISTERIAL CONTROL AFTER CONTRACTING OUT

*Peter Bayne**

These notes formed the basis of an address to an AIAL seminar, "Ministerial Control After Contracting Out", Canberra, 10 March 1997.

What is contracting out?

Government has long procured goods and the carrying out of public works by means of contracts with private operators. The use of the contract was never so limited, but in recent times the character of public administration has been altered significantly as a consequence of the growth of the use of competitive tendering and contracting (CTC) as a means for the discharge by government of its functions and obligations.[1]

More generally speaking, one may say that what was said in 1971 about developments in the USA and in the UK applies now (if it has not applied for some time) to Australia: "Contracting is no longer limited to the logistic periphery of government action but has moved into the main arena of policy-making".[2]

Why is there so much contracting out?

Harden argues that it will promote

> ... an institutional separation of functions. Specifically, responsibility for deciding what services there shall be is distinguished from responsibility for delivering the services.[3]

He (and many others) see benefits in this:

> this separation of the roles of 'purchaser' and 'provider' offers the opportunity not only to pursue economy, efficiency and effectiveness, but also to enhance both individual rights and accountability for government decisions.[4]

Ministerial control via the law of contract

A supposed virtue of the contract state is that it allows for a clear demarcation between the role of policy creation and the carrying into effect of some policy. At the level of rhetoric, it is not hard to formulate an argument that the contract state may enhance the accountability of government at the same time as it allows a measure of independence to the contractors to get on with the job of carrying out the contract. But there is obviously some tension here, and attention should be paid to how "[t]hrough the contract, we hope to achieve a satisfactory equilibrium between the conflicting values".[5]

In recent years, governments have attempted to enhance policy control over semi-independent agencies of government by means of empowering ministers to give directions or to set guidelines to be followed by those bodies when they exercise statutory powers.

Ministerial directions and guidelines might be a means to enable the government to ensure that the contract is performed in a way which conforms to government policy. On the face of it, this is simply a matter of expressing in the contract the power to give directions or formulate guidelines in words which will be appropriate to achieving the object. There are now plenty of examples in statutes and quite a bit of case-law to give guidance as to the legal

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effects of such provisions.[6] In these contexts, the judges have limited the extent of such powers by reference to those fundamental principles of statutory interpretation which are employed to limit all government power. Those principles may of course be displaced by language which is clear enough to achieve that result.

An interesting question - to which I cannot give an answer - is whether the judges would employ the same approach were they to be called upon to interpret a provision in a contract which empowered a minister to give directions to a contractor. This is but one dimension of the problem of how we classify ostensibly private bodies which perform public functions. As a matter of classification, the problem is one of contract law, but in a number of ways the judges might import public law values into the contract via an implied term.[7] A bolder approach might classify these contractors as a species of the public actor.

If the matter is looked at as a matter of contract law, some interesting questions might arise. Would there be a point at which the width of the contractual right to direct negates the contract? In other words, might it be that the extent of the power vested in the Minister to direct how the contract is to be performed leads to the conclusion that no contractual relationship resulted?[8]

The answer to the question just posed is likely to be "no", but it does point to the inadequacy of a body of law designed to deal with bargains between citizens. We need I think to free ourselves from the notion that when it comes to making a contract, the government is just like any other legal person. There are public interests at stake here which need to be accommodated. These ruminations lead to the question asked by many others: do we need a discrete body of law about public contracts? I suspect that we do.

Other ways of enhancing control or ensuring that the government's objectives are met

There are alternatives to directions or guidelines, and they might be more effective ways of ensuring that the government retains policy control and ensures that its objectives are met. More than that, there might be ways which would make the "service" provider accountable to the public. There are many who have spoken of the role of devices such as performance indicators, and of means whereby consumers might make the "service" provider accountable for the performance of the contract.

There has been a great deal of thinking along these lines. Much of it is cast in language taken over from one or other kind of the ways in which economists look at the world. There is much talk of service providers and clients. A great deal of attention is paid to reducing the costs and the size of government.

A recent issues paper of the Administrative Review Council (ARC) draws attention to these kinds of devices.[9] It also asks whether existing public law means for making those who exercise public power accountable should be enhanced to draw within their orbit the actions of those contractors who engage directly with members of the public. Thus, it asks questions about the role for judicial review, tribunal review, the Ombudsman and for legislative regimes such as the *Freedom of Information Act 1983*.

This kind of questioning is not limited to bodies such as the ARC. While a "key message" of the recent Industry Commission report is that CTC "is about helping public sector managers get best value for money by ensuring that the best provider is chosen for the task at hand",[10] it also accepted that "while responsibility to do certain things can be transferred, accountability for the results cannot".[11] It was said that "[w]hatever the method of

service delivery, a government agency must remain accountable for the efficient performance of the functions delegated to it by government ...".[12]

The Commission identified a number of means by which accountability might be enhanced through creative use of the contract with the non-government person or body who performs services for or on behalf of government. It also emphasised that "[a] change from direct to contracted provision ought not to undermine the ability of individuals or organisations to seek redress for decisions or actions for which governments are accountable".[13]

Constitutional questions about the contract state

I suspect that there are many who will say that merely the asking of these questions shows that the ARC and the Industry Commission have missed the point. It is apparent that there are many in government who see these means for checking the government as obstructions to efficient and cost-effective management or indeed to the proper role of ministers and the cabinet.[14] The non-government actors in the contract state are often not subject to the existing public law means for checking government. This is seen by many as a positive virtue.

But we are, I think, entitled to ask whether there is a point where at least some of the forms of contracting out are inconsistent with the basic principles of our form of democratic government.

There is a cynical response to this kind of question, encapsulated well in Sir Humphrey Appleby's observation:

> B[ernard] W[oolley]'s problem is that he has studied too much constitutional history - or at least, takes it too much to heart. He was arguing, not very articulately I must say, that 'if you've got a democracy, shouldn't people, sort of, discuss things a bit'.[15]

One can of course fail to see that constitutional principles are merely means to the end of achieving the sort of society we want. This point has been well made by Mr Kim Beazley MHR:

> The basis of democracy is not responsible government, separation of powers or any other constitutional formula or legislative/administrative process. They are tools to create the possibility of an orderly life and the advancement of democratic principles. The basis of democracy is that each individual in society has a right to determine how he or she is collectively governed. Implicit in this is a right of access to information on how decisions are made that directly and indirectly affect our lives.[16]

But concepts such as responsible government and separation of powers (and notions of human rights and the like) have been taken seriously because experience tells us that if they are we will advance democratic principles and thereby our quality of life.

Of course there are obvious and quantifiable costs of operating a democracy (such as the costs of elections and the like). There are also costs not so easily quantifiable. But there are also costs in not operating a democracy. There is in any event a limit to how far one pursues this line of thinking. In the end it is a question of what political philosophy should underpin our society. As Smith observes, "[m]ajor choices on institutional arrangements are ultimately questions of political theory rather than neutral principles of management".[17] In any event, one can argue, as does Smith, that a democratic system is congruent with a good administrative system:

> Each nation must learn to satisfy heightened popular expectations - by improving existing institutions and by inventing new ways to serve social needs - within a framework of democratic control if that capacity is to endure.[18]

Before one gets too excited about all this it has to be said that it is not clear just how

far Australian governments will go towards the contracting state. The problem becomes acute where government contracts out functions of decision-making in relation to laws which define rights and obligations of citizens, or in some other way contracts out the power of the state in relation to citizens. This has happened in the UK.

Take for example subsection 69(2) of the *Deregulation and Contracting Out Act 1994* (UK):

> If a Minister by order so provides, a function to which this section applies may be exercised by, or by the employees of, such person (if any) as may be authorised in that behalf by the office-holder or Minister whose function it is.

The section applies, inter alia, "to any function of a Minister or office-holder (a) which is conferred by or under an enactment: ..." (subsection 69(1)). Some functions - including a power or duty to make delegated legislation - are excluded (section 71).

The sidenotes to sections 72 and 73 seem to assume that an order made under section 69 has the effect of "contracting out" the exercise of the function. The purport of subsection 72(2) is that actions taken by the person authorised under subsection 69(2) to exercise of the function shall be treated as having been done by the Minister or office-holder in whom the function is vested; (although this picture is confused by subsection 72(3)).[19]

I have not looked for direct analogies in recent Australian practice, although the schemes which underpin privately run prisons might be instructive. There are of course some historical precedents, such as the company form of colonial administration, represented by the East India Company and the like. But these were forms designed for non-democratic polities. Are they suitable for a democratic government based on responsible government? Is there a point where the power of the minister is so remote from the decision-making that the scheme is simply unconstitutional? The basis for this kind of argument might be that the scheme offends the doctrine of responsible government.

This doctrine is embedded in the federal constitution,[20] and it does have ramifications for the way in which executive power may be lawfully exercised. Would a court shape the law of contract so far as it relates to government contracting in order to sustain responsible government?

Perhaps this is unlikely. The courts might answer in terms of the doctrine itself. In *New South Wales v Bardolph*,[21] Sir Owen Dixon said that:

> [i]t is a function of the executive, not of parliament, to make contracts on behalf of the Crown. The Crown's advisers are answerable politically to parliament for their acts in making contracts.

It is also true that judges no longer have much regard for the worth of the doctrine. This attitude is sometimes put forward as the justification for judicial activism in the field of implied rights. Sir Gerard Brennan has said that

> [a]s the wind of political expediency now chills Parliament's willingness to impose checks on the Executive and the Executive now has a large measure of control over legislation, the courts alone retain their original function of standing between government and the governed.[22]

But, with respect, perhaps it is time for the courts to turn their attention to the ways in which they can revitalise those elements of our constitutional structures which enhance the participation in the affairs of government of the citizens.[23] Imperfect as it is, the doctrine of responsible government is one such means.

Endnotes

1 See generally the report of the Industry Commission, *Competitive Tendering and Contracting by Public Sector Agencies*, report No 48, 24 January 1996, AGPS, Melbourne ("Industry Commission Report"). This report is a valuable review of this phenomenon.
2 Bruce L R Smith, "Accountability and Independence in the Contract State" in Bruce L R Smith and D C Hague, *The Dilemma of Accountability in Modern Government* (1971) at p 13.
3 I Harden, *The Contracting State* (1992), p xi.
4 Ibid.
5 Ibid. p 4.
6 See for example *Riddell v Secretary, Department of Social Security* (1993) 42 FCR 443; *Secretary, Department of Social Security v Kratvchvil* (1994) 53 FCR 49; *Smoker v Pharmacy Restructuring Authority* (1994) 53 FCR 287; and *Lynch v Minister for Human Services and Health* (1995) 61 FCR 515.
7 As may be seen in those cases concerned with the disciplinary powers of 'domestic' bodies such as sporting associations.
8 The general point is made by Harden, above (see p 4), and see D W Grieg and J L R Davis, *The Law of Contract* (1987) at 283ff, citing cases such as *Placer Development Ltd v Commonwealth* (1969) 121 CLR 353.
9 Administrative Review Council, *The Contracting Out of Government Services* AGPS, 1997.
10 Industry Commission Report (see note 1), p 1.
11 Ibid, p 4.
12 Ibid.
13 Ibid, p 6.
14 I have examined the influence of managerialist thinking in Peter Bayne, "Administrative Law and the New Managerialism in Public Administration" (1988) 62 ALJ 1040. A research paper (N Rossiter, "What Cost FMIP? Administrative Convenience and the Rule of Law") on file in the Faculty of Law, ANU, advances the thesis that the Financial Management Improvement Program (FMIP) carried further the view that public law controls and the rule of law are seen as barriers to proper management.
15 J Lynn and A Jay, *Yes Prime Minister* vol 1, (1986, BBC Books), p 176.
16 Quoted in P Bayne, *Freedom of Information* (1984), p 7.
17 Smith, op cit, p 55.
18 Ibid.
19 See M Freedland, "Privatising *Carltona*: Part II of the Deregulation and Contracting Out Act 1994" [1995] *Public Law* 21.
20 See the recognition accorded in the doctrine in *The Engineers case* (1920) 28 CLR 129, p 146ff.
21 (1934) 52 CLR 455 at 509.
22 The Hon Justice Sir Gerard Brennan, "Courts, Democracy and the Law" (1991) 65 ALJ 32 at 35.
23 Of course, the implied right to free political speech may be seen in this way.

THE AUSTRALIAN JANUS: THE FACE OF THE REFUGEE CONVENTION OR THE UNACCEPTABLE FACE OF THE MIGRATION ACT?

*Robert Lindsay**

The ancient Italian God, Janus, who was, after all, the guardian of doors and gates, seems a suitable symbol for Australia's migration policy towards refugee aspirants. Janus is usually represented with faces on the front and back of his head. The Australian Janus shows a smiling face, embodied in the Refugee Convention (the 1951 UN Convention Relating to the Status of Refugees), to the international community whilst the frowning face, at the back of his head, presents a refugee claimant with a series of formidable legislative obstacles under the *Migration Act 1958* if he or she is to win the sanctuary of a protection visa.

The "Albatross" case exemplifies the conflict between our national and international posture, but whatever deficiencies there are in our domestic legislative policy I think we should be conscious of the progress made in the last couple of decades in the field of "human rights" law and the potential this progress has for the future of our domestic law. Human rights law seems to me to be a re-emergence of a natural law philosophy. I wish to explore the influence of natural law upon municipal legislation; to discuss how judges have sometimes used natural law to negate the effect of domestic legislation that adversely affects human rights and how this use of natural law may be enjoying an English renaissance; and then to examine briefly the Refugee Convention and its interaction with the *Migration Act* provisions as demonstrated in the "Albatross" case before concluding with some comments on judicial review.

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The effect of international treaties upon Australian common law

The influx of refugees to Australia in recent years has brought about a renewed interest in setting the boundaries for the role of international law shaped by treaty and convention in defining the development of the common law of Australia. In *Minister for Immigration, Local Government and Ethnic Affairs v Teoh* Mason CJ and Deane J said:

> Apart from influencing the construction of a statute or subordinate legislation, an international convention may play a part in the development by the courts of the common law. The provisions of an international convention to which Australia is a party, especially one which declares universal fundamental rights, may be used by the courts as a legitimate guide in developing the common law.[1]

In so saying, there was a definitive statement advancing Australian law from the position that treaties might act as an aid to construction of statutory law, recognised in *Lim's case*.[2] Yet Their Honours' recognition that international law would shape and develop the common law seems a subdued echo of Blackstone, the English conservative 18th century judge who declared:

> .....the law of nations (wherever any question arises which is properly the subject of its jurisdiction) is here adopted in its full extent by the common law, and is held to be part of the law of the land. And those Acts of Parliament which have from time to time been made to enforce this universal law, or to facilitate the execution of its decisions are not to be considered as introductive of any new rule but merely as declaratory of the old fundamental constitutions of the kingdom, without which it must cease to be part of the civilised world.....[3]

Yet modest though the advance taken by the High Court may have been, the influence of international treaties and conventions in shaping municipal law has been marked. In *Teoh's case*, the Court found that the delegate's power to deport required him to give consideration to the United Nations Convention on the Rights of the Child. The *Mabo* (No. 2) decision invoked international conventions governing the rights of indigenous persons[4] and the *Dietrich* decision[5] compelling States to fund representation of indigent persons facing serious charges bears the impress of Article 14 of the International Covenant on Civil and Political Rights to which Australia is a party.

When the sources of international law are explored one sees there are indeed quite strong historical precedents in natural law for judges to protect the individual against the power of the State.

The impact of natural law upon international law

The basis of international law is in part natural law. Aristotle, speaking of natural law, observed that the laws of nature are immutable and have the same validity everywhere "as fire burns both here and in Persia". Natural law was contrasted with human justice which is variable from place to place and "like corn and wine measures, larger in wholesale and smaller in retail markets". Cicero in defending Milo, characterised natural law as "the law which was never written and which we were never taught, which we never learned by reading, but which was drawn from nature herself, and in which we have never been instructed, but for which we were made, which was never created by man's institutions, but which is inborn in us."

Thomas Aquinas saw it as that part of eternal law which man can apprehend with his unaided reason, but which, because it flows from God's reason and not from that of man, can neither be created nor changed by man whether by reason or by will. Specific principles were formulated by Seneca and set out in the Roman law. So it is that a man must be heard before he is condemned and that a person should not be judge in his or her cause.

The medieval idea that the whole civilised world ought to obey common laws was dispelled in the 17th century with the emergence of the new nation states. Speaking in 1951 Lord Radcliffe explained this development:

> When in time the medieval sense of community gave way before the rise of national states and Europe became a quarrelsome family of sovereign powers, international law had, as it were, to be invented in order to provide some structure upon which to build their relations with each other, and the law of nature is one of the founding fathers of international law. It is not spoken of now, in this country, as one of the elements of our own legal system. That is because men are broken in to looking to parliament as the sole source of new or altered law and we take our existing law from a complicated network of past statutes, precedents and decided cases.[6]

The emergence of the nation states saw the introduction of some of these natural law principles into the constitutions of the revolutionary states of North America and France. Thomas Jefferson in the Declaration of Independence 1776 said that "men are endowed by their creator

with certain unalienable rights, that among these are life, liberty and the pursuit of happiness".

Eleven years later, the American Constitution came to be framed in the same spirit. Through the work of Rousseau and Paine (who was a friend of Jefferson), the members of the French National Assembly in 1789 adopted a "Declaration of the Rights of Men and of Citizens". Although its authorship is uncertain, it is generally attributed to Thomas Paine. It includes such principles as these: "no man should be accused, arrested or held in confinement except in cases determined by the law and according to the form which it has prescribed"; that "no man ought to be molested on account of his opinions....."; that "the unrestricted communication of thoughts and opinions being one of the most precious rights of man, every citizen may speak and write freely provided that he is responsible for the abuse of this liberty in cases determined by the law"; and that "men are born and will always continue, free and equal in respect of their rights".[7]

The historical role of natural law in Australian and English jurisprudence

Many of the new Commonwealth constitutions contain chapters on human rights. The Australian Constitution, being rather older than most, does not. As Mr Gageler points out, the framers of the Australian Constitution drew upon a tradition of British and Colonial constitutional development with which they were well familiar. The Constitution was not framed in a time of social unrest and not drafted against a background of a popular view of oppressive government such as was the case in France, the United States,[8] and at least to some degree, in those British colonies which took the road to independence after World War II.

The inevitable consequence for Australia and English judicial systems in failing to declare expansive human rights provisions such as those in France, Germany, Canada and the United States has been that these systems have not enjoyed the liberating and moderating influence that natural law principles enshrined in a constitution may provide. The recognition of international law as a legitimate guide to the development of the common law opens the door to a small degree to the liberating influence but not enough to allow the citadel of narrowly confined statutory law to be taken.

But there was a time when natural law was claimed as a higher law. The English Law Lord, Lord Radcliffe, speaking in 1960, explained how there was a time when natural law, vague and misty though its outlines now seem, was thought of as an appropriate set of references for the lawyer:

> To the medieval doctor the law of nature was by no means a set of principles inscribed in air. He had his sources, identifiable ones, against which he could set the municipal law he challenged. There was the law of God, recorded in Holy Writ, and a source of reference for argument in our law courts certainly until the 18th century. There was the Digest, the Civil Code of the Roman Empire, whose accumulated wisdom and width of reference spoke virtually for jus gentium itself. The lawyer of today has no comparable working tools and so lacks a standard of reference of sufficient authority. There are those who hope to find such a standard in a wider appreciation of comparative law or, again, in a lively adherence to the 12 year old Universal Declaration of Human Rights of the United Nations General Assembly.[9]

Lord Radcliffe then quotes the eighteenth century Blackstone's view of a higher law:

> This Law of Nature being co-eval with mankind and dictated by God himself, is of course superior in obligation to any other. It is binding all over the globe, in all countries and at all times; no human laws are of any validity, if contrary to this; and such of them as are valid

> derive all their force and all their authority mediately or intermediately from the original.[10]

The Americans, more deferential to common law principles in general and Blackstone in particular, have squared the circle by aligning international and municipal law by the device of making international conventions to which they subscribe self executing and so binding upon their municipal courts.

But the doctrine of parliamentary sovereignty inculcated so effectively by Professor Dicey in the last century continues to dominate English law, and to only a slightly lesser extent, the constitutionally endowed Australian judicial landscape. The problem is of course that the doctrine of parliamentary sovereignty ceases to be satisfactory when parliament does not adequately protect the citizens' rights. The absence of an all-pervasive equity, which can mitigate the rigour of parliamentary law, is an age-old problem. It confronted Thomas More, Chancellor of England under Henry VIII, brought to trial and execution because he would not accept the King's new claim to headship of the church. The King's claim was passed into law. More said he was the King's servant, but God's first. His trial records More putting the question to his informer, Robert Rich,

> I will put you this case. Suppose the parliament should make a law that God should not be God, would you then, Master Rich, say that God were not God?

It is the question that has echoed down the ages. More's penetrating question did not save him from conviction and execution. Lord Radcliffe rather thought that Lord Mansfield, when shaping mercantile law in the late 18th century, was the one who missed the opportunity to introduce an over-arching equity to protect the citizen against oppressive statutory law. But the influence of the international community may yet supply the omission of Lord Mansfield to evolve a "higher law" common law doctrine.

Modern trends in United Kingdom: limitations to parliamentary sovereignty

In 1956 Lord Devlin stated that the common law did not have the strength to hold in check the Executive:

> The common law has now, I think, no longer the strength to provide any satisfactory solution to the problem of keeping the Executive, with all the powers which under modern conditions are needed for the efficient conduct of the realm, under proper control. The responsibility for that now rests with parliament.[11]

But parliament is no longer safeguarding the rights of the individual. The remedy of judicial review may itself be thwarted by legislative policy negating its role.

There is in some English judicial quarters, an atavistic desire to return to Sir Edward Coke's approach. In *Dr Bonham's case*,[12] Lord Coke said:

> When an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will control it, and adjudge such act to be void.

A current English High Court Judge, Sir John Laws, has suggested that it is the Constitution, not parliament, which is sovereign and that judges are custodians of the Constitution.

The supremacy of community law enshrined in the *European Communities Act 1972* can lead to the disapplication of domestic statutes. Some community law principles are designed to guarantee human rights against abuse by executive power. In particular, the European Convention on Human Rights is part of the fabric of European community law and has been held to be an aid to construction in the same way as international convention has been used in Australia.

Whilst the European Convention has not gone so far as to be introduced into UK legislation, a bill called the Human Rights Bill was introduced into the House of Lords in 1995 and was passed in a watered down form. It is thought, however, that it is unlikely to be taken up in the Commons and so will not become law. The previous Conservative government at least feared a weakening of parliamentary sovereignty by giving direct control over civil rights to the judges.

In the face of the legislative reluctance to safeguard human rights, some judges such as Lord Woolf, (now the Master of the Rolls), sees an enhanced role for the common law. He said, in the Mann Lecture:

> It is one of the strengths of the common law that it enables the courts to vary the extent of their intervention to reflect current needs and by this means it helps to maintain the delicate balance of a democratic society.

Lord Woolf went on to argue that parliament could not abolish judicial review:

> .....If parliament did the unthinkable, then I would say that the courts would also be required to act in a manner which should be without precedent. Some judges might choose to do so by saying that it was an irrebuttable presumption that parliament could never intend such a result. I myself would consider there were advantages in making it clear that ultimately there are even limits on the supremacy of parliament which it is the courts' inalienable responsibility to identify and uphold. They are limits of the most modest dimensions which I believe any democrat would accept....

Sir John Laws took up this theme when he said:

> The true distinction between judicial and elected power cannot be arrived at by a merely factual account of what the judges do or what governments or parliament.....do. The settlement is dynamic because, as our long history shows, it can change.....As a matter of fundamental principle, it is my opinion that the survival and flowering of a democracy.....requires that those who exercise democratic, political power must have limits set to what they may do: limits which they're not allowed to overstep.....the doctrine of parliamentary sovereignty cannot be vouched by parliamentary legislation; a higher order law confers it and must limit it.

Another English High Court judge, Mr Justice Sedley, has openly acclaimed "a new culture of judicial assertiveness to compensate for and in places repair the dysfunction of the democratic process."[13]

So in England there is a mood amongst some judges to reach back to a Blackstonian role for the common law.

The Australian experience

The issue of challenge to legislative capacity was taken up by Justice Toohey of the High Court in a 1992 address.[14] After describing processes that might occur if it were presumed that the Australian people did not intend grants of power to the Commonwealth Parliament under the Constitution to extend to invasion of fundamental common law liberties, His Honour said:

> If such an approach to constitutional adjudication were adopted, the courts would over time articulate the content of the limits on power arising from fundamental common law liberties and it would then be a matter for the Australian people whether they wish to amend their constitution to modify those limits. In that sense, an implied "Bill of Rights" might be constructed.

His Honour pointed out that "Parliaments are increasingly seen to be the de facto agents or facilitators of Executive power, rather than bulwarks against it."

His Honour explained how the Australian and English constitutionalists had been more sanguine than their American counterparts about the extent to which

parliamentary sovereignty might jeopardise individual freedom. In the United Kingdom parliament had been the liberating agent from monarchical despotism whereas in the United States the constitution was adopted to act as a safeguard against abuse of plenary power by the United Kingdom parliament. His Honour said that the statements of various judges suggested a revival of natural law jurisprudence that for law to be law it must conform with fundamental principles of justice. Under Australia's federal constitution, Chapter III (setting out the jurisdiction and tenure of the federal judiciary) "precludes the federal parliament from arrogating to itself the exercise of judicial power".

His Honour referred to the traditional approach in *Walsh v Johnson*[15] that the Commonwealth Parliament's capacity to curtail a common law liberty by legislation relating to the subject of its legislative power was unlimited but that it just had to do it unambiguously. He went on to say:

> Yet it might be contended that the courts should take the issue a step higher and conclude that where the people of Australia, in adopting a constitution, conferred power to legislate with respect to various subject matters upon a Commonwealth Parliament, it is to be presumed that they did not intend that those grants of power extend to invasion of fundamental common law liberties.....

An express Bill of Rights seems unlikely bearing in mind the general history of resistance to change by referenda. It would be open to the Commonwealth Parliament to adopt as domestic law many international treaties and conventions setting out human rights if so minded. This might be done simply by Act of Parliament or with more confidence of permanence by inclusion of a provision that such Act would bind subsequent legislative enactments unless parliament expressed itself as revoking provisions of the earlier Act. But aside from the doubt whether any government is likely to introduce such legislation there is the question of whether such legislation would act retrospectively to strike down provisions contained in earlier Acts that curtailed human rights. Given the absence of will by the people of Australia or parliament to protect a citizen or non-citizen's rights through constitutional or other legislative reform, and the recent retreat by the High Court from finding implied powers in the Constitution, much must now turn on the construction that the judiciary will place upon legislation which conflicts with our international posture on human rights.

The Migration Act 1958 and the Albatross detainees[16]

A comparison of Australia's obligations at the international level and those Australia has been prepared to adopt domestically is well illustrated by comparing the Refugee Convention with the *Migration Act 1958*. Australia signed the 1951 Convention relating to the status of refugees and the protocol which amended the Convention in 1967. Article 33 of the Refugee Convention made it an obligation upon contracting parties not to expel, return ("refouler") refugees where life or freedom would be threatened in their own country for convention reasons.

The *Migration Act* does not define a "refugee" or "convention reasons" but they are to be found in the well known definition contained in Article 1A (2) of the Refugee Convention:

> ....owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country; or, who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

Section 36 (2) of the *Migration Act* states:

> A criterion for a protection visa is that the applicant for the visa is a non-citizen in Australia to whom Australia has protection obligations under the Refugee Convention as amended by the Refugees Protocol.

The Minister for Immigration determines whether Australia's protection obligations have been engaged. A senior officer of the Department of Immigration has stated that it is the practice, once protection obligations are engaged, for the Department to provide persons held in detention with relevant application forms or legal assistance.

Under ss 45, 46 and 47 of the *Migration Act*, a non-citizen who wants a visa of a particular class, such as a protection visa, is required to fill out a specified form which needs to be provided by the Department's officers. Alternatively, the necessary form to make due application for a protection visa may be obtained through a lawyer. However, the Department interpret the obligation to provide a detainee with a lawyer to be confined to a literal construction of s 256 of the Act. This states that a person responsible for immigration detention "at the request of the person in immigration detention", should afford him or her all reasonable facilities for obtaining legal advice or taking legal proceedings in relation to immigration detention. The case of *Wu Yu Fang* raised questions about the extent of the obligations upon the Department under the *Migration Act* to provide refugees with forms and legal assistance.

118 Sino-Vietnamese were aboard a boat code-named the "Albatross" when boarded by Australian officials about 100 miles north of Darwin. The boat arrived in Darwin on 13 November 1994 and on 15 November 1994 the Sino-Vietnamese were flown to Port Hedland. On the same day the *Migration Act* was amended to provide that a non-citizen covered by an agreement between Australia and a "Safe Third Country" could not apply for a protection visa. By a Migration Regulation introduced on 27 January 1995 China became a "Safe Third Country", and, as from that date, former residents of Vietnam who had resided in China prior to coming to Australia could no longer apply for protection visas. By further amendment the date for lodgement of applications for protection visas was backdated to 30 December 1994.

The 118 Sino-Vietnamese applicants were all ethnic Chinese. The older ones had all been born in Vietnam and following the border wars between China and Vietnam in 1979 and 1980 were expelled from Vietnam. Many of them claimed that they had not been properly settled when they arrived in China. In particular, they had not been given household registration and thus did not have access to housing, employment and schooling for their children in the same way as indigenous Chinese citizens. Latterly they lived on the beach front in Bei Hai in cardboard shacks until taking passage on board the "Albatross" in late 1994.

On reaching the Port Hedland Detention Centre on 15 November 1994 the applicants were interviewed by immigration officers and largely related the particulars I have described. They were required to fill in "bio data" forms and also compliance "entry" forms. The protection visa application form for persons in detention was not proffered to the applicants. On 23 November a refugee casework officer, Mr Ross McDougall, sought to obtain access to "The Albatross" detainees. The Department informed him that since there had been no request for legal assistance, as defined in s 256 of the *Migration Act*, there was no obligation on the Department to allow Mr McDougall or any other lawyer access to the detainees. In January 1995 the amending legislation was introduced whereby Sino-Vietnamese, such as the applicants, could

not make valid applications for protection visas and in mid-February 1995 after the amendment had been backdated to 30 December 1994, the Centre Manager informed the detainees of this fact.

The applicants sought thereafter judicial review in the Federal Court. The trial judge dismissed the applicants' claims maintaining that the effect of the *Migration Act* was that there was no obligation upon the Department to provide the applicants with the means to apply for protection visas. His Honour also dismissed various claims by the applicants that they had been frustrated in obtaining legal assistance under s 256, and held that there was no obligation to inform the applicants that they could request legal assistance under s 256. His Honour considered that the claims made by the applicants did not amount to an engagement of Australia's protection obligations. In the Full Court of the Federal Court the applicants' claims were again dismissed by a majority of 2-1 (Jenkinson and Nicholson JJ and with Carr J dissenting). However, Nicholson J, who wrote the leading judgment for the majority, found that the applicants had impliedly engaged Australia's protection obligations. His Honour nonetheless concluded:

> This is a case in which parliament has negated the possibility of common law concepts of procedural fairness applying in favour of the non-citizen applicants. Parliament has achieved this by the enactment of ss 45-47 (requiring the existence of a valid application form to make an application) and ss 193 (2) and 198 (4) of the *Migration Act* (negating the requirement that a detainee have access to legal advice or the opportunity to apply for a visa if being removed as soon as reasonably practicable). The inference from the findings of the trial judge is that the representatives of the relevant arm of the Executive were well informed of this and avoided acting so as to place the applicants in the position where they had the means to apply for a protection visa when the course remained open to them prior to its preclusion by legislation. While that Executive conduct does not accord with internationally expressed goals relating to conduct in relation to refugees, the conditions for application of international law, as prescribed by Australian domestic law, are not present to enable international law to control that conduct. Furthermore such conduct was supported by the enactments of the Australian Parliament which, to that extent, evince an intention in relation to non-citizens to negate the application of those internationally commended basic procedural requirements.....[17]

Conversely, Carr J considered that the applicants were entitled to a degree of procedural fairness by reason of Article 10 (1) of the International Covenant on Civil and Political Rights ("ICCPR") to which Australia is a party. This provides that "all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person". The Human Rights Commission submission had pointed out that in interpreting Article 10 a body of rules known as the "Standard Minimum Rules" applied and that these rules required a detainee to be both informed of his rights (eg the right to legal assistance under s 256 of the *Migration Act*) and to be provided with an appropriate form. His Honour believed that ss 193 and 198 had not negated these requirements. Carr J contended that the appellants had a legitimate expectation that Article 10 of the ICCPR would be observed (referring to *Teoh's case* where the applicant was held to have a legitimate expectation that the delegate would consider the United Nations Convention on the Rights of the Child) before making a deportation order. This meant that the Department should have informed the detainees that a lawyer had expressed an interest in helping them and that they were entitled, if they so requested, under s 256, to reasonable facilities for obtaining legal advice. Finally, His Honour concluded that the appellants should have been given the appropriate form so that they could make application.

The High Court by a majority refused the applicants special leave to appeal. The Court did say that the question whether

there was a positive statutory or common law duty on the part of the respondents to provide visa application forms and to inform the applicants of their right to apply for visas and of the availability of legal advice might be a question of importance worthy of the grant of special leave but the findings of fact and pleadings had not sufficiently raised the question.

This case still leaves open for the future how far courts will read into domestic legislation international obligations, such as those under the Refugee Convention and the ICCPR, which may not be expressly or impliedly negated by domestic legislation.

The safe third country provisions under the Migration Act

In the *Wu Yu Fang case* there was an expressed acknowledgment by the majority both in the judgment of Justice Nicholson and during argument by Justice Jenkinson, that the *Migration Act* is in some respects inconsistent with the obligations that Australia has undertaken to perform. But even where the provisions of the *Migration Act* do not directly clash with obligations undertaken under the Refugee Convention and other international instruments, parts of the Act are contrary to the spirit of the Refugee Convention. This is observable under Subdivision A1 (ss 91A to 91G) which provides that certain non-citizens, who are covered by a comprehensive plan of action approved by the International Conference on Indo-Chinese Refugees and those for whom there is a "Safe Third Country" are not to be allowed to apply for protection visas. It was under this division that the "Albatross" Sino-Vietnamese were prohibited from applying for protection visas. The implementation of the arrangement whereby Sino-Vietnamese are forcibly repatriated to China arose because of a Memorandum of Understanding entered into between Australian and Chinese officials. The Memorandum of Understanding is set out in Schedule 11 to the Migration Regulations and provides for Vietnamese refugees settled in China to be returned under "verification arrangements".[18] The Department of Immigration provides the Chinese Ministry of Civil Affairs with Vietnamese refugee registration forms to "facilitate the verification by the Chinese side". Presumably these are the bio data forms which the "Albatross" detainees were required to fill in. Unless a detainee is able to gain access to a lawyer at the Detention Centre, the determination of whether or not the Vietnamese refugee has been "settled in China" depends upon these verification procedures which involve the Chinese authorities checking the details and indicating whether or not the person has been settled. If the Vietnamese refugee was, for example, a Tienamen Square protester, one wonders whether the Chinese Ministry of Civil Affairs would provide a truthful assessment of whether such a person had been "settled in China".

It seems doubtful that the framers of the Refugee Convention contemplated contracting parties using the Safe Third Country article contained in the Refugee Convention in the way it is used under the *Migration Act*. Under Article 1E of the Refugee Convention it is stated:

> This convention shall not apply to a person who is recognised by the competent authorities of the country in which he has taken residence as having the rights and obligations which are attached to the possession of nationality of that country.

The country of residence for the applicants in the "Albatross" case was China and the question was whether China extended to them "the rights and obligations which are attached to the possession" of Chinese nationality. This decision, under the Act, is now likely to be made at the political and not the judicial level unless the non-citizen detainee is lucky enough to secure access to legal advice.

The regulations governing applicants from "Safe Third Countries" were introduced in 1994 to prevent "forum shopping" and the first application was to boat people who arrived in Australia from Gulang in Indonesia where they had been refused refugee status. Its next application was to the ethnic Chinese Vietnamese from South China who the government asserted had been "settled" in China despite the claims by many of the boat people to the contrary.[19] The regulations prohibiting application by Sino Vietnamese substitute legislative mandate for individual administrative discretion that is subject to a process of judicial review.

Since the decision in *Wu Yu Fang* the Department of Immigration has introduced a Bill stating the Department is not required to provide visa application forms to detainees. There is strong evidence that the hunger strikes and violence that has attended some detainees' presence in centres is a consequence of a system that deprives detainees of rights of access to legal assistance and the means to make claims which are extended as a matter of course to citizens of this country. It is such legislation that debases judicial systems and is reminiscent of the South African apartheid legislation so movingly described in Nelson Mandela's autobiography.[20]

Limitations on the power of judicial review

Where, in what the English Law Lord, Lord Browne-Wilkinson described as "the go go world of judicial review" are we go-going?[21]

In 1993 Justice French spoke of:

> a significant extension of the reach of judicial review to ministerial and gubernatorial decision making. The exercise of prerogative powers may now be called into question and the possibility is open that even decisions of the cabinet could in certain circumstances be justiciable.[22]

But under the *Migration Act* there are legislative limitations upon review. In both the recent High Court cases *Kioa v West*[23] and *Teoh*, the High Court was concerned with the exercise by the Minister's delegate of the discretionary power to deport detainees for which the Act makes provision. But in *Wu Yu Fang's* case the introduction of legislation preventing the Sino-Vietnamese from making valid applications together with the omission to supply the detainees with forms meant that the administrative processes had not advanced to the stage where a delegate was called upon to make a "decision". In *Kioa v West*, Brennan J (as he then was) said that there was no "free standing" common law right to be accorded natural justice, rather observance of it was a "condition attached to the [statutory] power whose exercise it governed".[24] Nicholson J, in *Wu Yu Fang's case* had "some difficulty in identifying [an] administrative decision or exercise of statutory power".[25] Gaudron J and McHugh J, during argument on the special leave application in *Wu Yu Fang's* case, also questioned the absence of statutory provisions to which the detainees application for judicial review could attach.

At the very least, there would appear to be some doubt in the High Court as to the degree to which a "free standing" right to judicial review may arise. The House of Lords, however, has been prepared to hold that executive action is not immune from judicial review merely because it occurred in pursuance of a power derived from the common law, or prerogative, rather than a statutory source (*Council of Civil Service Unions and Others v Minister for the Civil Service*).[26]

In that case a minister proposed to give an instruction under Civil Orders in Council for the immediate variation of the terms and conditions of service of the staff at the Government Communications Headquarters (GCHQ) before there had been consultation with the staff or with the staff's union. It was held that the staff had

a legitimate expectation that unions and employees would be consulted before such instructions were issued. Of course, a liberal approach to intervention does give rise to scathing political comment. Lord Taylor (the former English Chief Justice) referred to this:

> In respect of judicial review, however, recent public and press criticism of the judiciary has moved beyond comment on the decisions reached and focuses increasingly on the legitimacy of the judges taking such decisions at all. If a judge strikes down the decision of a Minister. if a judge is appointed by the Government to investigate a matter of public concern, reports or is thought to be going to report adversely about individuals or groups within his terms of reference, cries are raised that he has got above himself. Phrases like "power hungry" and "frustrated politicians" are entering the commentators' lexicon. The suggestion seems to be that the senior judiciary have decided to mount a bloodless coup and to seize the commanding heights of the constitution.[27]

But if the judges do not protect the individual's rights by judicial review no one else can or will. It may be that judicial review is apt to be described as Mr Michael Beloff, QC sees it:

> I see judicial review coming in like a tide: but like a tide ebbing as well as flowing - even if it comes each time a little further up the beach - and while some obstacles in its path, like sand, can be overridden, others, like rock, will obstinately remain impervious - and all the while cross currents and eddies disturb its progress.[28]

Even if judicial review is "go-going" at the moment in England, in Australia, at least in the area of refugee law, it seems to be at a low ebb.

Perhaps in the views expressed by Justice Kirby - there is a beacon of promise in a sea of darkness:

> .....It is not enough that the highest courts of Australia and other Commonwealth countries should sanction the use of international human rights norms in the work of the courts. Nor is it enough that judicial leaders should evince an internationalist attitude in keeping with the eve of a new millennium. It is essential that judicial officers at every level of the hierarchy, and lawyers of every rank, should familiarise themselves with the advancing international jurisprudence of human rights; that the source material for that jurisprudence should be spread through curial decisions, professional activity and legal training; and that a culture of human rights should be developed amongst all lawyers and citizens of the Commonwealth. .....[29]

If the Australian Janus, keeper of the gate of entry, chooses to show a benign face to the international community, whilst denying human rights at home to which we have pleaded our allegiance abroad, then it is for judges as much as politicians to explore ways in which the unacceptable face of the *Migration Act* is exposed and wherever possible a construction placed upon our laws that mirrors the principles to which the Australian government has professed itself bound at the international conference table.

Endnotes

1 *Minister for Immigration, Local Government and Ethnic Affairs v Teoh* (1994-5) 183 CLR 273, p 288.
2 *Chu Khang Lim & Others v Minister for Immigration, Local Government and Ethnic Affairs & Another* (1992) 176 CLR 1.
3 Blackstone, *Commentaries on the Laws of England*, 3rd ed, vol IV, p 62.
4 *Mabo and Others v The State of Queensland (No 2)* (1991-2) 175 CLR 1.
5 *Dietrich v The Queen* (1992) 177 CLR 292.
6 Lord Radcliffe, "The Problem of Power", *Reith Memorial Lectures* (1951) Lecture II, 25.
7 This survey of the influence of natural law owes much to Professor Weeramantry's interesting exposition in *The Law in Crisis* Capemoss, 1975, 185-197.
8 Gagelar. "Foundations of Australian Federalism and the Role of Judicial Review" (1967) 17 *Federal Law Review* 162, 168.
9 Lord Radcliffe, "The Law and its Compass", (1960) *Rosenthal Lectures to North Western University School of Law*, Lecture 1, 32.
10 Lord Radcliffe, above n. 6, 26.
11 Lord Devlin, "The Common Law, Public Policy and the Executive" (1956) 9 *CLC* 1 at p 14.

12 *Dr Bonham's Case* 1610 8 Co Rep 1136.
13 Robert Stevens, *Judges, Politics, Politicians and the Confusing Role of the Judiciary*, p 36.
14 *Australian Law News*, November 1994, 7-11.
15 *Re Walsh and Johnson: ex parte Yates* (1925) 37 CLR 36.
16 *Wu Yu Fang and Others v Minister for Immigration and Ethnic Affairs and Another* (1996) 135 ALR 583.
17 *Ibid*, 636, per Nicholson J.
18 For a case involving the text of the Memorandum of Understanding itself see *Lu Ru Wei and Zhou Xiao Fang v Minister of Immigration and Ethnic Affairs*, unreported, Fed Ct No WAG 80 of 1996, Drummond J.
19 Migration Legislation Amendment Bill (No. 2) Second Reading, Hansard Thursday, 9 February 1995, p 877.
20 Nelson Mandela, *The Long Walk to Freedom*, pp 175 and 195. *The Long Walk to Freedom* refers to the *Population Registration Act* which defined inequality, suppressed Communism, and made persons who published statements by parties such as the ANC liable to prosecution, and the *Bantu Education Act* bringing native education under colonial decree.
21 Michael Beloff, QC, *Judicial Review 2001: A Prophetic Odyssey*.
22 Justice French, "The Rise and Rise of Judicial Review", (1993) 23 UWALR, 120, 121.
23 *Kioa v West* (1985) 159 CLR 550.
24 *Ibid*, 610.
25 *Wu Yu Fang*, 630.
26 *Council of Civil Service Unions and Others v Minister for the Civil Service* [1985] 1 AC 374.
27 Stevens, above n. 13, 37.
28 Beloff, above n. 21, 56
29 "The Australian Use of International Human Rights Norms", (1993) 16 (2) UNSWLJ 363, 393.

ERRATUM

An editorial error occurred in the article by Marshall Irwin, entitled "The Role of the Criminal Justice Commission in Criminal Justice Administration" published in (1996) 9 AIAL Forum. The first sentence of the first full paragraph on page 40 should read:

> "If some of these recommendations are accepted, there will be significant changes in the CJC".

The word "no" should not have appeared before the word "significant".