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NATURAL JUSTICE IN FEDERAL ADMINISTRATIVE LAW

*Justice J.W. von Doussa**

Paper presented to an AIAL charity seminar, Adelaide, 30 April 1998.

The requirement that in certain circumstances decision-makers must act in accordance with the principles of natural justice or *procedural fairness* (the terms are used interchangeably) is a long established one. Some 200 years ago in *Dr Bentley's case*, in which a famous scholar had been unlawfully deprived by the Vice Chancellor of Cambridge University of his qualifications without notice or an opportunity to be heard, the Court observed that even Adam and Eve were given an opportunity to be heard when they faced the ultimate decision-maker:

> The objection for want of notice can never be got over. The laws of God and man both give the party an opportunity to make his defence, if he has any. I remember to have heard it observed by a very learned man, upon such an occasion, that even God himself did not pass sentence upon Adam before he was called upon to make his defence. 'Adam' (says God), 'where are thou? Hast thou not eaten of the tree whereof I commanded thee that thou shouldest not eat? And the same question was put to Eve also.[1]

However, biblical precedent in this respect is somewhat conflicting.[2] At the dinner party of Belshazzar, the King of the Chaldeans recorded in Daniel V, a moving finger interrupted the proceedings to deliver a message to Belshazzar by writing on the palace wall "mene, mene, tekel, upharsin" which means "you have been weighed in the balance and found wanting". Thereafter Belshazzar's kingdom was divided and he was slain. The prophetic writing on the wall did not indicate that Belshazzar had been given any summons, information on the nature of the complaint, or any opportunity to answer.

In general terms, the principles of natural justice consist of two component parts; the first is the hearing rule, which requires decision-makers to hear a person before administrative or judicial decisions are taken which affect them.[3] The second and equally important component is the principle which provides for the disqualification of a decision-maker where circumstances give rise to a reasonable apprehension that he or she may not bring an impartial mind to the determination of the question before them.[4] The importance of these notions as principles of public law is recognised world-wide through their embodiment, not only as a fundamental component of the common law, but also in international treaties, state constitutions, statutes and codes.[5]

In Australia the right to "due process" or "fundamental justice" is not constitutionally guaranteed. At a federal level the requirement that administrators observe the principles of natural justice is embodied in particular in the *Administrative Decisions (Judicial Review) Act 1977* ("ADJR Act") which confers upon the Federal Court jurisdiction to review "decisions" or "conduct" which are of "an administrative character" arising under an "enactment". Subsection 5(1) of that Act entitles a person who is aggrieved by a decision to which the Act

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applies to apply to the Court for an order of review in respect of the decision on a number of specific grounds, including: "that a breach of the rules of natural justice occurred in connexion with the making of the decision." Gibbs CJ said in *Kioa*[6] that the object of section 5 was to reform procedure and to give the Court power, when it finds that there was a failure to observe the rules of natural justice, to grant the relief for which the Act provides. In this respect (and with the exception of one significant difference - the obligation to give reasons - discussed below) the Act adopts the common law as to the existence or otherwise of a duty to act fairly.[7] It does not render the rules of natural justice applicable to a case in which they would not otherwise apply.[8]

This paper explores some of the issues confronting federal administrative decision-makers and the challenges faced by federal courts engaged in judicial review of administrative action. It examines the scope and content of the duty to act fairly as it has been applied by federal courts.

The principles of natural justice are founded upon fundamental ideas of fairness and the inter-related concept of good administration.[9] Procedural rights also perform an "instrumental role".[10] They contribute to the accuracy of the decision on the substance of the case. Moreover, there are "non-instrumental" justifications for the provision of procedural rights. These embrace formal justice and the rule of law, as the rules of natural justice help to ensure objectivity and impartiality, and facilitate the treatment of like cases alike. Procedural rights can also be seen as protecting human dignity by ensuring that the affected individual is made aware of the basis upon which he or she is being treated unfavourably, and by enabling the individual to participate in the decision-making process.[11] Similarly the provision of procedural rights to an individual affected by an administrative decision serves to increase public confidence in administrators and their decisions. In turn this helps individuals to accept decisions that are adverse to their interests.

While the principle of procedural fairness may be simply stated as requiring that persons be afforded a fair and unbiased hearing before decisions are taken which affect them,[12] its application throughout the common law world has been beset by complexity. The perennial difficulty faced by courts and administrators is to determine in what circumstances procedural obligations must be observed by decision-makers, and what that obligation actually means for a person affected by an administrative decision; in other words, to determine where the outer limits of procedural fairness lie. This difficulty is compounded by two factors. First, values such as fairness and good administration are inherently vague and inchoate, and for this reason judicial review of administrative action is inevitably pragmatic and cannot be based on precise and clearly applicable rules.[13] Secondly, conflict exists between the differing interpretations of the constitutional role of the courts and the proper scope of judicial intervention in regulating government activities. This issue is tied inextricably to the question of how the appropriate balance between the public and private interest is to be attained. Whilst the courts, it has been said, feel compelled to respond to the "vulnerability of the citizen" facing "the pervasiveness of State power",[14] the courts must also be concerned to avoid a situation where the unconstrained expansion of the duty to act fairly threatens to paralyse effective administration.[15]

The general community has an interest in administrative efficiency and unfettered governmental decision-making, particularly where the class of individuals affected by an administrative decision is small. However, values such as fairness and justice to the individual necessarily require respect for individual rights, interests and expectations. What has

become clear since *Ridge v Baldwin*[16] is that the public interest in the functional efficacy of administrative decision-making processes will not always trump the importance of fairness and justice to the individual. Those values are not the antithesis of the public interest. Indeed as Mason CJ declared in *Attorney-General (NSW) v Quin*, "the public interest necessarily comprehends an element of justice to the individual."[17] The competing values of fairness and individual justice on the one hand and administrative efficiency on the other hand constitute the *public* and the *private* aspects of the public interest.

The principles of natural justice are intended to promote *individual trust and confidence* in the administration. They encourage certainty, predictability and reliability in government interactions with members of the public and this is a fundamental aspect of the rule of law which is expressly recognised in the jurisprudence of various European Courts.[18]

The challenge for the courts has been to develop coherent and explicable legal principles which provide administrators, (and their legal advisers) with clear guidelines whilst at the same time retaining sufficient flexibility to allow an appropriate balance between the public and private aspect of the public interest, in the infinite variety of circumstances that come before the courts.

History has shown the complexity of this challenge. The early application of the principles of natural justice by the courts was fraught with peril. Prior to the decision of the House of Lords in *Ridge v Baldwin*[19] the applicability of the *audi alteram partem* rule was based on an artificial distinction between "judicial" and "administrative" functions and between "rights" and "privileges" affected by the exercise of power. The law of procedural fairness has undergone a metamorphosis since that time. It is no longer rationed at its source, that is, rendered inapplicable on the ground of a decision being administrative rather than judicial, or governing a privilege rather than a right.[20] Furthermore, the courts have all but rejected the "universal" theory that the implication of a duty to act fairly in the exercise of a discretionary power is an exercise of statutory construction which restricts the scope of inquiry to the will of parliament.[21] On this view, the principles of natural justice apply "if the legislature authorises their application".[22] The courts have preferred the view that natural justice is a creature of the common law, susceptible to exclusion by clear evidence of legislative intent.[23]

The threshold test of implication

It was the recognition of the common law basis of natural justice that facilitated the conceptualisation of a broader and more simplified basis for determining the applicability of a duty to act fairly in *Kioa v West*,[24] in which Mason J articulated this now renowned principle of implication:

> The 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 statutory intention.[25]

Mason J did introduce one qualification to this formulation, specifically stating that a duty to act fairly does not attach to every decision of an administrative character, but only those which affect "rights, interests or expectations of the individual citizen in a direct and immediate way."[26] In other words, a decision must affect a person individually, not simply as a member of the public or class of the public.[27]

Deane J adopted a similar approach to that of Mason J. His Honour regarded procedural fairness as a common law right, applicable where a decision affects the "rights, interests, status or legitimate expectations of another in his individual

capacity."[28] His Honour acknowledged the relevance of legislative intention to the ascertainment of whether *prima facie* the common law duty to act fairly is excluded.[29] Wilson J did not posit any new test of implication, and seemed to equivocate between the common law implication test articulated by Mason and Deane JJ, and principles of statutory construction to determine the content of the duty to act fairly once established.

The remaining member of the majority, Brennan J, articulated an approach to implication resoundingly different to that of Mason and Deane JJ, but one which was equally as broad, thereby producing a similar result. His Honour held that the exercise of a statutory power will be conditioned by the principles of natural justice where that power, "is apt to affect the interests of an individual alone or apt to affect his interests in a manner which is substantially different from the manner in which its exercise is apt to affect the interests of the public."[30]

Since *Kioa* Australian courts have developed an autonomous system of public law which has experienced the considerable expansion of the principles and applicability of procedural fairness. As Deane J said in *Haoucher*:

> Indeed, 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 a clear contrary legislative intent, be recognised as applying generally to governmental executive decision-making and where the question whether the particular decision affects the rights, interests, status or legitimate expectations of a person in his or her individual capacity is relevant to the ascertainment of the practical content, *if any*, of those requirements in the circumstances of a particular case.[31] (emphasis added)

The courts have now reached the position where on the authority of the common law some degree of fairness is required in most administrative decision-making.[32] The courts have displayed an increasing tendency to relax the implication test and shift their focus towards the content of the duty to act fairly. It has become usual to ask, as Mason J advocated in *Kioa*, not whether a duty to act fairly exists, but rather, what is its practical content?[33] Since *Kioa* the High Court has displayed a commitment to determining the scope of procedural fairness according to broad principles of general application.[34] However, whether a duty to act fairly is owed by a public authority is still ascertained by reference to an individual's personal circumstances, and the threshold test of whether a discretionary power is apt to affect any existing right, interest or legitimate expectation.[35] The term "right" clearly covers situations in which the decision challenged affects a recognised personal or proprietary right of the complainant. Similarly, the protection provided to interests incorporates things such as business and personal reputation, liberty, confidentiality and livelihood.[36]

Furthermore, as Mason J stated in *Kioa*, as a general rule, when a decision-maker intends to reject an application by reference to some consideration personal to the applicant on the basis of information obtained from another source, which has not yet been dealt with by the applicant in his application, procedural fairness will ordinarily require the applicant be given an opportunity of responding to the matter.[37]

Legitimate expectation

The concept of legitimate expectation has been the subject of a great deal of judicial and academic discussion as "a primary vehicle for the implementation of the duty to act fairly."[38] Until recent years it can also be considered perhaps the most amorphous and misunderstood aspect of *audi alteram partem*. At the heart of the doctrine lie the two fundamental aspects of the public interest referred to earlier, specifically the public interest in fairness and individual justice as a manifestation of fair and good administration juxtaposed

against the fundamental importance of administrative efficiency and freedom of discretion. As Beazley JA commented recently:

> The rationale underpinning the recognition of legitimate expectations...includes the promotion of orderly, fair and good administration of government business so as to obviate expediency and to foster integrity in decision makers and public confidence in the process. On the other hand, there is the fundamental question of the right of the government of the day to make policy decisions and...to alter policy, without giving to those involved in the earlier process, a right to be heard as to the change.[39]

Legitimate expectation is arguably the most rapidly developing principle of administrative law and deserves some attention. It is useful to set out the juridical and theoretical basis of the doctrine. It was first used in English law by Lord Denning MR in *Schmidt v Secretary of State for Home Affairs*[40] and *Breen v Amalgamated Engineering Union*[41] as a mechanism for extending the implication of a common law duty to act fairly beyond the strictures of decisions affecting legally enforceable rights and protectable interests. It should be noted that while Lord Denning's original formulation of the doctrine in *Schmidt* was the first time the legitimate expectation doctrine had been articulated in English law, the concept closely reflects the long standing principle in European Community law that the existence of a legitimate expectation may provide its holder with protective safeguards to which he or she would not otherwise have been entitled. Indeed, the recognition and respect for legitimate expectations arising out of the conduct of governmental authorities is "one of the fundamental principles of the European Community"[42] and has been recognised by the European Court of Justice as "one of the superior rules of the Community legal order for the protection of individuals."[43]

The doctrine is a recognition of those aspects of the rule of law that value certainty, predictability and reliability in governmental interactions with individuals. In common law countries this proposition has only recently been acknowledged. In particular de Smith has commented: "The protection of legitimate expectations is at the root of the constitutional principle of the rule of law, which requires regularity, predictability and certainty in government's dealings with the public".[44] However, in the courts of Community Member States and the ECJ, the principle has long been established that the complete denial of legitimate expectations without redress is inimical to the principle of *legal certainty*. Legal certainty, *in this context*, embraces the fundamental idea that those who have expectations that a particular policy choice made by an administrative agency will not be altered or revoked, are entitled to some form of procedural redress if it does.[45] This principle is judicially acknowledged as fundamental to Community Law.[46]

In common law countries the importance of regularity and predictability, or *administrative certainty*, must be acknowledged as a component of fairness and individual justice which is manifest in the doctrine of legitimate expectation. This is so as unfairness flows from the unpredictability of broad discretionary powers. As Professor Galligan states: "By not enabling individuals to build up expectations about how decisions are to be made, discretion, it has been said, creates unfairness."[47] Express representations, or representations implied through a normative course of conduct, treaty ratification, policy statements and statutory criteria may create expectations as to the manner of, pre-conditions and criteria for, the exercise of discretionary powers. Where individual expectations are respected by public authorities they act as a limitation upon broad discretion, which in turn, makes the exercise of discretionary powers less arbitrary. Administrative decision-making becomes more predictable.

It is here that the connection between the rule of law and the theoretical basis of legitimate expectation is apparent. In our society it is the judiciary as the benefactor of supervisory jurisdiction over the executive arm of government that exists as the safeguard of the rule of law. The rule of law can be understood as embracing many of the principles of judicial review. It is a constraint upon the exercise of arbitrary power. It values the rights of individuals to reasonable access to the courts and the notion of equal responsibility before the law.[48] The rule of law also values stability, regularity and predictability in the state's interactions with individuals. As John Rawls states:

> A legal system is a coercive order of public rules addressed to rational persons for the purpose of regulating their conduct and providing the framework for social cooperation. When these rules are just they establish a basis for legitimate expectations. They constitute a ground upon which persons can rely on one another and rightly object when their expectations are not fulfilled.[49]

The rule of law therefore recognises the need for individuals to be able to plan their lives in reasonable anticipation of how government agencies will exercise discretionary powers towards them.[50] Hayek maintained that government authorities are bound by pre-announced fixed rules, which "make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances, and to plan one's individual affairs on the basis of this knowledge."[51] Joseph Raz questions the absoluteness of Hayek's statement, and his assumption of its overriding importance, but also regards one of the fundamentals of the rule of law as regularity, certainty and predictability in government interactions with the public.[52]

In Australia, where a government institution purports to resile from an expectation it has enlivened in an individual, such conduct must be regarded as no less inimical to the rule of law than it is in Europe. In common law countries, this principle is embodied in the notion of *fairness*, while in Europe, *legal certainty* is directly recognised as a fundamental principle of Community law.[53] It follows, that that aspect of the rule of law which values certainty and predictability in individual dealings with the state, underpins the courts' preparedness to recognise the importance of individual justice and the protection of legitimate expectations in both systems of law.

Despite its important theoretical basis, the concept of "legitimate expectation" has endured a range of compelling criticisms since it was first considered by the High Court in *Salemi v MacKellar*,[54] not the least of which have been directed at its vagueness and indeterminacy.[55] In both *Schmidt* and *Breen* and a number of cases which followed,[56] the doctrine was only elucidated by example, leaving it up to later courts to determine its precise meaning and content.[57] By the time it was first encountered by Australian courts in *Salemi* and *Heatley*[58] it had only existed in English law for a decade, and throughout that time courts considering it had refrained from attempting a definition.[59]

While the doctrine is by no means precisely defined even now, the concept has been incrementally developed and its precise scope has become more clearly identified. It has become an important instrument by which a common law duty to act fairly is invoked. The courts now recognise that expectations arise out of government interactions with individuals, the circumstances of which are examined to determine whether an expectation can be considered "legitimate". The test of legitimacy is an objective one, insofar as the relevant conduct must be reasonably capable of generating the expectation claimed.[60] It is irrelevant whether the complainant actually held the expectation at the relevant time.[61]

An expectation may be held that some *substantive* benefit or advantage will be granted by the decision-maker, or if the individual already has the benefit, that it will be continued and not abrogated without the opportunity to argue for its conferral or retention.[62] Alternatively, an expectation may be held that some form of procedural benefit will be conferred upon the individual before a decision is made affecting an entitlement to a substantive right or benefit. A claimant's entitlement however, is to the observance of procedural fairness before the substance of the expectation is denied rather than to the substance of the expectation itself.[63] In other words, what a person *actually expects*, (the *descriptive* content of an expectation) will not necessarily accord with the legal effect given by a court to the existence of the expectation. Thus, the judicial formula for determining entitlement pursuant to the existence of this objective legal status is essentially *prescriptive*.[64] In some circumstances the expectation may in fact be of a procedural right and subsequently the expectation may correspond with the remedy afforded by the court. For example where a government body represents to an individual that they will be given a hearing before a decision is made as to their entitlement to a particular benefit, the claimant's expectation is of a hearing and it may also be the remedy provided.[65]

Many of the vagaries of legitimate expectation that have plagued its development since *Schmidt* have now been resolved, particularly by the High Court's recent decision in *Minister for Immigration and Ethnic Affairs v Teoh*.[66] While the doctrine remains open-textured, it is now clear that a legitimate expectation will generally arise out of either an express or implied representation as to the substantive outcome of a decision-making process, or as to a particular procedure that a public authority will follow. Fairness will bind the government authority, to the extent that it must provide a hearing or other form of procedural right before departing from its assurance, provided that honouring the undertaking does not conflict with the public authority's statutory duty.[67]

A published, considered statement of policy of a public authority or the existence of published guidelines may create an expectation in an individual to whom the policy is directed that the decision-maker will act in accordance with the operative[68] policy.[69] A normative past course of conduct or regular practice of government in its interaction with an individual may give rise to an expectation that the practice will continue. If the practice is sufficiently regular, fairness may demand the public authority not depart from it without the affected individual being given an opportunity to argue for its continuance.[70] The practice does not necessarily need be directed at the complainant party.

More controversially, ratification of an international convention by the executive government is a positive statement to the international community and the Australian people that the government and its agencies will act in accordance with the convention. That positive statement founds an expectation, absent statutory or executive indications to the contrary, that administrative decision-makers will act in conformity with the provisions of the convention. In any event, a decision-maker cannot depart from its relevant provisions without first giving the individual affected a hearing as to why the convention provisions should be complied with.[71]

The effect of the *Teoh* decision may be cut short by the Federal Government's unfavourable reaction to it. Not long after the High Court handed down its decision, the former Labor government issued a statement intended "to restore the position to what it was understood to be prior to the *Teoh* case." The statement declared that "it is not legitimate, for the purpose of applying Australian law, to expect that the provisions of a treaty not

incorporated by legislation should be applied by decision-makers."[72] Whether this statement will have its intended effect is uncertain.[73] But its sequel, the *Administrative Decisions (Effect of International Instruments) Bill 1995* is likely to. It provides that Australia's ratification of an international treaty does not give rise to a legitimate expectation that an administrative decision will be made in accordance with its terms.[74] The Bill seems destined to become legislation in due course, and it is for this reason that the political ramifications of the *Teoh* principle and its effect upon executive efficiency will not be considered.[75]

Expectations have also been held to arise by virtue of the express statutory criteria for the exercise of a discretionary power.[76]

The concept of legitimate expectation is now accompanied by a significant body of case law and commentary which, to a significant extent, defines its legal parameters. Brennan J stated in *Annets v McCann*:

> Without an explicable legal principle to support the remedies of judicial review, the courts will be perceived to be asserting an authority to intervene in the affairs of the Executive Government whenever the court determines for itself that intervention is warranted.[77]

By continuing to look for legitimate expectations, rather than basing their decisions on broad and incipient ideas of fairness and good administration, judicial review for unfairness appears less like an exercise of discretionary power.

A dualist role

As Deane J pointed out in *Haoucher*, the existence of any recognisable right, interest or legitimate expectation is now becoming relevant to the ascertainment of the practical content of the common law requirements of procedural fairness.[78] It is for this reason that legitimate expectation now seems to occupy a dualist role, in both implying a duty to act fairly in those circumstances in which an applicant has no recognisable right or interest, and in strengthening the content of the duty to act fairly once established. This has been summarised by Gaudron J in *Haoucher*.

> The notion of legitimate expectation is one to which resort may be had at two distinct stages of an inquiry as to whether there has been a breach of the rules of natural justice. It may serve to reveal whether the subject matter of the decision is such that the decision-making process is attended with a requirement that the person affected be given an opportunity to put his or her case...On the other hand, *it may serve to reveal what, by way of natural justice or procedural fairness, was required in the circumstances of the particular case.*[79]

Similarly Brennan CJ, recognised that where a power is so created that the according of natural justice conditions its exercise, "the notion of legitimate expectation may usefully focus the attention on the content of natural justice in a particular case."[80] In other words, the existence of a legitimate expectation that a certain substantive benefit will be conferred or that a certain procedure will be followed may generate an obligation on a governmental authority to observe procedural requirements aimed at preventing the frustration of that expectation. It remains however, to strike a balance between the right of individuals to fair and just treatment at the hands of governmental authorities, and the importance of the functional efficacy of public administration.

Moral responsibility, it has been suggested, justifies the doctrine of legitimate expectation. If the government, by representation or otherwise, commits itself to a course of action it should be expected to honour that commitment.[81] In this sense, by facilitating the protection of legitimate expectations the courts are applying community standards and moral values.

Content of the duty to act fairly

As Professor Allars has observed:

> The emergent certainty in legal principle relating to the implication of procedural fairness does not provide neat answers to questions of the exact procedural rights of parties to tribunal proceedings. The content of procedural fairness is flexible, depending upon the statutory provisions and the particular circumstances of each case. There remains a problem of predicting exactly how the procedure the common law requires will be moulded to the statute and the circumstances.[82]

The difficulty of predicting procedural requirements derives from the fact that it is impossible to articulate any universal rule as to the content of the duty to act fairly. The oft-cited statement of principle of Tucker LJ in *Russell v Duke of Norfolk*[83] points out that the requirements of procedural fairness must depend upon the circumstances of the case, the nature of the enquiry, the rules under which the tribunal is acting, the subject matter that is being dealt with and so forth.[84] This factor has been further complicated by the fact that the broadening of the common law implication principle and subsequent expansion of the scope of decisions conditioned by the principles of procedural fairness has resulted in an inversely proportionate decrease in the minimum content of the duty to act fairly. Many judges and academics now believe that there is no irreducible minimum to the practical content of procedural fairness.[85] In other words, in some circumstances the duty to act fairly may be so minimal as to prevent an applicant from obtaining any form of redress.[86] In any event it is true to say that the content of fair procedures may range from merely prior notice that a decision is to be made, through to an entitlement to make written or oral representations, to a formal hearing possessed of all the characteristics of a judicial hearing.

The very fact that what is fair in a given situation, in terms of the content of the duty to act fairly, depends entirely upon the circumstances[87] of the case makes it very difficult to construct any meaningful body of rules capable of providing guidance to decision-makers and individuals. In *Kioa*, Brennan J said that the repository of power will satisfy an obligation to observe the principles of natural justice "by adopting a procedure which conforms to the procedure which a reasonable and fair repository of the power would adopt in the circumstances when the power is exercised."[88] This statement in itself provides little guidance, other than an indication that what is fair in the circumstances is the threshold test.

Some guidance may be provided where the duty to act fairly arises out of the existence of a legitimate expectation of a hearing.[89] Likewise the legislative framework in which a decision is made will be significant in determining what procedural fairness requires. Brennan J stated in *NCSC v News Corp Ltd*:

> The terms of the statute which creates the function, the nature of the function and the administrative framework in which the statute requires the function to be performed are material factors in determining what must be done to satisfy the requirements of natural justice.[90]

In addition to the nature of the statutory or other power being exercised, it is relevant to consider the width of the discretion conferred upon the decision-maker. Aronson and Dyer suggest that content may be reduced where there is little or no discretion and the decision turns on relatively straightforward questions.[91] The existence of a very broad discretion also suggests the existence of commensurately reduced procedural rights which may even go so far as to indicate a legislative intention to exclude the principles of natural justice altogether. This will be particularly so where the subject matter of the exercise of the discretion is essentially political. As it has often been said, matters within the area of policy or political decisions do not attract a duty to observe natural justice.[92]

Often legislative guidance as to the procedures to be followed by administrators may only exist at a more general level, for example obliging the decision-maker to act in a manner which is "fair, just, economical, informal and quick."[93] At other times the legislative regime will expressly prescribe minimum standards of fair procedures to be observed by administrators exercising a particular power. It may, for example, provide an affected person with an entitlement to an oral hearing, a right to legal representation and a right to call witnesses.

One significant example in which the procedures of a tribunal have been prescribed in the empowering statute may be found in the recent amendments to the *Migration Act 1958* (Cth) which is worthy of some discussion. Section 420 of that Act replaces the operation of the common law rules of natural justice. It requires the tribunal to pursue the objective of providing a "mechanism of review that is fair, just, economical, informal and quick" and that the tribunal act "according to the substantial justice and the merits of the case". According to Davies J in *Eshetu v Minister for Immigration and Multicultural Affairs*[94] the effect of that provision requires the procedures to be adopted by the tribunal to be fair, "otherwise the Refugee Review Tribunal will not be able to arrive at the justice and merits of the case."[95] Moreover, the failure to observe such procedures is considered to be a breach of the statute, rather than the common law principles of natural justice - accordingly such an error will not be saved by subsection 476(2), which precludes judicial review for breach of the common law principles of natural justice.[96] A useful discussion of the conditions upon which the tribunal may exercise its power may be found in the judgment of Burchett J in *Eshetu*.[97] Sections 423-429 relate to the conduct by a tribunal of a review. Section 423 provides for evidence and arguments to be put before the tribunal in writing. Section 424 entitles the tribunal to make a decision without proceeding to oral evidence, as long as the decision is favourable to the applicant. However, where the matter cannot be so simply disposed of section 425 provides that the tribunal "must give the applicant an opportunity to appear before it to give evidence." Section 426 entitles the applicant to request the tribunal obtain oral evidence from other persons, although it cannot be compelled to do so. Section 427 sets out the powers and procedures of the tribunal in obtaining evidence and at the hearing.

As Burchett J stated in *Eshetu*, section 425 is in effect a recognition of *audi alteram partem* as the primary rule of natural justice. His Honour considered that in combination with the section 420 requirement that the tribunal act in accordance with the "substantial justice and merits of the case" the tribunal may, in certain circumstances, be compelled to obtain evidence from witnesses who are able to support the applicant's case.[98]

Thus the Migration Act in general terms seems to codify procedures required by the common law. It confers enforceable statutory rights to fair procedures which are similar to those provided at common law.[99]

The codification of tribunal procedures would not be apposite to every type of decision-making body. In some cases decision-making processes are so informal and the participatory rights of applicants are so narrow that codification would in fact do more to encumber the procedures of the authority than to expedite them. In such cases the principle of administrative predictability must be subordinated to that of administrative efficiency.

For this reason codification, if it is to take place, is likely to occur on a tribunal by tribunal basis, probably through the mechanism of the empowering statute. The alternative of enacting a general statutory regime implementing uniform standards of procedural fairness to all

administrative decision-making bodies has been considered.[100] The central argument in favour of such a code is that it would introduce some uniformity into a field where variety between the many different decision-making bodies is a major characteristic.[101] However, in other jurisdictions legislation creating uniform "minimum standards" of procedural participation to be observed by tribunals has been of limited success.[102] This does not of course, mean that the idea should be discarded, however it encounters the formidable difficulty that any such legislative regime would have to accommodate the multiplicity of different jurisdictions and decision-making processes of individual tribunals as well as the myriad of factual circumstances that confront decision-makers. Any statutory code sufficiently wide to cover all forms of jurisdictions and responsibilities of individual decision-makers would have to be drafted so widely that it might provide only illusory safeguards.[103] In practice any "minimum standards" legislation would have to be supplemented by common law rules and would do little to redress the predictability question referred to above.

The next factor to be considered is the likely consequences of the decision. The fair procedures required of administrators must necessarily be proportionate to the seriousness of the consequences of a decision adverse to the individual affected. At one extreme, the decision under challenge may have an effect on an individual's life or liberty, as may be the case where the decision relates to a claim for refugee status. An example is *Zhang Jia Qing v Minister for Immigration and Ethnic Affairs.*[104] In that case, a departmental official had reason to consider that the applicant's visa may have been fraudulently obtained. The applicant arrived in Australia at 6.00 am on 12 July 1997. He was detained by an official and interviewed with the aid of an interpreter. He indicated that he was feeling unwell. The officer held another interview with the applicant at about 3.00pm, to further discuss his concerns about the manner in which the visa was obtained and to give the applicant an opportunity to discuss these concerns. The applicant was given five minutes in which to consider the proposed cancellation of his visa and to advance reasons why such a course should not be taken. After the expiry of five minutes, the officer decided to cancel the applicant's visa under paragraph 116(1)(a) of the Act, having decided that the applicant had not provided sufficient reasons as to why this action should not be taken. The relevant power to cancel a visa was conditioned upon a reasonable opportunity being given to the holder of a visa to respond to a proposal by a departmental officer to cancel it.[105] Burchett J considered that the time allowed was not reasonable, and that a breach of the statutory rules governing the cancellation of visas and embodying the principles of procedural fairness, had occurred. The case is illustrative of the principle well recognised in the United Kingdom, that where life and liberty are threatened (particularly in immigration cases) "only the highest standards of fairness will suffice".[106]

The suggestion of Aronson and Dyer that in assessing the consequences of the administrative decision for the individual affected, reference should be had to the consequences which would seem probable on the basis of what the decision-maker knew and might reasonably be expected to know, is a sensible one.[107]

The relevance of cost

Professor Craig suggests that in deciding upon the application of natural justice or fairness, the court necessarily balances the nature of the individual's interest against the likely benefit to be gained from an increase in procedural rights and the costs to the administration of having to comply with such process rights.[108] Such an approach has been adopted (although not wholeheartedly) in the United States. In *Mathews v Eldrige*[109] the

Supreme Court weighed the private interest to be affected by the administrative action and the risk of an erroneous deprivation of that interest through the procedures used against the government's interest in the form of the "fiscal and administrative burdens that the additional or substitute procedural requirements would entail."[110]

Whilst the likely costs for the administration of complying with administrative procedures prescribed by the courts is undoubtedly a consideration, the use of a "cost-benefit" analysis to determine the content of the duty to act fairly has its obvious limitations. Such tests are difficult, unpredictable and subjective in their application and are based on factors not readily assessed by a court.[111] However, the courts cannot ignore the effect of increased procedural standards upon government resources. The effect of prescribed administrative procedures upon public resources must be taken into account as a relevant (although far from determinative) consideration in balancing the public and private interests of administrative efficiency and individual justice and fairness. Whilst the critics of the High Court's *Teoh*[112] decision would argue otherwise, this appears to be the approach the courts now maintain.[113]

Urgency

In assessing the circumstances in which a decision is to be made, regard must be had to the existence of temporal limitations. The content of fair procedures may be reduced to the extent that it creates no positive obligation upon a decision-maker where the court is satisfied that a decision was required to be made as a matter of urgency.[114] Notable case examples of such a situation include the decision by the "Inspector of Nuisances" to exercise his power to seize and destroy contaminated meat.[115] Similarly in *R v Davey*[116] an order was upheld requiring the "removal to hospital of a person suffering from a dangerous infectious disorder" without notice to the individual affected.[117]

Futility

In deciding what the existence of a duty to act fairly requires it is necessary to note one factor which should, in all but the most limited circumstances, be ignored. That is whether any causal link exists between the existence of fair procedures and the likely final outcome of the decision-making process. The courts strive to avoid the imposition of costly and ineffective procedures upon the administration. In this regard the temptation often exists for courts to refrain from granting relief for a breach of the rules of natural justice where their observance would not have influenced the final outcome; in other words where to grant relief would be a futile exercise. Professor Wade states the principle in *Administrative Law*:

> A distinction might perhaps be made according to the nature of the decision. In the case of a tribunal which must decide according to law, it may be justifiable to disregard a breach of natural justice where the demerits of the claim are such that it would in any case be hopeless.[118]

To posit an example a company may be told at a preliminary stage by a government department that its application for a government grant meets the relevant criteria. It is told that its application will be considered on an "individual merits" basis with the only determinative factor being whether the applicant satisfies the relevant criteria. It is told to take its time and ensure its application is complete. Because the government's available funds are limited, and contrary to the earlier representation, its application is treated on a "relative merits" basis, alongside other applicants and is subsequently rejected. Clearly the company has a legitimate expectation that its application will be considered on a "individual merits" basis, irrespective of other applicants. The existence of the legitimate expectation would give rise to a

hearing as to why the government authority should not have treated its application on a relative merits basis. However, funding has since been distributed and no more is available. Even if the company were able to convince the public authority that its decision-making process was flawed, no funding will be available if its application is subsequently successful. It is in such circumstances that the question of futility arises and it is a question that often presents difficulties to courts engaged in judicial review.[119]

There is an established line of authority that not every error of law discovered by a court in the reasoning of a decision-maker will result in the decision being vitiated. Certainly, both section 39B of the *Judiciary Act 1903* (Cth) and section 16 of the ADJR Act confer upon the court a broad discretion to grant relief in the form of a wide range of orders and also a discretion to refuse relief, notwithstanding that the statutory preconditions for a grant of relief have been fulfilled.[120] The error in question must be material to the tribunal's decision, and not merely academic[121] before relief will be granted.[122] For example a failure to correctly state the law may be of no consequence to the ultimate decision and relief may be denied.[123] Similarly an order requiring the reconsideration of a decision would be futile and the denial of relief can be justified where the application must be refused as a matter of law. In *Mobil Oil v Canada Newfoundland Offshore Petroleum Board*,[124] the Canadian Supreme Court found that the Board had denied Mobil Oil natural justice but declined to grant relief on the basis that the Board was compelled by law to reject the application. The Court considered it would have been "nonsensical" for it to set aside the Board's decision.[125]

However, where the error involves a failure to observe the principles of natural justice, it is submitted that the discretion whether to grant relief is governed by different considerations not necessarily applicable where a decision may be impugned on the basis of some other error of law. The denial of relief to an individual on the basis that the provision of procedural fairness would require the expenditure of government resources and would probably make no difference to the decision encounters a number of formidable objections. The first objection concerns the possibility that *actual injustice* may arise because the denial of natural justice in fact affects the outcome of the decision-making process. In this respect one is quickly reminded of the well known statement of principle of Megarry J in *John v Rees*:

> As everybody who has anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases which, somehow, were not; of unanswerable charges which, in the event, were completely answered; of inexplicable conduct which was fully explained; of fixed and unalterable determinations that, by discussion, suffered a change.[126]

The Full Court of the Federal Court pointed out in *Century Metals v Yeomans*[127] that it may compound the injustice already done to an applicant if he were denied an opportunity, on discretionary grounds, to seek a reversal of a public authority's decision.[128]

The second objection is stated by de Smith and concerns the *perceived injustice*, that may eventuate from a failure to provide relief:

> The fundamental principle at stake is that the public confidence in the fairness of adjudication or hearing procedures may be undermined if decisions are allowed to stand despite the absence of what a reasonable observer might regard as an adequate hearing.[129]

Megarry J's statement in this respect is also notable:

> Nor are those with any knowledge of human nature who pause to think for a moment likely to underestimate the feelings of resentment of those who find that a decision against them has been made without their being afforded any

> opportunity to influence the course of events.[130]

In *Mobil Oil v Canada Newfoundland Offshore Petroleum Board,* Iacobucci J cited Sir William Wade for the proposition that "fair procedures should come first, and that the demerits of bad cases should not ordinarily lead courts to ignore breaches of natural justice or fairness."[131]

The dangers of denying relief on the basis that the outcome would have been no different had a hearing been given were discussed by Bingham LJ in *R v Chief Constable of Thames Valley Police; ex p. Cotton*[132] and later in "Should Public Law Remedies be Discretionary" where his Lordship pointed out a further danger:

> In considering whether the complainant's representations would have made any difference to the outcome, the court may unconsciously stray from its proper province of reviewing the propriety of the decision-making process into the forbidden territory of evaluating the substantial merits of a decision.[133]

Thus the importance of the appearance of fair procedures and the potential for the perpetration of actual injustice on affected individuals requires the applicant for a government grant frustrated by the unavailability of funding be afforded procedural redress - despite its apparent futility. Fortunately, this is a proposition that has generally been supported by Australian courts.[134]

Reasons & the duty to act fairly

As noted earlier the ADJR Act adds to the common law by imposing an obligation upon decision-makers to provide reasons for their decisions.[135] The obligation upon public officials to provide persons affected by an administrative decision with the details of the case against them and an opportunity to be heard in response is quite different from any obligation to give the reasons for the decision.[136] At common law no such general duty exists.[137] The traditional justification for the absence of a general duty to give reasons at common law has been a desire on the part of public officials to avoid litigation.[138] It is also said to potentially "place an undue burden on decision-makers; demand an appearance of unanimity where there is diversity; call for the articulation of sometimes inexpressible value judgments; and offer an invitation to the captious to comb the reasons for previously unsuspected grounds of challenge".[139] The provision of reasons is also said to increase delays and the formalisation of procedures as well as to expose administrative policy to public scrutiny.

The duty to give reasons under the ADJR Act is consistent with the notion of good administration. At a federal level its beneficial effects are wide-ranging[140] and have proved to far outweigh its disadvantages. First it must be noted that the obligation to give reasons is tempered by provisions which render it inapplicable to decisions to which its application is considered, as a matter of public policy, to be inappropriate.[141] In instrumental terms it facilitates a close analysis (both by the individual affected and an appellate court) of the basis upon which a decision was reached to ensure the decision was based upon relevant considerations, it enables greater consistency in decision-making and provides guidance for other public officials determining similar issues. However, the existence of a statutory duty to give reasons brings certain *non-instrumental* benefits. Specifically, it recognises the basic principle of fairness that an individual should be entitled to an explanation as to why there has been an adverse exercise of power. Moreover, it diminishes the perception that the exercise of power is an arbitrary one and facilitates an understanding in the individual affected that the public official has discharged the obligation to act fairly and in accordance with the empowering statute.[142]

Operative policy guidelines

A representation capable of founding a legitimate expectation may take the form of a published, considered statement of government policy, itself lacking statutory force.[143] Statements of policy are effectively representations made by public authorities as to the manner in which a particular discretion will be exercised.[144] This was recognised by the High Court in *Haoucher v Minister of State for Immigration and Ethnic Affairs*[145] and by Gummow J in *Minister for Immigration, Local Government and Ethnic Affairs v Kurtovic*.[146] In *Haoucher*, the relevant policy concerned the circumstances in which the Minister for Immigration would order deportation. The importance of ministerial policy in this respect was highlighted by Deane J: "For as long as that published policy was operative, a deportee would reasonably be expected to see it as providing a critical reference point in determining the desirability and effectiveness of an application to the tribunal for review of a deportation order."[147] A policy will be *operative* where the relevant public authority purports to act in compliance with its provisions.[148]

However, not all policy statement will give rise to legitimate expectations which impose procedural obligations. Only policy statements which are clear, unambiguous, and relatively particularised will do so. Broad and abstract advisory documents, which do not clearly indicate the circumstances in which a particular discretionary power will be exercised, but merely set out the government's general attitude towards a particular subject, cannot give rise to expectations that are legitimate. Rather, such statements can only be considered as giving rise to mere "hopes" that a decision-maker will act in a particular way.

Policy abrogation

The extent to which the adoption by a public authority of a later policy "impliedly repeals" an earlier inconsistent policy is an important issue which has barely been explored in administrative law.[149] The adoption of a new policy by a government institution raises questions of the extent to which expectations based on an abrogated policy can survive. This is particularly so where an individual has initiated an application for some form of discretionary benefit, with an expectation based on an operative policy that particular criteria will be applied by a decision-maker in making a determination. In such circumstances, it is not clear whether the applicant must be heard as to whether new criteria outside those contained in the operative policy should be applied to his or her circumstances. In this respect, a conflict can be seen to arise between that aspect of individual justice and fairness that requires the law to be certain, predictable and ascertainable, (discussed above) and what can be considered "the constitutional importance of ministerial freedom to formulate and reformulate policy."[150] The courts have recognised as a fundamental principle of public law, the importance of enabling government authorities to make both plenary and incremental changes to pre-existing policies.[151] It is for this reason that the High Court in *Quin*,[152] made it clear that the existence of a legitimate expectation arising out of government policy guidelines for the exercise of discretion, cannot prevent a decision-maker from departing from that policy. An expectation cannot dictate the terms of any new policy a government institution decides to adopt.[153] nor can it require a hearing be given to affected individuals prior to a public authority's decision to devise and publish a new policy.[154]

This proposition was recently affirmed by the New South Wales Court of Appeal in *Save the Showground for Sydney Inc v Minister for Urban Affairs and Planning*.[155] Briefly stated, the facts of that case are as follows. In 1994 the NSW state government announced its intention to relocate the Royal Agricultural Society and the annual Royal Easter Show from

the Sydney showground site to Homebush Bay. The government declared that a Regional Environmental Plan (REP) would be prepared in respect of the future planning uses of the Showground. It established a committee under section 22 of the *Environmental Planning and Assessment Act 1979* to advise on the impact of proposed planning uses for the site. In March 1995 the state elections resulted in a change of government. The REP process was abandoned and a State Environmental Planning Policy (SEPP) was established which permitted the use of the showground as a film studio.

The appellants contended that the representations made by the former government gave rise to a legitimate expectation that the land planning uses for the showground would be preceded by a consultative process and that the members of the former section 22 Committee had a legitimate expectation that they would be consulted as a part of that process. It was also submitted that the section 22 Committee had a legitimate expectation that they would be consulted with respect to the decision to abandon the REP process and replace it with a SEPP.

Gleeson CJ considered that the legitimate expectations for which the appellants contended had not been established.[156] His Honour held that the section 22 Committee could not reasonably have expected to be consulted about a change of policy from REP to SEPP nor to be consulted about the use of the showground notwithstanding the abandonment of the REP. His Honour considered that once it was accepted that the new policy was within the ambit of the discretion of the executive, it followed that the executive could not, by promise or representation, fetter itself in the exercise of its discretion.[157] Notably his Honour did not consider the change of government as relevant to the existence or otherwise of any legitimate expectation.[158]

Beazley JA considered that a legitimate expectation may be held by a group, as well as by an individual affected by an administrative act.[159] Her Honour considered that the right of consultation and any legitimate expectation thereof that was held by the section 22 Committee, could only exist for so long as the REP remained operative. Once the REP was abandoned, any legitimate expectations arising out of it were extinguished. Her Honour held:

> A decision to abandon is as much a matter of policy as is a decision to instigate the process, and is one which a government is free to make, unfettered by any previous representation or promise.[160]

Most importantly however, Beazley JA considered that there had been no undertaking or promise, express or implied, to the section 22 Committee or to the public generally that there would be consultation in respect of planning matters generally relating to the showground site. Nor were there any other circumstances which gave rise to any legitimate expectation that the section 22 Committee would be heard on the government's decision to change from the REP process to a SEPP.[161] Powell JA agreed with their Honours Gleeson CJ and Beazley JA.

The case confirms the principle articulated in *Quin*, that an individual does not have a right to be heard on a general change of policy. Decisions to change policy are political ones and it need only be established that the new policy is within the ambit of the discretion of the executive. In the *Sydney Showground* case there could be no expectation on the part of the public generally that there would be consultation on either the decision to change policy, or even more broadly, on the future use of the showground site, notwithstanding the abandonment of the REP.

Are there circumstances where a change of policy attracts procedural rights to individuals affected by the change?

The authorities point to a proposition which is implicit in the judgment of Beazley JA in the *Sydney Showground* case[162] that had there been a representation to the public generally or at least to a specific class[163] of individuals that such consultation would take place, an expectation to that effect would have been legitimate and would have conditioned the change of policy upon the provision of a hearing to the class of individuals to which the representation was directed.

This general proposition must be qualified in one respect. Where an individual has initiated an application with a government institution with the expectation that an operative policy will be applied, and the government decides to apply new criteria to that individual's specific circumstances, the individual adversely affected should be given an opportunity to be heard as to why the public authority should not take such a course. In other words, where the government authority purports to apply criteria selectively depending on an applicant's individual circumstances, its power to do so should be conditioned upon the provision of a hearing to the applicant affected.[164]

This is a proposition which has received some support in the case law.[165] Perhaps the best known authority can be found in the English Court of Appeal's decision in *R v Secretary of State for the Home Department, ex p. Khan.*[166] The Secretary of State for the Home Department had published a circular setting out the criteria to be satisfied before a foreign child would be allowed to enter the United Kingdom for adoption. The Home Secretary rejected Khan's application, applying vastly different criteria to those set out in the circular. Parker LJ equated the circular to a representation or undertaking clearly capable of giving rise to a legitimate expectation.[167] Although the Home Secretary could disappoint the expectation it had created, he was not entitled to do so without affording the complainants a hearing as to why new criteria should not be adopted, and "then only if the public interest required it".[168]

However, a different view was taken in *Re Findlay.*[169] Lord Scarman held that the publication of a new policy destroys any previous expectations as to how a discretionary power will be exercised and that an applicant could only legitimately expect to have his or her case decided individually and in accordance with whatever policy the repository of power saw fit to adopt.[170] A similar view was held by Wilcox J in *Peninsula Anglican Boys' School v Ryan.*[171] His Honour pointed to the main arguments against requiring a decision-maker to give an individual a hearing before applying a new policy to an individual's particular circumstances:

> A rule which required [an] imminent decision to be deferred whilst notice was given of the policy considerations which appeared to be relevant would be, at least, highly inconvenient. Moreover, policy considerations change from time to time; sometimes quickly and frequently. The inconvenience and delay attendant upon giving notice of each shift of wind is obvious.[172]

The High Court has only made passing reference to this question. *Attorney-General v Quin* concerned a legitimate expectation arising out of government policy but the individual affected sought the enforcement of his *actual* expectation based on the old policy rather than simply a hearing as to whether the new policy should be applied to his circumstances. Mason CJ confirmed there exists a conflict of authority as to whether a hearing is required, deferring the matter to be determined upon a more appropriate occasion.[173]

It is submitted that the approach of Parker LJ in *Khan* with respect to the selective application of a new criteria to an applicant's circumstances is to be

preferred to that of Lord Scarman in *Re Findlay*. Procedural fairness requires that an applicant be afforded an opportunity to be heard as to why the previously operative policy should not continue to apply to the circumstances of his or her case. There seems no logical reason to allow a public authority to escape the requirement that it afford an individual a hearing, prior to the disappointment of an expectation based on policy, simply because it is characterised as such. An integral part of fairness in governmental decision-making is the formulation and notification of standards to be used in the exercise of discretion.[174] If decision-makers were free to announce such standards but refuse to apply them upon closer examination of an individual's circumstances, without any form of a hearing being given to the individual affected, then policy statements would be of little value. Parker LJ in *Khan* went so far as to describe such a practice as "bad and grossly unfair administration."[175] It must be remembered, however, that provision of a hearing prior to a public authority's decision to apply new criteria to a consideration of an individual's circumstances, does not prevent the public authority from ultimately adopting a new policy. It is for this reason that Gabrielle Ganz's suggestion that Parker LJ's approach in *Khan* threatens to set government policies in concrete, is misplaced.[176] As has been made clear most recently by the New South Wales Court of Appeal, the government cannot be prevented from implementing a change in policy altogether. To compel a decision-maker to act in accordance with an abrogated policy would run counter to the principle of legality that requires repositories of power not fetter the future exercise of their discretion,[177] as well as the established principle that policies should not be inflexibly applied.[178]

Conclusion

Against this background of legal principle, this paper ends on a practical note. To ensure that these principles are applied and achieve their intended purpose, there is obviously a need for government authorities to provide training sessions to decision-makers, to provide up to date agency policy manuals which reflect developments in the law, and to create a general awareness in decision-makers of the fundamental requirements of the principles of procedural fairness. Given that the obligation to act fairly is a question that is central to an enormous variety of disputes between governmental authorities and citizens, it is likely that the precise parameters of the procedural fairness doctrine will never be mapped out. Of course the legal representatives of those seeking to impugn an administrative decision will perennially scrutinise administrative action in search of new grounds to attack a decision on the basis that it was procedurally unfair.[179] However, if such an educative regime is observed, administrative error will tend to flow at the outer boundaries of previously articulated principles rather than from a general lack of understanding of the law.

Endnotes

1 *The King v The Chancellor, &c., of Cambridge*, 1 Stra. 557

2 See Heuston *Essays in Constitutional Law* (1964) p185.

3 Otherwise known as the principle of *audi alteram partem* (hear the other side).

4 Otherwise known as the principle of *nemo debet esse iudex in propria sua cause* (no one may judge his or her own cause).

5 See for example: Article 6 of the *European Convention on Human Rights*; Article 14 of the *International Covenant on Civil and Political Rights*: Chapter 3 Article 24 of the new South African Constitution which provides that "Every person shall have the right to ... procedurally fair administrative action where any of his or her rights or legitimate expectations is affected or threatened"; the NZ *Bill of Rights Act* 1990 s 27; the Fifth and Fourteenth Amendments to the US Constitution which make provision for "due process"; the Canadian *Charter of Rights and Freedoms* 1982 in which the right most closely related to that of procedural fairness is that described in s7 as the "right to life, liberty and security" of the person and the right not be deprived thereof except upon observance of "the principles of fundamental justice". See also s5(2)(a) of the Constitution of the

Republic of Vanuatu which provides for the right to a fair hearing in criminal proceedings.

6 *Kioa v West* (1985) 159 CLR 550 at 567.

7 See par 12 of the Explanatory Memorandum to the 1977 ADJR Bill.

8 See also *McVeigh v Willara Pty Ltd* (1984) 6 FCR 587 at 600; *Piroglu v Minister for Immigration and Ethnic Affairs* (1980) 4 ALD 323 at 325.

9 "It is in the interests of good administration that [public authorities] should act fairly": Lord Fraser in *Ng Yuen Shiu* [1983] AC 629.

10 See PP Craig "Legitimate Expectations: A Conceptual Analysis" (1992) 108 LQR 79 at 84; Resnick, "Due Process and Procedural Justice" in *Due Process* (Pennock and Chapman eds, 1977) at p217 and Aronson & Dyer, *Judicial Review of Administrative Action* (NSW, 1996) at p394.

11 See PP Craig, Ibid, p 87.

12 Aronson & Dyer, *Judicial Review of Administrative Action* (1996) at p 385.

13 See PS Ayitali *Pragmatism and Theory in Public Law* (Hamlyn Lecture, 39th Series, 1987); *Davey v Spelthorne BC* [1984] AC 262 at 276.

14 Justice P Finn, "The Courts and the Vulnerable" in *Law and Policy Papers* (Paper no. 5, 1996) at p7 and Sir Anthony Mason, "The Importance of Judicial Review of Administrative Action as a Safeguard of Individual Rights" (1994) 1 *Aust J of Human Rights* 3.

15 See de Smith, Woolf & Jowell *Judicial Review of Administrative Action* (London, 5th ed. 1995) p402

16 [1964] AC 40.

17 (1990) 170 CLR 1 at 18.

18 Primarily in the Federal Republic of Germany, the Netherlands and Italy and the European Court of Justice. See J. Schwarze, *European Administrative Law*, (London, 1992) p869. In Germany in particular it is embodied in the concept of *vertrauenschutz*, a legal principle closely resembling that of legitimate expectation.

19 [1964] A.C. 40.

20 See de Smith, Woolf & Jowell *Judicial Review of Administrative Action* (1995) p401

21 It is termed the "universal" theory on the basis that its proponents regard the application of natural justice as a matter of statutory construction which demands a "universal answer": *Kioa v West* (1985) 159 CLR 550 at 611.

22 *R v Angel, ex p. Van Beelen* [1983] 108 LSJS 200 at 222 (Wells J).

23 *Kioa v West* (1985) 159 CLR 550 at 584 (Mason J), *South Australia v O'Shea* (1987) 163 CLR 378 at 386 (Mason CJ). See also Dawson J in *A.G. (NSW) v Quin* (1990) 170 CLR 1 at 57-58 "[T]he right to procedural fairness is the product of the common law and not the construction of the statute, although a statute may exclude the right if the intention to do so appears sufficiently clear." See also A F Mason, "The Importance of Judicial Review of Administrative Actions as a Safeguard of Individual Rights", (1994) 1 *Aust J of Human Rights* 3.

24 The facts and individual judgments of *Kioa* have been discussed elsewhere and will not be detailed here. See for example P. Tate, "The Coherence of "Legitimate Expectations" and The Foundations of Natural Justice" (1988) 14 *Mon U.LR.* 15; M.Paterson, "Legitimate Expectations and Fairness", 18 *MULR* 1992 70; Aronson and Dyer, *Judicial Review of Administrative Action* (1996), p399; Douglas and Jones, *Administrative Law, Commentary and Materials* (2nd ed. NSW 1996), p481.

25 *Kioa v West* (1985) 159 CLR 550 at 584.

26 As above

27 This qualification is derived largely from the judgement of Jacob J in *Salemi v MacKellar (No 2)* (1977) 137 CLR 396, identifying those decisions which are appropriate for judicial review (as opposed to decisions affecting large numbers of people or 'polycentric' decisions, which are not; see P. Cane *An Introduction to Administrative law* (Oxford, 1992) p149-52), by reference to effect of the decision on the individual.

28 (1985) 159 CLR 550 at 632.

29 At 633.

30 At 619.

31 (1990) 169 CLR 648 at 653. This statement was adopted by the majority in *Annetts v McCann* (1990) 170 CLR 596 at 598. See also *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 311 per McHugh J.

32 A position very close to that described by Lord Loreburn L.C. in *Board of Education v Rice* [1911] AC 179 at 182, who required "everyone who decides anything" to act fairly in so doing.

33 (1985) 150 CLR 550 at 585.

34 Aronson & Dyer, *Judicial Review of Administrative Action*, (1996) p403.

35 *Annets v McCann* (1990) 170 CLR 596 at 598 per Mason CJ, Deane and McHugh JJ. This test has replaced the 19th century method of determining the applicability of procedural fairness by reference to the *Durayappah* test which arose from the Privy Council's identification of 3 matters to be considered, specifically, the nature of the right affected by the decision, the width of the decision-maker's power or discretion and the seriousness of the decision's effects: *Durayapah v Fernando* [1967] 2 AC 337 at 349.

36 The nature of rights and interests have been discussed elsewhere, see in particular Aronson & Dyer, *Judicial Review of Administrative Action*, (1996) Ch. 5.

37 (1985) 159 CLR 550 at 587.

38 TRS Allan, *Law, Liberty and Justice* (Oxford, 1993) p 197.

39 *Save the Showground for Sydney Inc v Minister for Urban Affairs and Planning* (1997) 95 LGERA 33 at 51.

40 [1969] 2 Ch 149.

41 [1971] 2 QB 175.

42 European Court of Justice, Joined Cases 42 & 49/59 *SNUPAT v High Authority* [1961] ECR 109, 172; E.C.J. Case 112/00 *Dürbeck v Hauptzollamnt Frankfurt am Main-Flughafen* [1981] ECR 1095, 1120.

43 Advocate-General Trabucchi, Case 5/75 *Deuka v Einfuhr und Vorratsstelle für Getreide und Futtermittel* [1975] ECR 759 at 777.

44 *Judicial Review of Administrative Action* (1995) p417. See also J. Raz, *The Authority of Law* (1979) Ch 11.

45 See also Professor Craig, "Substantive Legitimate Expectations in Domestic and Community Law" (1996) 55(2) *CLJ* 289 at 299.

46 ECJ Joined Cases 42 & 49/59, *SNUPAT v High Authority* [1961] ECR 109 at 172. See also E.W. Fuss, "Der Schutz des Vertrauens auf Rechtskontinuität im deutschen Verfassungsrecht und europäischen Gemeinschaftsrecht" in *Festschrift für Hans Kutscher*, p201 (203) in J.Schwarze, *European Administrative Law*, (Sweet & Maxwell, London, 1992) p948. See generally J. Schwarze at p.946.

47 Galligan, *Discretionary Powers* (1986) p 154.

48 Dicey, *An Introduction to the Study of The Law of the Constitution* (10th ed. 1959). The vast scope of the rule of law has yet to be fully determined. It is unlikely that it ever will be. This analysis is not new nor is it intended to propound the theory that the rule of law is the bedrock of judicial review. For such an approach see Justice Toohey, "A Government of Laws, and Not of Men?" (1993) 4 *PLR* 158 at 159-163, Wade and Forsyth, *Administrative Law* (7th ed. Oxford, 1994) pp24-28, 34-41, 379. It is however, useful in explaining the courts' preparedness to protect legitimate expectations.

49 *A Theory of Justice* (1972) p235.

50 See J.Rawls, *A Theory of Justice* (1972) p235-243; TRS Allan, "Legislative Supremacy and the Rule of Law." (1985) 44(1) *CLJ* 111 at 118; and *Black-Clawson Ltd v Papierwerke AG* [1975] AC 591, 613G per Lord Diplock.

51 *The Road to Serfdom* (London, 1944), p54.

52 *The Authority of Law* (Oxford, 1979) Ch 11.

53 de Smith regards the basis of the common law doctrine of legitimate expectation as legal certainty: "That aspect of the rule of law that requires legal certainty and predictability is practically applied through the emerging requirement that "legitimate expectations" should be fulfilled in appropriate circumstances." *Judicial Review of Administrative Action*, (1995), p 417. This view is shared by Professor Craig, see *Administrative Law* (3rd ed. 1994), p 670; "Substantive Legitimate Expectations in Domestic and Community Law." (1996) 55(2) *CLJ* 289 at 298ff; and P.Cane *An Introduction to Administrative Law* (2nd ed. Oxford, 1992).

54 (1977) 137 CLR 396. In that case Barwick CJ considered that the concept "probably adds little, if anything to the concept of a right" (at 404). His views were not shared by the rest of the Court and were rejected in *Heatley v Tasmanian Racing & Gaming Commission* (1977) 137 CLR 487 and later in *FAI Insurances v Winneke* (1982) 151 CLR 342.

55 See in particular Barwick CJ in *Salemi* who said with respect to legitimate expectation "I am bound to say I appreciate its literary quality better than I perceive its precise meaning and the perimeter of its application." (at 404).

56 *McInnes v Onslow-Fane* [1978] 1 WLR 1520; *O'Reily v Macman* [1983] 2 AC 237; *R v Liverpool Corporation, ex p Liverpool Taxi Fleet Operator's Association* [1972] 2 QB 299; *R v Barnsley Metropolitan Borough Council, ex p Hook* [1976] 1 WLR 1052.

57 In particular, early decisions avoided distinguishing the concept from that of *protectable interests* - see for example *R v Liverpool Corporation, ex p. Liverpool Taxi Fleet Operators' Association* [1972] 2 QB 299.

58 *Heatley v Tasmanian Racing & Gaming Commission* (1977) 137 CLR 487.

59 *McInnes v Onslow-Fane* [1978] 1 WLR 1520; *O'Reilly v Mackman* [1983] 2 AC 237; *Re Findlay* [1985] AC 318; *AG Hong Kong v Ng Yuen Shiu* [1983] 2 AC 629.

60 Or it must have a reasonable basis, see *Save the Showground for Sydney Inc v Minister for Urban Affairs and Planning* (1997) 95 LGERA 33 at 37 per Gleeson CJ and per Beazley JA at 46.

61 See Toohey J in *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, "...legitimate expectation ... does not depend upon the knowledge and state of mind of the individual concerned." (at 301).

62 *FAI Insurances v Winneke* (1982) 151 CLR 342, *Council of Civil Service Unions v Minister for Civil Service* [1985] AC 374.

63 *AG (NSW) v Quin* (1990) 170 CLR 1 at 22, *Haoucher v Minister for Immigration and Ethnic Affairs* (1990) 169 CLR 648 at 652, *Save the Showground for Sydney Inc v Minister for Urban Affairs and Planning* (1997) 95 LGERA 33 at 37 per Gleeson CJ.

64 Finn and Smith, "The Citizen, the Government and 'Reasonable Expectations'" (1992) 66 *ALJ* 139.

65 See for example *Attorney-General (Hong Kong) v Ng Yuen Shiu* [1983] AC 629; *R v Secretary of State for the Home Department, ex p. Khan* [1985] 1 All ER 40; *Century Metals and Mining NL v Yeomans* (1989) 100 ALR 383; *Consolidated Press Holding Ltd v*

Commissioner of Taxation (1995) 57 FCR 348; *Annets v McCann* (1990) 170 CLR 596; *Cox v O'Donnel* (1996) 106 ALR 145. This is primarily because the decision-maker is left free to determine the substantive outcome of the decision-making process, once the procedure expected has been observed.

66 (1995) 183 CLR 273 .

67 *AG Hong Kong v Ng Yuen Shiu* [1983] 2 AC 629; *R v Liverpool Corporation, ex p. Liverpool Taxi Fleet Operators Association* [1972] 2 QB 299; *Cole v Cunningham* (1983) 49 ALR 123, *GTE (Aust) Pty Ltd v Brown* (1990) 14 FCR 309 at 332; *Edelsten v Wilcox* (1988) 83 ALR 99; *Century Metals & Mining NL v Yeomans* (1989) 100 ALR 383; *Minister for Local Government and Ethnic Affairs v Kurtovic* (1990) 92 ALR 93 at 125-127; *Burns v Tafe Commission of New South Wales* (unreported, NSW Sup Ct, Spender AJ, 15 November 1994); *Cox v O'Donnel* (1992) 106 ALR 145; *R v Commissioner of Police, ex p. Ramsay* [1993] 2 Qd R 171; *Consolidated Press Holding Ltd and Others v Commissioner of Taxation* (1995) 57 FCR 348: *Minister for Aboriginal and Torres Strait Islander Affairs v Douglas* (unreported, Fed Ct (Full Court), Black CJ, Burchett and Keifel, 28 May 1996). *Re Warden KM Boothman SM, ex p. Peko Exploration* (WA Sup Ct, Malcolm CJ, Kennedy and Ipp JJ unreported, 14 November 1997).

68 A policy will be operative where the relevant public authority purports to act in compliance with its provisions (discussed further below).

69 For example, publication of a document setting out a council's policy on consulting with voluntary organisations on certain issues may give rise to a legitimate expectation of consultation, see *R v London Borough of Islington, ex p East* (unreported QBD 5 May 1995). See also *R v Secretary of State for the Home Department, ex p. Asif Mahmood Khan* [1985] 1 All ER 40; *R v Secretary of State for Transport, ex p Richmond London Borough Council* [1994] 1 WLR 74 at 92 per Laws J; *Haoucher v Minister for Immigration and Ethnic Affairs* (1990) 169 CLR 648: *AG (NSW) v Quin* (1990) 170 CLR 1; *Minister for Immigration, Local Government and Ethnic Affairs v Kurtovic* (1990) 91 ALR 93; *R v Ministry of Agriculture Fisheries and Food ex p Hamble (Offshore) Fisheries Ltd* [1995] 2 All ER 714; *Re Findlay* [1985] 1 AC 318; *Hughes v Department of Health and Social Security* [1985] 1 AC 776; *Whim Creek Consolidated NL v Colgan and Another* (1991) 103 ALR 204.

70 *Breen v Amalgamated Engineering Union* [1971] 2 QB 175; *Council of Civil Service Unions v Minister for Civil Service* [1985] 1 AC 374; *R v British Coal Corporation, ex p Vardy* [1993] I.C.R. 720; *Hamilton v Minister for Immigration, Local Government and Ethnic Affairs* (1993) 48 FCR 20; *R v Secretary of State for the Home Department, ex p. Ruddock* [1987] 1 WLR 1482; *AG (NSW) v Quin* (1990) 170 CLR 1; *Haoucher v Minister for Immigration and Ethnic Affairs* (1990) 169 CLR 648; *General Newspapers Pty Ltd v Telstra Corporation* (1993) 117 ALR 629; *Australian Workers Union v Minister for Natural Resources* (1992) 26 ALD 458 per Priestly JA.

71 *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 and see also the application of the *Teoh* principle by Sackville J in *Kwong Leung Lam v Minister for Immigration & Multicultural Affairs* (unreported, Federal Court of Australia 4 March 1998).

72 See the *Joint Statement* by the former Minister for Foreign Affairs Gareth Evans, and Attorney General, Michael Lavarch, 10 May 1995.

73 See Allars, "One Small Step for Legal Doctrine, One Giant Leap Towards Integrity in Government" (1995) 17 *Syd Law Rev* 204, Aronson & Dyer, *Judicial Review of Administrative Action,* (1996), p423. The AAT has held that the statement has had its desired effect: *Re PW Adams Pty Ltd and Australian Fisheries Management Authority (No 2)* (unreported, BJ McMahon, Deputy President, 23 August 1995). In *Lam v Minister for Immigration & Multicultural Affairs* (unreported, 4 March 1998) Sackville J applied the High Court's *Teoh* decision but did not consider the effect of the Joint Statement.

74 The Bill passed the House of Representatives on 25 June 1997 and is awaiting consideration in the Senate. Equivalent legislation came into force in South Australia in the form of the *Administrative Decisions (Effect of International Instruments) Act* (1995) SA on 30 November 1995.

75 Various commentators are in favour of the effect of the decision, in particular Allars, "One Small Step for Legal Doctrine, One Giant Leap Towards Integrity in Government" (1995) 17 *Syd Law Rev* 204; Walker and Mathew "Minister for Immigration v Ah Hin Teoh" (1995) 20 *MULR* 236; For an opposing view see McMillan, 'Teoh, and Invalidity in Administrative Law." (1995) *AIAL Forum* No 5, p10 and M. Taggart in "Legitimate Expectation and Treaties in the High Court of Australia." (1996) 112 *LQR* 50.

76 See for example *R v Murphy; ex p. Clift* [1980] Qd R 1.

77 (1990) 170 CLR 596 at 607.

78 (1990) 169 CLR 648 at 653.

79 (1990) 169 CLR 648 at 672; Emphasis added.

80 (1990) 170 CLR 1 at 39.

81 See Justice PD Finn, "Controlling the Exercise of Power" (1996) 7 PLR 86 at 93.

82 M Allars, "A General Tribunal Procedure Statute for New South Wales" (1993) 4 PLR 19 at pp21-22.

83 [1949] 1 All ER 109.

84 See also *Minister for Immigration and Ethnic Affairs v Pochi* (1980) 31 ALR 666 per Deane J at 686-689.

85 See Mason J in *Kioa* (1990) 159 CLR 550 at 586 and Brennan J at 615 and 626 where their Honours considered that the Minister was entitled to exercise the power to deport without notice to the individual affected where to do so would frustrate the proper exercise of the statutory power. *Haoucher v Minister for Immigration and Ethnic Affairs* (1990) 169 CLR 648 at 653 (Deane J); *Johns v Australian Securities Commission* (1993) 178 CLR 408 at 472 (McHugh J); *El-Sayed v Minister for Immigration, Local Government and Ethnic Affairs* (1991) 22 ALD 767 at 770 (Davies J); G.Johnson, "Natural Justice and Legitimate Expectation in Australia" (1985) *FLR* 39 at 71. Aronson & Dyer, *Judicial Review of Administrative Action* (1996), p407. By contrast see Tucker LJ in *Russel v Duke of Norfolk* [1949] 1 All ER 109 at 118 who considered that there is an irreducible minimum required by the principles of natural justice, specifically "that the person concerned should have a reasonable opportunity of presenting his case."

86 See M Paterson, "Legitimate Expectations and Fairness" (1992) 18 *MULR* 70 at 80.

87 *Mobil Oil Australia Pty Ltd v FCT* (1963) 113 CLR 475 at 504 (Kitto J).

88 *Kioa v West* (1985) 159 CLR 550 at 627 per Brennan J.

89 Discussed above. See also de Smith, *Judicial Review of Administrative Action* (1995) p 431.

90 (1984) 156 CLR 296 at 326 (citations omitted).

91 *Judicial Review of Administrative Action* (1996) p515.

92 *Salemi v MacKellar* (No 2) (1977) 137 CLR 396 at 452 per Jacobs J; *Bread Manufacturers of NSW v Evans* (1981) 180 CLR 404 at 416-7 per Gibbs J; *Kioa v West* (1985) 159 CLR 550 per Mason J at 584; *Save the Showground for Sydney Inc v Minister for Urban Affairs & Planning* (1997) 95 LGERA 33 at 51 per Beazley JA.

93 See for example s1246 *Social Security Act 1991* (Cth).

94 (1997) 145 ALR 621.

95 At 624.

96 At 626. Section 476 of the Migration Act provides for review of the Refugee Review Tribunal's decisions by the Federal Court and sets outs grounds upon which an application for judicial review may be made. Section 485 provides that other laws, including s39B of the *Judiciary Act 1903* (Cth) and the ADJR Act do not apply in relation to judicially reviewable decisions made under the Act.

97 (1997) 145 ALR 621 at 633-634. His Honour agreed with Davies J that the new provisions replaced the common law principles of natural justice with statutory rules, and that to prohibit review for a breach of those rules would be to "throw out the new statutory baby together with the now unnecessary common law bathwater" (at 639).

98 (1997) 145 ALR 621 at 634.

99 See also the provisions governing the right of the Minister to cancel a visa under s116(1). Section 119 and 120 of the Act requires the holder of the visa be notified that there appear to be grounds for canceling the visa and the information upon which those grounds are based. The holder of the visa is entitled to show that those grounds do not exist and that there is a reason why the visa should not be cancelled. Section 121 requires the holder of a visa be given a reasonable period within which to respond.

100 See M Allars, "A General Tribunal Procedure Statute for New South Wales" (1993) 4 PLR 19 and G.A. Flick *Natural Justice* (1984), p23.

101 Keith, *A Code of Procedure for Administrative Tribunals* (1974). Some federal jurisdictions in the United States have enacted an *Administrative Procedure Act* which prescribes minimum procedural standards.

102 See the *Statutory Powers Procedure Act* 1980 of Ontario and the commentary thereon in M Allars, "A General Tribunal Procedure Statute for New South Wales" (1993) 4 PLR 19. As Allars points out, this may be because the Canadian *Charter* although indirectly, seems to facilitate the protection of rights through the requirement that the "principles of fundamental justice" be observed.

103 Cf Farmer, "A Model Code of Procedure for Administrative Tribunals - An Illusory Concept" (1970) 4 *NZ Univ L Rev* 105 at 110.

104 (1997) 149 ALR 519.

105 See sections 119-121, discussed above at fn 95 In this sense the legislation again substituted the common law with respect to the power to cancel a visa.

106 *Secretary of State for the Home Department v Thirukumar* [1989] Imm AR 402 at 414 per Bingham LJ.

107 Aronson & Dyer, *Judicial Review of Administrative Action*, (1996) p 511.

108 *Administrative Law* (3rd ed, 1994) p296.

109 (1976) 424 US 319.

110 At 334-335. The Court seemed to draw upon an approach to judicial balancing in order to determine the appropriate level of procedural protection required that has been advocated by those who support a "law and economics" approach to judicial review, see for example Posner *Economic Analysis of Law* (2nd ed, 1972). p430.

111 KC Davis & RJ Pierce, *Administrative Law Treatise* (3rd ed 1994) vol II, p50-51. See also Marshaw, *Due Process in the Administrative State* (1985) who considered the law and economics approach as possessed of "an enormous appetite for data that is disputable, unknown, and, sometimes, unknowable" at 115.

112 See John McMillan, "Teoh, and Invalidity in Administrative Law", *AIAL Forum No. 5* (1995) at p10 and M. Taggart in "Legitimate Expectation and Treaties in the High Court of Australia." (1996) 112 *LQR* 50 at 52.

113 See for example *New South Wales v Canellis* (1994) 181 CLR 309 at 331 (per Mason CJ) and *Cornall v A.B.* (1995) 1 VR 372 (Ormiston, Coldrey and O'Bryan JJ) at 400.

114 *Kioa v West* (1985) 159 CLR 550 at 586 (Mason J) at 626 (Brennan J) and 633 (Deane J); *Edelsten v Federal Commissioner of Taxation* (1989) 85 ALR 226 at 233; *Li v Minister for Immigratoin, Local Government and Ethnic Affairs* (1991) 33 FCR 568 (Hill J). It is a largely academic question as to whether this means that the duty to act fairly is displaced, or whether it can be regarded as existing without any practical content.

115 *White v Redfern* (1879) 5 QBD 15.

116 [1899] 2 QB 301.

117 That is, until the happening of the event.

118 6th ed. (1988) at p535.

119 Circumstances broadly commensurate with those postulated were considered by a Full Court of the Federal Court in *Bristol Myers Squibb Australia Pty Ltd v Minister for Health & Family Services* (Wilcox, O'Loughlin and Lindgren JJ unreported, 8 September 1997). The Court was not required to consider the futility question as on the facts, as it found that there had been no breach of natural justice.

120 *Lek v Minister for Immigration, Local Government & Ethnic Affairs* (1993) 43 FCR 100 at 136 (Wilcox J).

121 *Swan Portland Cement Ltd v Minister for Science, Customs and Small Business* (1989) 88 ALR 196 at 209 (Wilcox J).

122 *Casarotto v Australian Postal Commission* (1989) 86 ALR 399 at 401; *BTR PLC v Westinghouse Brake & Signal Co (Australia) Ltd* (1992) 106 ALR 35 at 41-42 per Lockhart and Hill JJ. *Zhang Jia Qing v Minister for Immigration & Multicultural Affairs* (1997) 149 ALR 519 at 531; *Hyundai Automotive Distributors v Australian Customs Service* (unreported, Federal Court of Australia, Hill, Sackville and Madgwick JJ, 1 April 1998)

123 As was the case in *BTR PLC v Westinghouse Brake & Signal Co (Australia) Ltd* (1992) 106 ALR 35.

124 111 D.L.R. (4th) 1.

125 111 D.L.R. (4th) 1 at 18. See also *Lek v Minister for Immigration, Local Government & Ethnic Affairs* (1993) 43 FCR 100 at 136 (Wilcox J).

126 [1970] Ch 345 at 402.

127 (1989) 100 ALR 383.

128 See also *Perder Investments Pty Ltd v Elmer* (1991) 31 FCR 201 (Full Court) and *Reid & Ors v Vocational Registration Appeal Committee & Anor* (1997) 73 FCR 43 at 63.

129 de Smith, *Judicial Review of Administrative Action* (1996) p500-501.

130 *John v Rees* [1970] Ch 345 at 402.

131 111 D.L.R. (4th) 1 at 18.

132 [1990] IRLR 344 at 352.

133 [1991] *Public Law* 64 at 72-73.

134 See for example *Kioa v West* (1985) 159 CLR 550 at 603 (Wilson J) and 633 (Deane J); *Colpitts v Australian Telecommunications Commission* 70 ALR 554 at 573 (Burchett J); *Johns v Release on Licence Board* (1987) 9 NSWLR 268 at 283 (Kirby P, Hope and Priestley JJA).

135 See s13 of the ADJR Act. Section 28(1) of the *Administrative Appeals Tribunal Act 1975* (Cth) makes similar provision.

136 *Public Service Board v Osmond* (1985-1986) 159 CLR 656 at 663 per Gibbs CJ.

137 See *Public Service Board of New South Wales v Osmond* (1986) 159 CLR 656 in which the High Court held that no general rule of common law or principle of natural justice requires reasons to be given for administrative decisions, even where a decision is made in the exercise of a statutory discretion and is liable to adversely affect the interests or defeat the legitimate or reasonable expectations of the person affected.

138 *Public Service Board of New South Wales v Osmond* (1986) 159 CLR 656 at 675.

139 *R v Higher Eductation Funding Council; ex p Institute of Dental Surgery* [1994] 1 WLR 242 at 256-267 (Sedley J and Mann LJ) (DC).

140 See discussion on this topic in de Smith *Judicial Review of Administrative Action* (1995) p, 459.

141 ADJR Act s13(8).

142 See Kirby P in *Osmond v Public Service Board* [1984] 3 NSWLR 447 at 467.

143 See R.Baldwin and J.Houghton "Circular Arguments: The Status and Legitimacy of Administrative Rules", [1986] *PL* 239; G.Ganz *Quasi Legislation* (1986).

144 See McHugh J in *Haoucher v Minister for Immigration and Ethnic Affairs* (1990) 169 CLR 648 at 679, who held the ministerial policy "was a representation by the Minister as to the way in which he would exercise his discretion."

145 (1990) 169 CLR 648.

146 (1990) 91 ALR 93. Gummow J was the only member of the Court to consider the relationship between legitimate expectations and government policy.

147 (1990) 169 CLR 648 at 655.

148 Conversely a policy will be *abrogated* where some or all of its provisions have been *impliedly repealed* by a later statement of policy by the same executive body, or overridden by a superior executive body.

149 Allars "One Small Step for Legal Doctrine, One Giant Leap Towards Integrity in Government" (1995) 17 *Syd Law Rev* 204 at 240.

150 *R v Ministry of Agriculture Fisheries and Food, ex p. Hamble (Offshore) Fisheries Ltd* [1995] 2 All ER 714 at 731 per Sedley J.

151 *Peninsula Anglican Boy's School v Ryan* (1985) 69 ALR 555 at 570-71 per Wilcox J; *Hughes v Department of Health and Social Security* [1985] AC 766 at 788; *Re Findlay* [1985] AC 318 (Lord Diplock); *South Australia v O'Shea* (1987) 163 CLR 378 at 411 (Brennan J), *Attorney General (NSW) v Quin* (1990) 170 CLR 1; *Beechworth Shire v Attorney General* [1991] VR 325; *R v Secretary of State for Health, ex p. US Tobacco International Inc* [1992] 1 QB 353 (Taylor LJ); *R v Ministry of Agriculture Fisheries and Food, ex p. Hamble (Offshore) Fisheries* [1995] 2 All ER 714 at 730-32 (Sedley J).

152 *Attorney-General (NSW) v Quin* (1990) 170 CLR 1.

153 (1990) 170 CLR 1 at 60 per Dawson J.

154 Both *Findlay* and *Hughes* were approved by Dawson J in *AG (NSW) v Quin* at 43.

155 (1997) 95 LGERA 33 (Gleeson CJ, Powell and Beazley JA).

156 At 41.

157 At 41, citing *Attorney General (NSW) v Quin* (1990) 170 CLR 1 at 17.

158 At 40.

159 Referring to the House of Lords decision in *Council of Civil Service Unions v Minister for Civil Service* [1985] AC 374.

160 At 53, referring to Mason CJ in *Quin* (1990) 170 CLR 1 at 17.

161 At 53.

162 At 53.

163 A representation may be in the form of a government statement directed at a class of individuals or beneficiaries to which an individual claimant belongs: *Century Metals and Mining NL v Yeomans* (1989) 100 ALR 383 and *A.G. (Hong Kong) v Ng Yuen Shiu* [1983] AC 629 are examples.

164 Provided of course, that the change in policy is unfavourable to the applicant.

165 In *R v Secretary of State for Transport, ex p. Richmond L.B.C.* [1994] 1 All ER 577, Laws J accepted that a departure from an existing policy may require a hearing as a pre-condition. See also the decision of Taylor J in *R v Secretary of State for the Home Department, ex p. Ruddock* [1987] 1 WLR 1482 and *R v British Coal Corporation, ex p. Vardy* (1993) ICR 720.

166 [1985] 1 All ER 40.

167 Referring to one of the earliest cases in which the legitimate expectation doctrine was applied: *R v Liverpool Corporation, ex p. Liverpool Taxi Fleet Operators' Association* [1972] 2 Q.B. 299 per Lord Denning MR.

168 [1985] 1 All ER 40 at 46.

169 [1985] 1 AC 318.

170 At 338

171 (1985) 69 ALR 555.

172 (1985) 69 ALR 555 at 570. Wilcox J did not require a decision-maker to inform an applicant of any new criteria applied to the exercise of a discretionary power. This aspect of His Honour's judgement can be regarded as impliedly overruled by the decision of the majority in *Haoucher*.

173 (1990) 170 CLR 1 at 24.

174 As above. A similar view was held by Northrop J in *Haoucher v Minister for Immigration and Ethnic Affairs* (1988) 83 ALR 530 at 533, who regarded the publication of guidelines for the exercise of discretion as not only "permissible, but in many cases desirable, especially when the power conferred is unfettered."

175 [1985] 1 All ER 40 at 49.

176 G.Ganz, "Legitimate Expectation" in Harlow (ed.) *Public Law and Politics* (1986) p154.

177 This principle of legality (also referred to as the no-fettering doctrine) is as Professor Craig explains, a particular manifestation of the ultra-vires principle. It essentially means that a public body cannot fetter the future exercise of a discretionary power conferred upon it by statute. If it does so, it will act beyond power: : *"Substantive Legitimate Expectations in Domestic and Community Law"* (1996) 55(2) *CLJ* 289 at 299. See *Birkdale District Electricity Supply Co v Southport Corp.* [1926] AC 355 at 364; and Mason CJ in *A.G. (NSW) v Quin* (1990) 170 CLR 1 at 17.

178 *British Oxygen Co. Ltd. v Minister of Technology* [1971] AC 610.

179 As was the case in *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273.

DISCRETION - PRIVATE INTERESTS AND PUBLIC LAW
or
WHAT IS THIS THING CALLED DISCRETION?

*The Hon Justice Paul L Stein AM**

Paper presented to an AIAL seminar, Judicial Review - The Public Interest, Sydney, 2 September 1997.

When we think about discretion in legal decisions ...[1] Well, the fact is that we do not think about it overly much. It is too confronting. If we do, we may have to admit that the yearned-for objectivity is not, on many occasions, fulfilled. Facing the reality of discretionary legal decision-making challenges the pretence that we use rules to ensure that discretionary decisions are objective.

I was struck when I read a paper delivered to the last NSW Supreme Court Annual Conference by Professor David Wood. Discussing the role of judicial officers he said:

> Above all, it is required that judges be utterly impartial. They must be able to apply the law to the facts irrespective of their own personal beliefs and values. Of course, they have their own views on the matters before them - there would be something amiss if they did not. Judges are quite properly expected to be independently-minded and knowledgable about their society. What is of the utmost importance, however, is that they possess the temperament and strength of character to exclude, as far as possible, the influence of their own personal beliefs and values in their judgments and decisions. Judges are, quite simply, to apply the law, not their own values.[2]

This is all very well but when discretionary judgment comes into play, even with all of the integrity in the world, the going gets tough.

I am indebted to one of your members, Dr Steven Churches, for drawing my attention to a refreshing and illuminating article by Professor Steve Wexler - "*Discretion: the Unacknowledged Side of Law*" in the *Toronto Law Journal*.[3] Written over 20 years ago, it still resonates today. Part of his thesis is that you can make as many rules as you like, but you can never completely eliminate the subjective element. Wexler suggests that we would be far better off, and so would the litigants, if we stopped kidding ourselves and faced reality. Only then can we devise rules which will truly make discretionary decisions less subjective, and train lawyers and decision-makers in discretionary decision-making. Assuming that there are such things as right and wrong answers,[4] we should endeavour to make right ones more often. But in approaching the exercise of judicial discretion we should not retreat from reality into a fantasy world constructed of words and rules.

With this acknowledgment in mind I will turn to the exercise of discretion in public law to grant or withhold relief where private rights or interests are invariably involved. This judicial balancing act is nowhere more apparent than in environmental law. To keep tonight's topic within manageable proportions, I will deal, almost exclusively, with the discretion to grant third party applications.

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The nature of the discretion

The context of the exercise of discretion is important. Both New South Wales and Queensland have open standing provisions in their environmental law. Section 124 of the *Environmental Planning and Assessment Act 1979* ("EPA Act") provides that where a breach is proven or will, unless restrained, be committed, the court "may make such order as it thinks fit to remedy or restrain the breach". This inevitably leads to discretionary balancing acts.

It may be observed that there is not a great deal of difference between the discretion under section 124 and the scope of the discretion exercised pre-1979 in the equitable jurisdiction of the NSW Supreme Court. The existence of open standing and the concomitant development of environmental law has nonetheless highlighted the issue. The fact of the matter is that the Land and Environment Court is asked to exercise its discretion to withhold or grant relief on an almost daily basis.

The width of the discretion and its exercise is amply demonstrated by Street CJ in *Hannan v Electricity Commission of NSW [No 3]*.[5]

> The width of the powers and jurisdiction of the Land and Environment Court is apparent from the legislative provisions that I have mentioned. These need no elaboration. Likewise it is apparent that the court enjoys a wide discretionary range within which to consider the formulation of orders or to remedy or restrain breaches of the planning legislation. It by no means follows that the mere demonstration of a right that a party would be entitled to expect to have enforced by the ordinary civil courts will be afforded equivalent enforcement by the Land and Environment Court. It is the duty of that Court, in formulating "such order as it thinks fit", to have regard at all times to the pursuit of the objects of the *Environmental Planning and Assessment Act* as set out in s 5. This involves, in appropriate cases, the evaluation of matters extending beyond the mere determination of the rights and matters in dispute between the immediate parties. It involves due weight being given to the public interest and the interests of other affected persons in the overall context of the pursuit of the objects broadly set out in s 5. It is at this point that I revert to s 123 of the *Environmental Planning and Assessment Act*. Subsection (1) of that section provides:
>
> > (1) Any person may bring proceedings in the Court for an order to remedy or restrain a breach of this Act, whether or not any right of that person has been or may be infringed by or as a consequence of that breach.
>
> This provision read in the context of the objects of the Act as set down in s 5 makes it apparent that the task of the Court is to administer social justice in the enforcement of the legislative scheme of the Act. It is a task that travels far beyond administering justice *inter partes*. Section 123 totally removes the conventional requirement that relief is normally only granted at the wish of a person having a sufficient interest in the matters sought to be litigated. It is open to *any* person to bring proceedings to remedy or restrain a breach of the Act. There could hardly be a clearer indication of the width of the adjudicative responsibilities of the Court. The precise manner in which the Court will frame its orders in the context of particular disputes is ultimately the discretionary province of the Court to determine in the light of all of the factors falling within the purview of the dispute.

The existence of the discretion had been acknowledged, at least since 1963, see *Cooney v Ku-ring-gai MC*.[6] In *Blacktown MC v Friend*[7] Mahoney J (as he then was) confirmed the existence of a general discretion unfettered by any principle limiting it to special cases. His Honour also said that it was undesirable to attempt to delineate the matters relevant to the exercise of the court's discretion.

A decade later, Wilson and Dawson JJ in *Norbis v Norbis*[8] reminded us that the genius of the common law was to be found in its case-by-case approach. They stated:

> [accumulated wisdom] ... does not lie in the abstract formulation of principles or guidelines designed to constrain judicial

> discretion within a predetermined framework ...

Sedevcic

Nonetheless, and partly because of the frequency of the discretion's exercise, the temptation was difficult to resist: *Warringah v Sedevcic*.[9] The judgment of Kirby P on discretion (at 339-340) has become required reading, not the least for judges of the NSW Land and Environment Court and the comparable courts in Queensland and South Australia. Keeping in mind the "salutary warning" of *Blacktown v Friend*,[10] the President set out some guidelines to the exercise of the discretion. It is instructive to examine them.

Having noted the undoubted width of the discretion (see for example *Associated Minerals Consolidated Ltd v Wyong SC*)[11] Kirby P reiterated that the discretion was not limited to special cases as had been outlined in *Friend*. Thereafter, he noted that a purely technical breach, which would be unnoticed other than by a person well versed in the law, was a relevant factor, *Parramatta CC v R A Motors Pty Ltd*.[12] Fairly obviously, delay by a claimant would be a material consideration. Any adverse effect of the breach on the environment or an amenity would also be relevant. In addition, the converse - that the breach may have actually had a beneficial effect.

The President made the important comment that the restraint sought was not the enforcement of a private right.[13] Rather it was the enforcement of a public duty imposed by an Act of Parliament. The Parliament had expressed itself on the public interest in the orderly development and use of land and the environment, *Attorney-General v BP (Australia) Ltd*.[14] The open standing provision in section 123 of the EPA Act was indicative of a legislative purpose of upholding the law.

Kirby P added:

> Unless this is done, equal justice may not be secured. Private advantage may be won by a particular individual which others cannot enjoy. Damage may be done to the environment which it is the purpose of the orderly enforcement of environmental law to avoid.[15]

and:

> ... the obvious intention of the Act is that, normally, those concerned in development and use of the environment will comply with the terms of the legislation. Otherwise, if unlawful exceptions and exemptions became a frequent occurrence, condoned by the exercise of the discretion under s 124, the equal and orderly enforcement of the Act could be undermined. A sense of inequity could then be felt by those who complied with the requirements of the Act or who failed to secure the favourable exercise of the discretion in s 124.[16]

Where the enforcement action is by the Attorney-General or a local authority, a court may be less likely to deny relief than in private litigation between citizens: *Associated Minerals*. See also *Rowley v NSW Leather Trading Co*.[17]

Another "guideline" was whether the relief was sought in respect of a "static" development such as an erection of a building. If the breach could only be cured by excessive cost and inconvenience, the discretion may be more easily exercised than when there is a continuing breach which could be modified to bring it into compliance. But, as the President acknowledged, this was really no more than a reflection of the need to balance the public interest in equal compliance with the law and the degree of irremediability and expense of the law's enforcement. It was not a hard and fast exception.

Lastly, Kirby P adopted Menzies J's description of the wide discretion as "an adequate safeguard against abuse of a salutary procedure"[18] (see *Cooney v Kuring-gai MC*) by noting that the court could soften the relief so as not to produce an unjust result in a particular case. This could be done by postponing the effect of injunctive relief. His Honour returned to this "mollifying" aspect of the discretion in

Fatsel Pty Ltd v ACR Trading Pty Ltd [No. 3].[19]

He said:

> It permits, in appropriate cases, the refusal of injunctive relief where to grant such relief would work such an injustice as to be disproportionate to the ends secured by enforcement of the legislation including by injunction.

It is important to stress, as did Kirby P, that the so-called "guidelines" are no more than indicators or parameters. Indeed, subject to establishing some relevance to the subject matter, it may be fair to say that almost any circumstance may be a discretionary factor. The question, of course, is the weight to give to each factor and the balancing of all of the relevant considerations.

Identity and interest of applicant for relief

The identity and motive of the moving party may be relevant. It seems, however, that with the introduction of liberal standing provisions the identity of the applicant assumes less significance, since the court is focussing primarily on the breach and its consequences. The applicant, of course, may have no motive other than to see that the law is observed. The primacy given to the Attorney-General or local authority seeking enforcement also appears to have diminished. Nonetheless, there is still a distinction between a private litigant seeking to enforce a public right and the role of a public authority. However, the width of the discretion to withhold relief is still available, except that a court may be less likely to deny relief at the suit of an agency, *Sedevcic* at 340 and see also *NRMCA (Q) v Andrews* in the Queensland Court of Appeal.[20]

There are, naturally, circumstances where the relationship of the applicant to the respondent developer will be relevant. For example, when the claimant is a business competitor of the developer who is in receipt of the "consent" from the public agency. There may be circumstances where the litigation is brought for an ulterior commercial purpose. But even where this is not the situation, the fact that the applicant is a business competitor and stands to benefit from the litigation is a relevant factor. See *R v Monopolies and Mergers Commission, ex parte Argyle Group Inc.*[21] and *Waiheke Shipping Co Ltd v Auckland RC*[22] quoted by Gillian Macmillan in *Judicial Review, Competitors, and the Court's Discretion to Withhold a Remedy.*[23]

Conduct of the developer

By the same token the conduct of the developer may be relevant. Has it been the "innocent" party standing by while the decision-maker fumbled the ball? On the other hand, did the developer commit or contribute to the wrong-doing by its conduct or representations to the decision maker or collude in the unlawful decision. In other words, was the developer blameless?

Delay

Delay is pre-eminently a discretionary factor. Most environmental judicial review is time-limited, eg. section 104A EPA Act which prescribes a period of 3 months after publication of a consent to bring a challenge to validity (likewise section 35A for challenges to the validity of planning instruments). However, if the claimant is alleging a breach of consent, or development without consent, there is not time limitation.

Unreasonable delay has been held to be a significant factor in the refusal of relief. An example is *Liverpool CC v RTA.*[24] Cripps J found that the applicant council had established that the environmental impact statement ("EIS") for the M2 (tollway) had breached the law. However, he refused relief partly because, given the circumstances, there was no utility in doing so. His Honour found that the delay by the

applicant council in formulating its claim was not satisfactorily explained and was not the result of any conduct by the Road and Traffic Authority. Moreover, the council knew of the agency's proposals, knew the work was going ahead and that there was no supplementary EIS. Not only did it stand by, but it also conducted itself in such a fashion as to lead to the conclusion that it did not regard the breach as a matter of importance.[25]

Where undue delay is coupled with prejudice, it is likely to be an important discretionary factor to weigh in the balance, see for example *Auckland Casino Ltd v Casino Control Authority*[26] and the cases cited by Macmillan.[27]

Hardship and prejudice to the developer

Hardship to the respondent if the relief is granted is often relied on as a discretionary factor. The extent to which hardship will be a significant factor to be weighed in the balance will depend upon the particular circumstances. For example, the extent to which the hardship of the developer was contributed to by its own actions will be relevant. Another situation to be assessed is where the developer, in the face of the challenge, deliberately decides to incur expenditure on the project. In such circumstances a court may determine that it has proceeded at its own risk and be justified in disregarding or downplaying any resulting prejudice. Steps taken in reliance on the decision prior to any notice of the challenge can of course be relied on. An example of the former is *Wilson v Iron Gates Pty Ltd.*[28] In this matter a developer had built an access road to a subdivision in a position contrary to that required by the consent. It had spent $700,000 on the road which was 75-80% complete with only 6 weeks' construction left. However, the developer carried out the construction after the litigation had been commenced and at a time when it knew of the applicant's case. Nonetheless, it elected to continue and bear the risk of an adverse result in the litigation. This significantly diminished the degree of hardship *caused* by the grant of relief. Once the hardship is assessed it is of course necessary to weigh it in the balance of discretionary factors.

The public interest factor

The *public interest* in the obedience to law is an important discretionary factor. As Kirby P said in *Sedevcic*, it was the obvious intention of the Parliament that developers (including, if I may say, state agencies and local authorities) will comply with the law. If breaches of the law are frequently condoned by the exercise of the discretion, the law is undermined. This, in turn, will lead to a sense of inequity by those who have complied or who have failed to secure an exercise of discretion in their favour.[29] In assessing the importance to be attached to the public interest, the conduct of the developer may be relevant. If the breach is flagrant - a deliberate flouting of the law - the public interest in securing obedience to the rule of law may assume a greater importance. This may be particularly so where the development is the subject of high public controversy. The impact of the breach on the environment, and its remediability, will be an important factor particularly if the breach is a substantial one.

On the other hand, if harm to the environment is absent or minimal, the development is supported by the community and of long standing, the breach may be overlooked. This may be especially so if the breach is a mere technical one.

Concluding comments

This brief review suggests some of the key factors to be accounted for in the exercise of the discretion. It is apparent that the extent of the breach (and its remediability) weighed against the prejudice and hardship to the respondent, are significant factors. Of more importance in some cases, is the overarching public interest in the obedience to laws which affect the public generally

and impose duties. In determining the appropriate order to make, the court *may* need to look beyond the immediate interests of the parties to the litigation. However, it must be stressed once again, as have Justices Mahoney and Kirby, that it is undesirable to draw upon past decisions, even in similar factual contexts, to attempt to catalogue all of the circumstances which will allow the discretion to be exercised, given its width and unfettered nature. As Kirby P said in *Sodovcic*, "[the discretion] should not be unduly circumscribed by a gloss of cases".[30]

However, if I may return to where I started. In my opinion, we should accept that with the best will in the world, judges of the highest integrity will (even unconsciously) allow subjectivity to enter into the balancing act. Once we acknowledge this, we will be better able to make more just discretionary and more consistently "right" decisions.

Endnotes

1 Coke defined discretion in *Rooke's* case in 1598 as 'a science or understanding to discern between falsity and truth, between right and wrong, between shadows and substance, between equity and colourable glosses and pretences, and not to do according to their wills and private affections.'
2 *Judges and Community Involvement*, paper delivered to the Supreme Court of New South Wales Annual Conference, 13-14 June 1997.
3 (1975) 25 *University of Toronto Law Journal* 120.
4 de Smith, *Judicial Review of Administrative Action* 4th Ed 278 acknowledges that to say someone has a discretion presupposes that there is n uniquely right answer.
5 (1985) 66 LGRA 306 and 313.
6 (1964) 114 CLR 582.
7 (1974) 29 LGRA 192 at 197.
8 (1986) 161 CLR 513 at 533.
9 (1987) 10 NSWLR 335.
10 *Sedevcic* at 339E.
11 (1974) 2 NSWLR 681.
12 (1986) 59 LGRA 121.
13 *Sedevcic* at 339G.
14 (1964) 83 WN (Pt 1) NSW 80.
15 *Sodovcic* at 340B.
16 *Sedevcic* at 340C-D.
17 (1980) 46 LGRA 250.
18 *Sedevcic* at 341A.
19 (1987) 64 LGRA 127 at 192.
20 (1992) 75 LGRA 64 at 69.
21 (1986) 1 WLR 763 (C.A.)
22 Unreported High Court of New Zealand 14 October 1991 Wylie J.
23 1995 NZLR 192 at 211-212.
24 (1991) 74 LGRA 265.
25 *RTA* at 279.
26 (1995) 1 NZLR 142 (CA).
27 Macmillan, Gillian, *Judicial Review, Competitors, and the Court's Discretion to Withhold a Remedy*, [1995] NZLR 192.
28 Unreported Land and Environment Court 2 December 1996.
29 *Sedevcic* at 340D.
30 *Sedevcic* at 342C-D.

DOES AUSTRALIAN LAW RECOGNISE PUBLIC LITIGATION?

*Andrea Durbach**

Paper presented to an AIAL seminar, Judicial Review - The Public Interest, Sydney, 22 July 1997.

In 1987, Sir Anthony Mason, in a lecture entitled "Future Directions in Australian Law", published in the *Monash University Law Review*, declared:

> ... that the courts have a responsibility 'to develop the law in a way that will lead to decisions that are humane, practical and just', to repeat the words of Sir Harry Gibbs. Judges do not carry out this responsibility in a vacuum, by shutting their eyes to contemporary conditions. They must have an eye to the justice of a rule, to the fairness and the practical efficacy of its operation in the circumstances of contemporary society. A rule that is anchored in conditions which have changed radically with the passage of time may have no place in the law of today.

Increasingly courts are being asked to analyse and decide legal questions in the context of complex social, political and economic issues. With the emergence of public interest groups which have sought to redress public harm, enforce public duties and protect hard-won political and social rights, the traditional common law view of litigation as a process of resolving individual disputes, has had to shift to accommodate the ripples of social and political transformation.

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PIAC's role in public interest litigation

It is largely in the context of the work of my Centre, the Public Interest Advocacy Centre (PIAC), that I approach the question posed by this seminar: *Does Australian law recognise public interest litigation?* PIAC is an independent, non-profit legal and policy centre based in Sydney. It was established in July 1982 as an initiative of the Law Foundation of NSW with the primary aim of undertaking policy-orientated or test case litigation which would transcend the interests of individual litigants and promote those of members of the community at large, with particular reference to disadvantaged groups.

In pursuit of its charter of promoting the public interest and enhancing the quality of public policy-making, PIAC represents and regularly consults with a broad spectrum of groups and individuals well placed to interpret and give definition to the *public interest* and devise appropriate methods for its advancement. Invoking a multi-disciplinary approach to its work which combines legal action, policy analysis and legal reform and campaigning, PIAC's cases and projects have tended to focus on consumer protection, human rights and access to justice issues.

It is the combination of addressing a substantive public interest on the one hand and judicial support of procedures which facilitate its effective ventilation and clarification on the other, which underlies our definition of public interest litigation. There is in some quarters adherence to a narrow view which argues that a dispute which simply espouses a public interest is

sufficient to attract the classification public interest litigation; that if litigation suggests a public interest as the content of the dispute it is by implication public interest litigation. Indeed, Australian law is full of rich deliberation on the meaning of "the public interest". There is case law which offers quantitative (that a matter affects a significant sector of the public) and qualitative (that a matter has an intrinsic value or import to the wider community) assessment. Judgments go to some length in describing and evaluating competing public interests and then turn to the difficult exercise of weighing up public benefit as against public cost. And there is extensive discussion on the intention of the legislature where courts have had to construe the public interest in the context of a statutory framework.

The willingness of our courts to evaluate the public interest within the parameters of a statutory setting is however far from indicative of an acceptance of public interest litigation. The desire of the Australian courts to explore, interpret and define the public interest goes only half way to the full recognition of public interest litigation. For until the means or processes for furthering or accommodating the public interest are accorded widespread approval by our courts, the judicial reception of public interest litigation will continue to be seen as lukewarm and defensive. An important step in the route to this recognition is for courts to construe litigation as being in the public interest; what is essential is recognition of the mechanisms or strategies which allow for its effective declaration and protection. Public interest litigation therefore presupposes the existence of viable and amenable procedures within the framework of the judicial system which sustain and advance a public interest. It entails expanding the right of procedural access to judicial remedies through broadening the rules of standing, facilitating broad-based litigation with maximum conservation of cost via representative proceedings and devising appropriate costs allocation rules where the litigation is considered in the public interest.

Thus, we would argue that recognition of public interest litigation by the courts, would require their embracing both the substantive issue as one of public interest and the procedural mechanism(s) for its most effective advancement. It is perhaps in respect of the latter component, the question of facilitating access to allow for the ventilation of a public interest issue, where Australian courts have lacked largesse. The Italian-American jurist, Mauro Cappelletti, in his book *The Judicial Process in Comparative Perspective*, writes:

> The right of effective access to justice has emerged with new social rights. Indeed, it is of paramount importance among other new rights since, clearly, the enjoyment of traditional as well as new social rights presupposes mechanisms for their effective protection. Such protection, moreover, is best assured by a workable remedy within the framework of the judicial system. Effective access to justice can thus be seen as the most basic requirement - the most basic 'human right' - of a system which purports to guarantee legal rights.

Why should public interest litigation receive judicial recognition?

Why does public interest litigation warrant special treatment as to access? What is the value to our jurisprudence for the judicial recognition and nurturing of public interest litigation and why should our courts embrace procedures which convey a public interest expeditiously and with minimum expense to both the litigant and the court system? The benefits which I summarise below are extracted from a submission by PIAC, Environmental Defenders Office and Consumer Law Centre of Victoria (CLCV) to the then Commonwealth Attorney-General, Michael Lavarch and Minister for Justice, Duncan Kerr in support of the establishment of a National Public Interest Legal Assistance Scheme. These benefits include:

- **Development of the law:** Legal rights and obligations can be developed or clarified via public interest litigation with resultant increased equity, access to the law and public confidence in its administration.

- **Economies of scale:** The pursuit of fundamental issues and outcomes via public interest litigation can affect a wide circle of people experiencing similar difficulties with reduced cost implications for legal aid commissions and the justice system as a whole.

- **Impetus for reform and structural change to reduce potential disputes:** Public interest litigation can be a major impetus for structural change and reform which reduce the likelihood of disputation, and hence litigation. Improved regulatory structures (through legislation, codes of practice, complaints mechanisms, charters of rights and industry ombudsman schemes), and changes in policy and practice by government or private corporations in fields such as banking, insurance, health care, nursing homes, chemical manufacture - can be attributed in large part to successful public interest litigation.

- **Contribution to market regulation and public sector accountability by allowing greater scope for private enforcement:** Public interest litigation can play an important role in market regulation and public sector accountability. Actions in respect of unfair practices or defective and harmful products can provide incentives to produce quality products and clean environments or safe and non-discriminatory work practices.

- **Reduction of other social costs:** Through successful resolution of civil and administrative disputes public interest litigation can prevent and stop costly market or government failures. For a small investment, public interest litigation can save the community substantial direct and indirect costs (lost taxes, health expenditure, inefficient administration).

- **Public participation in decision-making:** Public interest litigation can secure public participation in key decision-making processes and in judicial law-making. Where those potentially affected by decisions or laws have an opportunity to shape their content and form, generally greater adherence to outcome is achieved.

These benefits come under threat when a social and political climate comes into play which:

- undermines public participation in government policy-making and the capacity to inform social progress;

- removes channels for scrutiny of government decisions;

- effectively excludes entire classes of people from the judicial process through the application of the narrowed principles of standing;

- imposes cuts and limitations on legal services programs and on public interest organisations, thus curtailing their capacity to advocate in the public interest.

As these developments take hold (and I am not setting a hypothetical scene) with consequent weakening of social rights and obligations, our courts must assume an even greater responsibility to ensure that important public interests and rights do not fade from the agenda. How they do this is to demonstrate a willingness to accept that many matters of national interest are litigated in suits between private parties and to welcome judicial participation which will assist in the determination and exploration of issues of public interest raised by litigation. In a report of PIAC's first five years of operation entitled *Five*

Years in the Ring, High Court Justice Michael Kirby, then President of the NSW Court of Appeal, wrote:

> The dis-inclination of judges to conceive their role, even partly as social engineers, is itself the consequence of an unfamiliarity with public interest test cases. To some extent at least. the willingness and ability of courts to consider relevant social phenomena and to articulate general legal principles dependc upon the stimulus and assistance they receive from counsel.

Our work over the years suggests that without judicial flexibility in relation to *amicus curiae* interventions, class actions and cost rules, opportunities for the responsible and effective articulation of a public interest through litigation will be lost and the Australian common law response to public interest cases will remain uncertain with few articulated principles. Justice O'Connor in the US Supreme Court 1989 decision *Webster v Reproductive Health Services* suggests important values which should underlie our acceptance of judicial participation:

> ... the willingness of courts to listen to interveners is a reflection of the value that judges attach to people. Our commitment to a right to a hearing and public participation in ... decision-making is derived from the belief ... that we improve the accuracy of decisions when we allow people to present their side of the story ... (and) create a moral obligation (on their part) to respect the outcome.

This clarity of acknowledgment has not yet permeated judicial thinking in Australia. Indeed, attempts to participate in judicial decision-making by way of *amicus curiae* interventions, have not been met with a clear or consistent response from the courts, a lack of welcome being perhaps indicative of the confusion over what may be considered a desired level of public interest litigation in Australia and the absence of a developed principle on participation. This lack of common understanding has lead to some anomalous and unhelpful dicta.

In a test case, *Breen and Williams*, which concerned the right of a patient to have access to her medical records held by a plastic surgeon, PIAC in a coalition with Consumers Health Forum and the Health Issues Centre, intervened as *amici* before the Supreme Court of NSW to inform the Court of the wider implications of its decision, and on recent legal and policy developments regarding patient access to medical records held by private practitioners, within Australia and internationally. PIAC's work on health issues in general and access to records in particular, had been extensive, well-documented over many years. Its expertise and well-founded interest in the issue, and its ability to present to the court a novel perspective, would have sufficed as the basis for permitting leave to intervene. The intervention however was allowed reluctantly by the NSW Supreme Court who chose to focus on PIAC as an organisation, declaring:

> There is no reason for thinking of the Public Interest Advocacy Centre as in any way the guardian of or representing persons with similar interests to the plaintiff or the public interest, and notwithstanding its name it is not a public body, but a private company limited by guarantee whose members have power to decide whom they admit to membership and what causes they espouse. I should not be taken as supporting any claim of the Public Interest Advocacy Centre to be heard in the public interest.

Despite a reluctant granting of leave permitting PIAC's intervention at first instance, the NSW Court of Appeal denied PIAC "a similar privilege on appeal" (per Kirby, P). In a dissenting judgment on appeal, Kirby P commented that:

> (t)he courts should not turn a blind eye or a deaf ear to the assistance that they might receive from *amicus curiae* on matters of general principle in test cases ... to exclude the assistance of PIAC evidences in my respectful view the procedural formalism and rigidity which limits the utility of the court['s contribution] to modern dispute resolution.

Class actions

While class actions and public interest litigation are obviously not identical, class actions claims often overlap with public interest litigation in that they allow for consistent and equitable resolution of disputes arising from common circumstances, providing a more efficient and effective court procedure for dealing with numerous related claims, with benefits to the group involved, to its opponent and to the court system. (*Access to Justice - an action plan of the Access to Justice Advisory Committee* (the Sackville Report), May, 1994 at p 59, para 2.104).

Since the High Court decision in *Carnie v Esanda* two years ago, the law on class actions procedures remains unpredictable and uncertain, offering little guidance but recurrent obstacles to potential public interest litigants. The High Court in *Carnie* undoubtedly opened the way for courts to be more innovative in exercising their discretion to formulate procedural rules regulating the most efficient method of conducting representative proceedings. It seems however that the courts have been timid in taking up the High Court call to develop rules in the absence of legislative intervention. Certainly in NSW, despite the development and advocacy of appropriate models for law reform, government has been slow to put in place a structure which would eradicate current uncertainty and clarify class actions procedures. Any hopes for such clarification, now appear to sit with the courts adopting procedural rules through the Rules Committee of the NSW Supreme Court. Without such boldness, communities harmed by widespread practices, will continue to face barriers which may prevent them from enforcing their rights or involve them in costs which far outweigh the desired benefit of litigation.

Costs

Costs, the most formidable barrier to participation, remain a powerful disincentive to public interest litigation. In an address to an international conference on environmental law in 1989, Justice Toohey contended:

> There is little point in opening the doors to the courts if litigants cannot afford to come in. The general rule in litigation that 'costs follow the event' is in point. The fear, if unsuccessful, of having to pay the costs of the other side (often a government instrumentality or wealthy private corporation), with devastating consequences to the individual or environmental group bringing the action, must inhibit the taking of the case to court. In any event, it will be a factor that looms large in any consideration to initiate litigation.

Public interest litigation will not frequently produce financial gain for the public interest litigant. Typically, public interest litigants must obtain legal aid funding to cover their own legal costs and possibly those of the other side should they lose. Legal aid resources are limited in application to both subject matter and quantum and only in NSW does an indemnity provision exist where an award of adverse costs falls to the legally aided litigant. Public interest litigation is also discouraged by the potential obligation to provide security for costs. In the 1986 NZ case *Ratepayers and Residents Action Association Inc v Auckland City Council*, Richardson J said:

> In acting in a responsible way as watchdogs of the public interest, community organisations perform a valuable service. Having in the public interest opened the court door to the airing of public law questions, the public interest in having those questions proceed to hearing and determination must be a factor for consideration in deciding whether to order security.

In the NSW Court of Appeal 1996 judgment, *Richmond River Council v Oshlack*, Sheller J refers to the case of *Kent v Cavanagh* as expressing concern that "responsible citizens who take public spirited action not for personal or selfish reasons but for the benefit of the public at large should be heavily out of pocket if they fail". He continues, quoting Fox J from the judgment:

> It seems to me undesirable that responsible citizens with a reasonable grievance who wish to challenge Government action should only be able to do so at risk of paying costs to the Government if they fail. They find themselves opposed to parties who are not personally at risk as to cost and have available to them almost unlimited public funds. The inhibiting effect of the risk of paying costs is excessive and not in the public interest.

Despite these references and the fact Mr Oshlack was acting clearly in the public interest to ensure compliance by the Council with environmental legislation, the NSW Court of Appeal held that litigation in the public interest was not a relevant factor to be taken into account when determining whether or not to make an award of costs against Oshlack with the failure of his application to court. The High Court will reconsider the soundness of this approach in early August this year. If disincentives to wider public participation continue to exist, as with the *Oshlack* ruling where legislation invited the applicant to remedy a perceived breach, it is foreseeable that those who are able to bear the costs of litigation will have an exaggerated impact on judicial decision-making.

Linked to the facilitation of public interest litigation, is the need for the sponsorship or subsidisation of public interest litigation. The words of Justice Michael Kirby, again in the PIAC report, are instructive in this regard:

> As the funds available to legal aid are strictly limited the cases which the Commission can fund tend to be concerned with individual, rather than community interests. Larger questions of public policy, if fought, arise incidentally or haphazardly. This is the principal justification of a separate and distinct body to run public interest litigation. Without the funds to support capable and imaginative lawyers, important issues may simply never be debated in court.

Conclusion

There is no doubt that Australian courts have not been oblivious to the potentially beneficial effect of public participation on the development of the law. Different degrees of curiosity in public interest litigation rather than wholesale recognition by Australian courts of public interest litigation, is the concluding answer I would suggest to the question posed by this seminar. With the changing nature of litigation, frequently implicating many individuals or organisations, corporations and governments, often not party to the dispute, courts will have to recognise the importance of expanding the information available to them and the most effective methods for its dissemination. Public interest litigants are particularly important to this information-gathering process representing interests important to society but that would not otherwise be represented in court.

Last year I attended a conference of the Public Law Project in London on *Litigating in the Public Interest* and one of the speakers, barrister Rabindah Singh, discussing the role of public interest litigants and the importance of judicial participation, drew on the President Kennedy quote stating: "Ask not what the courts can do for you, but ask rather what you can do for the courts." The courts must somehow find a place for accommodating responsible citizens who seek to prevent harm or illegalities in government which otherwise would go unchallenged. Drawing again on the paper of Sir Anthony Mason, his words offer a fitting conclusion:

> Of course the legal issues for decision in a particular case often do not correspond with the real issues underlying the case as the public sees them. A court must necessarily deal with the legal issues. But undue emphasis on formalism promotes a lack of correspondence between the legal issues and the real issues as the public perceives them. And a similar emphasis on formalism diminishes public confidence in the administration of justice in an age in which confidence in the courts and respect for the law cannot be taken for granted.

LEGISLATIVE INSTRUMENTS BILL—R.I.P.?

*Stephen Argument**

Introduction

During the parliamentary sittings that have recently concluded, one event that has gone relatively unnoticed is the apparent demise of the Legislative Instruments Bill, an important and innovative attempt to impose some much-needed discipline into Commonwealth delegated legislation. Set out below is a brief history of the Bill, it's main features and the reasons behind its apparent demise.

The Legislative Instruments Bill

In 1994, the previous (ALP) Government introduced the Legislative Instruments Bill 1994 (the 1994 Bill). This Bill was, in large part, the Government's response to the Administrative Review Council's 1992 report, *Rule making by Commonwealth agencies.*[1]

The 1994 Bill was subjected to fairly rigorous scrutiny by both Houses of the Parliament—including inquiry and report by parliamentary committees in both Houses[2]—and was amended significantly by the Senate, in the light of that scrutiny.

At the time of the 1996 federal election, the 1994 Bill—as amended by the Senate—was awaiting passage. When the election was called, the Bill lapsed. In its election policies, the Coalition affirmed its commitment to the reforms promoted by the 1994 Bill, focussing, in particular, on the Bill's potential benefits for business.[3]

This commitment was given effect when the current, Coalition Government was elected. The Legislative Instruments Bill 1996 (the 1996 Bill) was introduced into the House of Representatives on 26 June 1996. It incorporated many of the amendments that had been made to the 1994 Bill. The greater business focus was also evident in this version of the Bill, in provisions that would require public consultation in relation to legislative instruments "likely to have a direct, or a substantial indirect, effect on business".[4]

Unfortunately, this Bill has gone nowhere. Between June 1996 and December 1997, the Bill bounced between the House of Representatives and the Senate, essentially because the Senate kept making (and insisting upon) amendments that the Government (and, as a result, the House of Representatives) was not prepared to accept. Finally, on 5 December 1997, the House laid the 1996 Bill aside.

On 5 March 1998, the Legislative Instruments Bill 1996 [No 2] (the 1996 [No 2] Bill) was introduced into the House of Representatives. It is in the same form as the (original) 1996 Bill. On 14 May 1998, the Senate passed the 1996 [No 2] Bill, again with substantial amendments. This was despite the Minister for Justice, Senator Vanstone, telling the Senate at the opening of the substantive debate that:

> [t]he latest draft of amendments put forward are entirely unacceptable ... . For the reasons given to the Senate last year, the Government is unable to accept the many recycled amendments that I understand are now being proposed by the Opposition and the Greens. The Government will again reject those amendments in the other

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> House and the Bill will not be returned to this chamber.[5]

The 1996 [No 2] Bill now seems doomed though, given its re-introduction in the same form as the 1996 Bill, it stands as a potential double dissolution trigger, with the resulting possibility that it might be passed by a Joint Sitting, should a double dissolution be called. One might (for various reasons) wonder just how realistic a prospect this is.

In the remainder of this paper, I would like to touch (briefly) on the main features of the 1996 version of the Bill and also the amendments upon which the Senate has been insisting.

The Legislative Instruments Bill 1996

The Legislative Instruments Bill (in its various forms) has always promised to be the answer to various problems that have been identified in relation to delegated legislation. These problems have largely been a product of the development (without any discernible logic) of forms of delegated legislation that fall outside the established categories of delegated legislation (ie regulations, by-laws, etc). The most obvious problems are:

(a) proliferation (both in volume and in variety);

(b) inaccessibility;

(c) poor quality of drafting; and

(d) (in many cases) absence of parliamentary scrutiny.

I do not propose to say anything further about those issues here.[6] What I will do, however, is set out the main features of the Bill. For the sake of currency, I shall refer to the 1996 version of the Bill.

Clause 5 - Definition of "legislative instrument"

The first thing to note about the 1996 Bill is that it operates in relation to all "legislative instruments". The concept of "legislative instrument" is defined in subclause 5(1) of the 1996 Bill as an instrument in writing:

> (a) that is of a legislative character; and
> (b) that is or was made in the exercise of a power delegated by the Parliament.

Subclause 5(2) adds to this definition, by providing:

> Without limiting the generality of subsection (1), an instrument is taken to be of a legislative character if:
>
> (a) it determines the law or alters the content of the law, rather than applying the law in a particular case; and
> (b) it has the direct or indirect effect of affecting a privilege or interest, imposing an obligation, creating a right, or varying or removing an obligation or right.

Subclauses (3) to (6) make some more specific provision about what is and *is not* a legislative instrument, but I do not propose to deal with those provisions in detail here.[7]

The importance of this definition is that (in my view) it clearly encompasses the kinds of instruments that have previously been causing so much concern. The effect of something being a legislative instrument is that it would be subject to an ordered and stringent regime in relation to drafting, publication, registration, parliamentary scrutiny and, in some cases, public consultation. It is also important to note that, if an "instrument that is of a legislative character" is not made, etc in accordance with the provisions of the Bill then it may be unenforceable.[8]

The responsibilities of the Principal Legislative Counsel

Part 2 of the 1996 [No 2] Bill provides for the establishment (within the Attorney-

General's Department) of an office of "Principal Legislative Counsel". The responsibilities of this officer, set out in clause 15, are:

> (a) ensuring that all legislative instruments are of a high standard; and
>
> (b) maintaining the Register [see further below];
>
> (c) maintaining a database of all electronic copies of instruments given to the Principal Legislative Counsel...;
>
> (d) ensuring that all original legislative instruments lodged with the Principal Legislative Counsel ... are retained and, as necessary, transferred to the Australian Archives for storage;
>
> (e) delivering to each House of the Parliament copies of all legislative instruments for which ... Parliamentary scrutiny is required.

Clause 16 of the 1996 [No 2] Bill further provides:

> (1) To ensure that legislative instruments are of a high standard, the Principal Legislative Counsel may take any steps he or she considers likely to promote their legal effectiveness, their clarity and their intelligibility to anticipated users.
>
> (2) The steps referred to in subsection (1) include, but are not limited to:
>
> (a) undertaking or supervising the drafting of legislative instruments; and
>
> (b) scrutinising preliminary drafts of legislative instruments; and
>
> (c) providing advice concerning the drafting of legislative instruments; and
>
> (d) providing training in drafting and matters related to drafting to officers and employees of other Departments or agencies; and
>
> (e) arranging the temporary secondment to other Departments or agencies of staff responsible to the Principal Legislative Counsel; and
>
> (f) providing drafting precedents to officers and employees of other Departments or agencies.

If enacted, this provision would clearly give the Principal Legislative Counsel an important supervisory role in relation to the drafting of legislative instruments, which could only lead to an improvement in the quality and consistency of drafting.

Consultation

Part 3 of the 1996 [No 2] Bill provides for consultation prior to the making of legislative instruments. As indicated at the outset, the consultation requirements essentially apply in relation to legislative instruments "likely to have a direct, or a substantial indirect, effect on business".[9] Subclause 17(2) of the 1996 [No 2] Bill provides that the intention of this requirement is to improve the quality of proposed legislative instruments by:

> (a) drawing on the expertise of persons in fields relevant to the proposed instruments; and
>
> (b) ensuring that persons likely to be affected by the proposed instruments have an adequate opportunity to comment on the policy and content of the proposed instruments.

While I do not propose to deal with the consultation processes in any detail, it is important to note that the only legislative instruments in relation to which those processes are to apply are those made under the primary legislation specified in Schedule 2 of the 1996 [No 2] Bill (which is headed "Enabling legislation providing for legislative instruments likely to have an effect on business"). As you can well imagine, Departments were keen that their legislation not be listed in this Schedule.

It is also important to note that clause 28 of the 1996 [No 2] Bill provides for exemption from the public consultation process. Paragraph 28(1)(a) provides

that public consultation is not necessary if the rule-maker is satisfied that various conditions—most of which involve a significant subjective element—exist. Importantly (and contrary to the earlier version of the Bill), decisions under clause 28 would be subject to judicial review under the *Administrative Decisions (Judicial Review) Act 1977*.

The Federal Register of Legislative Instruments

Part 4 of the Bill provides for the establishment of a Federal Register of Legislative Instruments (the Register). The Register would be kept on computer[10] and would be accessible to the public.[11] Subject to certain exceptions, registration would be required in relation to all future[12] *and* past[13] legislative instruments. In simple terms, a failure to register an instrument would render it unenforceable.[14]

Parliamentary scrutiny

Part 5 of the 1996 [No 2] Bill provides for the parliamentary scrutiny of legislative instruments. The Part incorporates (and builds on) the provisions contained in sections 46, 46A and 48-50 of the *Acts Interpretation Act 1901*.[15] I do not propose to deal with the detail of the provisions here but suggest that the incorporation of the tabling and disallowance provisions of the Acts Interpretation Act into a Bill such as this is a sensible idea.

Sunsetting

Part 6 of the 1996 [No 2] Bill deals with sunsetting of legislative instruments. The inclusion of this Part is significant in that the 1994 Bill did *not* contain such provisions. This was, in turn, significant, because the ARC had recommended that provision be made for the sunsetting of legislative instruments.[16] It is also consistent with the kinds of views expressed by the Senate Standing Committee on Legal and Constitutional Affairs in its report, *The cost of justice: Checks and imbalances*,[17] and by the House of Representatives Standing Committee on Legal and Constitutional Affairs in its report, *Clearer Commonwealth law*.[18]

The essence of the sunsetting regime is that legislative instruments would be automatically repealed—or "sunsetted"—5 years after commencement or, in the case of existing instruments that are required to be registered, of their being "backcaptured" on to the Register (ie registered under the procedures provided for by clauses 48 to 50 of the 1996 [No 2] Bill).

The Senate amendments

I now turn to the Senate amendments that are apparently the stumbling-block for the Legislative Instruments Bill. For ease of reference, I will refer to the amendments as proposed to the 1996 [No 2] Bill.

The amendments in question may be divided into the following categories:

(a) amendments directed at eliminating the use of gender-specific language in legislative instruments;[19]

(b) amendments making a certificate issued by the Attorney-General to the effect that a particular instrument is or is not a legislative instrument *itself* an instrument subject to parliamentary scrutiny and disallowance;[20]

(c) amendments directed at requiring that a Legislative Instrument Proposal (an aspect of the consultation process, provided by clause 21 of the 1996 [No 2] Bill)) contain a statement of the direct and indirect *environmental* costs and benefits of a particular option for achieving the objective of the instrument, in addition to a statement of the direct and indirect

social and economic costs and benefits of the option;[21]

(d) amendments providing further exemption from the consultation processes in relation to instruments "related to the prudential supervision of insurance, banking or superannuation or the regulation of the financial markets" or if "notice of the content of an instrument would enable individuals to gain an advantage over other persons";[22]

(e) amendments removing the exemption from disallowance given by subclause 61(7) of the 1996 [No 2] Bill to instruments relating to national legislative schemes;[23]

(f) amendments intended to give the Parliament a supervisory role in relation to the sunsetting of legislative instruments, in order to avoid "throwing good regulations out with the bad";[24]

(g) amendments intended to ensure that certain instruments dealing with terms and conditions of employment in the Australian Public Service are disallowable by the parliament;[25]

(h) amendments intended to modify the exemption from the sunset provisions (contained in subclause 66(1) of the 1996 [No 2] Bill) provided in relation to "any legislative instrument that gives effect to an international obligation of Australia" and "any legislative instrument that confers heads of power on a self-governing territory".[26]

It is not for me to second-guess the Senate (and, of course, the Government) by proffering a view as to whether or not the issues set out above are important enough to govern the life or death of the Legislative Instruments Bill. What I will say, however, is that, in my view, this is a **very** important Bill, containing reforms that are both meritorious and *long* overdue. It will be an enormous shame if, in effect, the baby ends up being thrown out with the bath-water.

Endnotes

1 Parliamentary Paper No 93 of 1992.
2 See Senate Standing Committee on Regulations and Ordinances, *Legislative Instruments Bill 1994, Ninety-ninth Report* (October 1994, Parliamentary Paper No 176 of 1994) and House of Representatives Standing Committee on Legal and Constitutional Affairs, *Report on the Legislative Instruments Bill 1994* (February 1995, Parliamentary Paper No 11 of 1995).
3 As part of both its *Law and Justice* and *New Deal for Small Business* policies.
4 Contained in Part 3 of the later versions of the Bill.
5 See Senate, *Hansard*, 13 May 1998, p 2597.
6 For further discussion of the problem, see, generally, Argument, S, "Parliamentary scrutiny of quasi-legislation", 15 *Papers on Parliament* (May 1992) and "Quasi-legislation: Greasy pig, Trojan horse or unruly child?" (1994) 1 *Australian Journal of Administrative Law* 144 and also the ARC report on *Rule making by Commonwealth agencies*.
7 Nor do I propose to deal with clause 7, which provides that rules of court are not legislative instruments, or clause 8, which allows the Attorney-General to certify whether or not an instrument is a legislative instrument.
8 See, eg, clauses 55 and 56 of the 1996 [No 2] Bill.
9 Subclause 17(1) of the 1996 [No 2] Bill.
10 See clause 37 of the 1996 [No 2] Bill.
11 See clause 38 of the 1996 [No 2] Bill.
12 See clauses 41 to 47 of the 1996 [No 2] Bill.
13 See clauses 48 to 50 of the 1996 [No 2] Bill.
14 See clauses 55 and 56 of the 1996 [No 2] Bill (though note that subclauses 55(2), 56(3) and 56(5) provide a validation mechanism).
15 Though with some modifications in relation to matters such as the time within which instruments must be tabled (see clause 58).
16 See *Rule making by Commonwealth agencies* (supra note 1), at pp 58-60.
17 Parliamentary Paper No 128 of 1993.
18 Parliamentary Paper No 127 of 1993.
19 See Senate, *Hansard*, 13 May 1998, pp 2598-2607, Thursday 14 May, pp 2722-3.
20 See Senate, *Hansard*, 14 May 1998, pp 2723-6.
21 See Senate, *Hansard*, 14 May 1998, p 2727.
22 See Senate, *Hansard*, 14 May 1998, pp 2727-9.
23 See Senate, *Hansard*, 14 May 1998, pp 2729-31.

24 See Senate, *Hansard*, 14 May 1998, pp 2732-3. The quote is from Senator Murray, and appears at p 2732.

25 See Senate, *Hansard*, 14 May 1998, pp 2733-4.

26 See Senate, *Hansard*, 14 May 1998, p 2734. The modifications in question would change "that gives" to "the sole or principal purpose of which is to give" and "that confers" to "the sole or principal purpose of which is to confer".

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