AIAL

National Lecture Series on Administrative Law

Sir Anthony Mason AC KBE

Lecture 1 Perth
The Foundations and the Limitations of Judicial Review

Lecture 2 Canberra
The Scope of Judicial Review

Lecture 3 Sydney
Australian Administrative Law Compared with Overseas Models of Administrative Law

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The AIAL National Lecture Series on Administrative Law

Sir Anthony Mason AC KBE

The Australian Institute of Administrative was established in 1989 to promote knowledge of and interest in Australian administrative law. Chapters of the Institute exist in all States and Territories. In keeping with its objective of promoting the study of administrative law on a national and integrated basis, the Institute established a national lecture series in administrative law in 2001. The inaugural lecture series was conducted by Sir Anthony Mason, at three lectures held in Perth, Canberra and Sydney.

The Hon Sir Anthony Mason AC KBE was Chief Justice of Australia from 1987–1995. He was appointed to the High Court in 1972, being formerly a Judge of the NSW Court of Appeal (1969–1972) and Commonwealth Solicitor-General (1964–1969). He was a member of the Commonwealth Administrative Review Committee, whose report in 1971 led to the establishment of the major structural elements of the present Commonwealth system of administrative law.

Lecture 1

Lecture 2

Lecture 3

LECTURE 1

THE FOUNDATIONS AND THE LIMITATIONS OF JUDICIAL REVIEW

The purpose of this series of Lectures is to address some of the contemporary issues in Administrative Law or, as I would prefer to describe it, Public Law. In this, the first of the series, I discuss the foundations and limitations of judicial review. This discussion necessarily engages with the provisions of the Australian Constitution for those provisions lie at the core of federal judicial review. In this and succeeding Lectures, it will emerge that the foundations and limitations of judicial review have a strong influence on the concepts and principles which govern judicial review.

The Lectures will not deal with Australian Administrative Law in isolation. Developments in Australia are not unrelated to what is happening in other jurisdictions. So some degree of comparison is inevitable. By the end of Lecture III it will become apparent that judicial review in Australia is not as broad-ranging as it is in other jurisdictions, most notably England. That is not to say that we have missed the boat. It may be a boat, like the HMAS Manoora en route to Nauru, on which we would be well advised not to travel. The comparison, however, should cause us to look at our own system critically.

The constitutional provisions

Justice Gummow has made the comment that:

> The subject of administrative law cannot be understood or taught without attention to its constitutional foundation.1

This statement, in itself no more than a truism, serves to highlight the significant development of Ch III constitutional jurisprudence by the High Court in more recent times.

The only provision in the Australian Constitution which deals explicitly with judicial review is s 75(v) which confers original jurisdiction on the High Court in matters —

(v) In which a writ of mandamus or prohibition or an injunction is sought against an officer of the Commonwealth.

Of course, this provision is not the only constitutional source of federal jurisdiction in judicial review. Section 75(iii) confers original jurisdiction on the High Court in matters —

(iii) In which the Commonwealth, or a person suing or, being sued on behalf of the Commonwealth, is a party.

Moreover, s 76(ii) enables Parliament to make laws conferring original jurisdiction on the High Court —

(ii) In any matter arising under any laws made by the Parliament.

The purpose of including s 75(v) in the Constitution was —

> … to make it constitutionally certain that there would be a jurisdiction capable of restraining officers of the Commonwealth from exceeding Federal power.2

It has been said that s 75(v) may not add to the jurisdiction conferred by s 75(iii). This statement is based on the suggestion that it was included in the Constitution as a safeguard against the possibility that the provision in s 75(iii) would be read down by reference to decisions on Art III of the United States Constitution3 so as to make relief unavailable where the Commonwealth itself is not the real party.

The Convention Debates suggest that the framers of the Constitution were aware of this possibility and that their purpose in including s 75(v) was to overcome the defect revealed in *Marbury v Madison*, namely that the Supreme Court of the United States lacked jurisdiction to grant mandamus. If we take the view that the purpose of s 75(v) is to reinforce the vesting of federal judicial power in Ch III courts and to supplement s 75(iii) in the context of judicial review, the omission to refer in s 75(v) to certiorari, after the express reference to mandamus and prohibition, though somewhat surprising, is not as significant as has been thought. Jurisdiction to issue certiorari may exist under s 75(iii). In any event, it seems that it is inherent or implicit in the power to grant prohibition that the Court may make its power to grant a prohibition effective in the circumstances and that would include authority to grant certiorari.4 On that footing, the Court would have power in an appropriate case to issue certiorari to quash or make an order in the nature of certiorari to quash.

It follows that it may be a mistake to regard s 75(v) as the only or even the primary source of the High Court's jurisdiction by way of judicial review. In a jurisdiction with a written constitution incorporating a separation of powers in its paramount law, it is natural to assign the ultimate authority for the exercise of all curial jurisdiction to that constitution,5 and this on the basis that one accepts Sir Owen Dixon's proposition that, in Australia, the common law is the ultimate constitutional foundation.6 That proposition means that the Constitution owes its recognition in part at least to the common law, that the provisions of the Constitution are framed in the language of the common law and that, as the common law forms an important part of the context in which the Constitution operates, it is to be understood and interpreted by reference to the common law.7 At the same time, some common law principles are so fundamental and of such importance that they may assume the character of constitutional principles and require clear, even specific, expressions of legislative intention to displace them.

It is accepted that the duty and the jurisdiction of the courts is, to use the words of Marshall CJ in *Marbury v Madison*,8 "to say what the law is". That means, in administrative law, declaring and enforcing the law which determines the limits and governs the exercise of the repository's power.9 Subject to such specific provisions as are made by the Constitution and by statute with respect to the exercise of jurisdiction, the vesting of the federal judicial power in Ch III courts and its separation from the legislative and executive powers were enough to arm the High Court as the Federal Supreme Court with a jurisdiction to declare and enforce administrative law and by way of judicial review.10 The existence and exercise of this jurisdiction is a manifestation of the rule of law, a notion which is receiving increasing attention in Australia and, more particularly, England.11 According to no less an authority than Sir Owen Dixon, the Australian Constitution is an instrument framed on the assumption of the rule of law.12 The rule of law is a fundamental concept or principle which informs the interpretation of the Constitution, indeed of every constitution, so that my comments have an application to a State constitution.

Section 76(ii) enabled Parliament to enact the *Administrative Decisions (Judicial Review) Act 1977* (ADJR Act) which provided for a régime of judicial review extending beyond the prerogative writs.

Section 76(ii) would enable Parliament to provide for an appeal from federal administrative decisions to the Federal Court or to a court exercising federal jurisdiction. But a court vested with such an appellate jurisdiction would necessarily be restricted to exercising functions which involved the exercise of judicial power. For it is the gloss on Ch III resulting from the decision in the *Boilermakers Case*13 that precludes a federal court from exercising non-judicial power, while a similar line of reasoning confines the vesting of federal jurisdiction under s 77(iii) to matters within federal judicial power.

The High Court's jurisdiction in judicial review, particularly s 75(v), has been described as "inherent jurisdiction". Whether that is a correct description is open to question. It may not be "inherent jurisdiction" in the sense which that term has been applied to the general jurisdiction of the Supreme Courts of the States. It is, of course, constitutional jurisdiction and to be distinguished from statutory jurisdiction, even though statutory jurisdiction is vested in the High Court by force of the operation of the provisions of the Constitution. The distinction is important because Parliament can limit the jurisdiction which it vests in federal courts and courts exercising federal jurisdiction under Ch III.

So far I have been speaking of the jurisdiction of courts, principally of the High Court and federal courts under Ch III. Except in s 75(v), Ch III does not speak in terms of remedies. Nor does it confer power to issue remedies or prescribe the grounds on which they shall issue. The constitutional provisions assume that federal courts will, in the exercise of the jurisdiction vested in them, grant such remedies as are appropriate to the particular jurisdiction and to the case in hand. Neither s 75(iii) nor s 75(v) is a source of substantive rights, except in so far as the grant of jurisdiction necessarily recognises the principles of general law according to which the jurisdiction to grant the remedies is exercised.14

The “prerogative” or “constitutional” writs

We have called the writs of mandamus, prohibition and certiorari prerogative writs, in common with other writs offering remedies in the field of public law. For almost a century we have applied the same description to the writs referred to in s 75(v), notwithstanding that writs issued in the exercise of the s 75(v) jurisdiction provide relief in situations unknown in England, notably in situations where a statutory provision is *ultra vires* the Constitution. Because these writs issue in circumstances in which a writ did not issue in England, it is now thought appropriate to call them “constitutional” writs. There is no reason to cavil at the new description so long as we recognise that the name change in itself does not herald any change in the character and availability of the relevant writ. We know from *Ex parte Aala* that the scope of prohibition in s 75(v) is not confined to the notion of jurisdictional error which prevailed in 1901 or to the grounds on which the prerogative writ issues in England. We know also from *Ex parte Aala* that the grounds on which the remedy issues change over time. The same comment applies to other constitutional remedies.

In suggesting that s 75(v) does no more than supplement s 75(iii) , I acknowledge that, although federal judges have been held to be “officers of the Commonwealth” within s 75(v), federal courts may not fall within the descriptions in s 75(iii) of “the Commonwealth” or “a person being sued on behalf of the Commonwealth”.15 It is, however, necessary to recall that, although federal courts are independent in the judicial sense of that word, they are a branch or institution of the polity and are, in international law, regarded as the State or as an agency of the State.

The statutory *ultra vires*/common law controversy

For some time there has been an on-going controversy about the source of the principles which the courts apply in the exercise of judicial review. This controversy is often called a controversy about the foundations of judicial review. There have been those, like myself, who have regarded the principles of judicial review as a common law creation. There have been others, like Sir Gerard Brennan, following the view of Sir William Wade, who have seen judicial review as having a statutory and — even ultimately — a constitutional basis. In England, where the controversy has generated much academic discussion, an entire book of learned essays has been dedicated to the topic.16

Earlier I had not thought that much turned on the outcome of the controversy. Adherents of the common law view concede that the availability and the scope of judicial review depend upon the legislative intention as expressed in the relevant statute. Subject to such limitations as may arise from the Australian Constitution — and I speak here of federal judicial review — Parliament may, as we know from recent experience in connection with the *Migration Act 1958* (Cth), curtail judicial review, so long as it does not impair the High Court’s constitutional jurisdiction. On the other hand, adherents of the statutory view acknowledge that the courts attribute to the statute an intention that the decision-maker, in whom the power to decide is reposed by the statute, is to exercise its power in conformity with the law, including the common law. The difference between the two views has been encapsulated in two propositions. The first, the common law proposition, is:

> Unless Parliament clearly intends otherwise, the common law will require decision-makers to apply the principles of good administration as developed by the Judges in making their decisions.17

The second, the statutory *ultra vires* proposition, is:

> Unless Parliament clearly indicates otherwise, it is presumed to intend that decision-makers must apply the principles of good administration drawn from the common law as developed by the Judges in making their decisions.18

As you can see, the difference between the two propositions is theoretical.

Adherents of the statutory view proceed on a fictional presumption that Parliament intends that the courts will correct any error of law made by the decision-maker. This approach was succinctly stated by Lord Browne-Wilkinson in these terms:

> Parliament had only conferred the decision making power on the basis that it was to be exercised on the correct legal basis: a misdirection in law in making the decision therefore rendered the decision *ultra vires*.19

Since then the House of Lords has affirmed the view that the *ultra vires* doctrine is "the central principle of administrative law"20 and is "the juristic basis of judicial review".21

The fictional presumption has been applied in many situations in England where, on ordinary principles of statutory construction, it would not be possible to derive the legislative intention attributed by the presumption to the legislature. Indeed, in England the presumption has been carried to the point that privative clauses are virtually ineffective. The justification for carrying the presumption so far has been expressed by Lord Steyn in this way:

> The presumption that in the event of ambiguity legislation is presumed not to invade common law rights is inapplicable … A broader principle applies. Parliament does not legislate in a vacuum. Parliament legislates for a European liberal democracy founded on the traditions and principles of the common law. And the courts may approach legislation on this initial assumption. But this assumption only has prima facie force. It can be displaced by a clear and specific provision to the contrary.22

This assumption applies even in the absence of ambiguity, though it will be displaced by clear and specific language to the contrary. The requirement for specific language is important; general words are not sufficient to displace the presumption.

This is an enterprising exercise in judicial gymnastics. You begin by affirming the *ultra vires* doctrine as the central pillar of administrative law. You then apply not a *presumption* but an *assumption* that the common law is intended to apply. Note that Sir Owen Dixon, when speaking of the rule of law, referred to it as an *assumption* on which the Constitution was based. Lord Steyn's assumption, which is divorced from ordinary principles of statutory interpretation, has such strong prima facie force that it is only displaced by clear and specific provision to the contrary. By this route his Lordship arrives at the result which the common law advocates propound. One must ask — why go to all this trouble? Perhaps it is because judges think that it is important for political purposes that politicians should think that judges believe that judicial review lies within the gift of the statute and it is not a creation of the common law or the judges. That, it seems to me, is the reason for these judicial gymnastics.

Recently, in England there has been an emphasis on the importance of the rule of law and the principle of legality.23 That emphasis was present in *R v Secretary of State for the Home Department; ex parte Pierson*,24 a recent decision of the House of Lords. It would, however, be a mistake to see this development as a movement away from the *ultra vires* doctrine. What the new emphasis suggests is that the principle of legal certainty and the rule of law could support the availability of judicial review in cases where the decision-maker does not purport to have acted pursuant to statutory authority. Further, the two elements supplement the *ultra vires* doctrine and could conceivably perhaps in the fullness of time displace it as the preferred basis of judicial review. At this time, however, in England at least, the doctrine is the accepted juristic basis of judicial review of decisions purportedly made under statutory authority.

Main objections to the *ultra vires* doctrine

It would take too much time in this paper to review in detail all the objections which have been made to the *ultra vires* doctrine. It is sufficient to mention the more important points. First, the doctrine provides no explanation for judicial review of prerogative power. Judicial review of prerogative power has been accepted in England25 though it remains to be accepted authoritatively in Australia. In *R v Toohey; ex parte Northern Land Council*,26 Mason J said that there was much to support the view that an exercise of prerogative power is reviewable. And in *Ex parte Aala*, Gaudron and Gummow JJ said that if an element of executive power incorporated a requirement for natural justice, prohibition would lie to enforce observance of the Constitution itself.27 Their Honours' citation28 of passages from *Minister for Arts, Heritage and Environment v Peko Wallsend Ltd*29 also suggests that exercises of common law or prerogative power by the executive will be reviewable.

Review of the prerogative in England has been based by the Court of Appeal30 on the rule of law, following the approach adopted by the New Zealand Court of Appeal.31 There is no reason why a similar development should not take place in Australia, given the emphasis which the High Court has placed on Marshall CJ's statement in *Marbury v Madison.* That statement itself reflects the rule of law principle.32

Nor does the *ultra vires* doctrine provide a basis for review in other cases where the power exercised does not purport to be statutory. In England, decisions made by a variety of bodies not exercising statutory powers have been subjected to judicial review on the broad and rather imprecise basis that the body is exercising "public power". These bodies include the Panel on Takeovers and Mergers33 and sporting bodies.34 Here the question will be on what grounds is review to take place? There is a need for the courts to apply principles analogous to judicial review principles to the bodies concerned, so far as it is appropriate to apply them.

There is also the historical objection namely that the grounds of review, particularly the duty of procedural fairness, have been judicially created. The strength of the historical objection has been clouded by the debate over the celebrated statement by Byles J in *Cooper v Wandsworth Board of Works*35 that —

> … although there are no positive words in a statute requiring that the party shall be heard, yet the justice of the common law will supply the omission of the legislature.

This Delphic utterance is said to support either statutory implication or common law creation, depending upon the eye of the beholder.

What is incontrovertible is that the grounds of judicial review have been developed by the judges. Any recognition by statute of the grounds of review has followed judicial development of them and in that judicial development there has been no statutory contribution. The most that can be said is that Parliament is taken to withhold from the decision-maker the power to act in contravention of the principles of law enshrined in the grounds of review.36 As already stated, to attribute that view to legislative intent is simply an exercise in fiction, there being no basis in fact for asserting that the legislators applied their minds to the question (which, I think, Lord Steyn implicitly accepts) and no basis in law for reading the statutory language as evincing such an intent.

There is, of course, no fundamental objection to legal fictions if they are necessary to achieve a necessary or desirable outcome. They should, however, be avoided if there is another acceptable legal basis for reaching that outcome.37

The High Court's approach to the *ultra vires*/common law controversy

Conflicting views were expressed in the High Court in a series of cases culminating in *Annetts v McCann*,38 in which a majority of the Court adopted the common law theory, at any rate in relation to the common law duty of fairness. It would, however, be a serious mistake to think that *Annetts v McCann* is the end of the line. In *Ex parte Aala*, Hayne J adverted to the possibility that the correctness of the common law theory remains an open question.39 In the same case, Gaudron and Gummow JJ went further and referred40 to Brennan J's exposition in *Kioa v West*41 of implied statutory authority for exercising a statutory power with procedural fairness and noted that it was consistent with the proposition stated by Brennan CJ in *Kruger v Commonwealth*42 that —

> … when a discretionary power is statutorily conferred on a repository, the power must be exercised reasonably, for the legislature is taken to intend that the discretion be so exercised.

Their Honours went on to say that this reasoning should be accepted with respect to the remedy of prohibition provided for in s 75(v) of the Constitution and remarked:

> It represents the development of legal thought which began in before federation and accommodates s 75(v) to that development.

Subsequently, in *Ex parte Miah*,43 McHugh J appears to have proceeded on the basis that the common law view applies. On the other hand, Gleeson CJ and Hayne J cited44 the well-known passage in the judgment of Brennan J in *Kioa v West*,45 which, in the context of procedural fairness, emphasises that the starting point is the construction of the statute reposing the discretionary power in the decision-maker.

Also noted is another statement made by Brennan J in *Annetts v McCann*.46 His Honour said:

> Thus the common law will usually imply a condition that a power be exercised with procedural fairness to parties whose interests might be adversely affected by the exercise of power. This is the foundation and scope of the principles of natural justice. The common law confers no jurisdiction to review an exercise of power by a repository when the power has been exercised, or is to be exercised in conformity with the statute which creates and confers the power.47

Whether the current strand of thinking favouring a statutory basis for judicial review owes anything to the linkage between judicial review of administrative action and the constitutional jurisdiction and duty of the courts of which Marshall CJ wrote in *Marbury v Madison*, is not entirely clear.

It is, however, material to refer to the point, that there is a distinction between conferring jurisdiction and the concomitant obligation to exercise it (which will include the grant of appropriate remedies) and the principles according to which remedy and relief is granted. There is no necessary connection between Marshall CJ's constitutional imperative and the source of the principles which have been formulated by the courts in shaping the grounds of review of administrative action, except that it is the function of the courts to declare and enforce the law, which includes the principles of administrative law.

In *Enfield City Corporation*,48 the High Court was at pains to point out that, in Australia, the merits of administrative action are for the decision-maker alone and that this principle stems not from any doctrine of deference "but from basic principles of administrative law respecting the exercise of discretionary powers". The significant reference in this passage is to the principles of "administrative law".

The current strand of thinking is unquestionably related to the doctrine of parliamentary supremacy. That doctrine is unrelated to Marshall CJ's constitutional imperative. That imperative is related to the Constitution, its separation of powers, judicial power and the rule of law. The rule of law, it must be emphasised, stands at a different pole from parliamentary supremacy. The rule of law imposes constitutional limits on parliamentary supremacy49 and restricts the exercise of power of decision-makers by reference to legal concepts and principles. In any event, the common law theory is not inconsistent with parliamentary supremacy, although the theory does not concede as much to the statute as the *ultra vires* doctrine.

Another perspective on the controversy is that the conflict between the theories can be seen as reflection of a disagreement between those who wish to emphasise legislative supremacy and those who wish to protect fundamental or individual rights.

I conclude the discussion on this point with the comment that the starting point may be important. If the statute is the starting point, it may be easier to conclude that there is no intent to subject the decision-maker to the common law principles than to conclude that there is a clear intent to displace or curtail an established duty, whether it be to accord procedural fairness or to abide by the substantive principles of administrative law governing the making of decisions. No doubt the presumptive fiction that the decision-maker is intended to abide by the principles of administrative law will bridge the gap. But there may remain residual misgivings about this approach in that it could facilitate legislative erosion of the grounds of review. If Australian courts give the presumption the robust application it has been given or if Australian courts adopt Lord Steyn's assumption with its consequential requirement for clear and specific displacement of the assumption, the misgivings will evaporate.

The concept of judicial power as a source of limitation of judicial review

The distinction between judicial review and merits review is a central feature of Australian administrative law. The existence in Australia of a dual system of review of administrative decisions is to some extent cumbersome. Professor Cane has suggested that judicial review should extend to merits review and that, to the extent that the constitutional separation of powers and the concept of judicial power stand as an obstacle to that outcome, the concept of judicial power is unrealistic and should be reformulated.50 That the separation of powers and the concept of judicial power, as developed by the High Court, represent an obstacle to the attainment of Professor Cane's goal is unquestionable. I have expressed my views elsewhere51 and will not repeat them.

Nevertheless it is necessary to make the point that the expression "merits review" is not notable for its precision and that it may convey various shades of meaning to the discerning observer. For present purposes, however, we can take it that merits review means review of a decision by a court or tribunal which is empowered to substitute its view of the correct or preferable decision for the decision under review. There may well be administrative decisions which turn on issues, the determination of which would be appropriate to the exercise of judicial power. On the other hand, there are other administrative decisions which turn on contentious questions of policy in which the decision-maker finds it necessary to formulate or evaluate policy. High Court decisions of long standing are solidly against the view that such decisions involve the exercise of judicial power. So there is no way in which, consistently with the Australian Constitution, federal courts could be given a "merits review" function in relation to decisions of that kind, so long as the decision in the *Boilermakers Case*52 holds its ground.

The reasoning in the *Boilermakers Case*, both in the High Court and the Privy Council, is by no means compelling. The incompatibility test favoured by Williams J in the High Court but rejected by the Privy Council has much to commend it. Were it to be accepted, a court could perform administrative as well as judicial functions, so long as the administrative functions are compatible with the Court's judicial functions and the exercise of federal judicial power. In that event, the troublesome distinction between judicial and non-judicial power would not be as important as it presently is. The distinction would, of course, continue to have importance in that federal judicial power is vested by s 71 in Ch III courts and cannot be exercised by any other body.

Boilermakers seems, however, to be set in concrete. Its authority has been accepted in a number of cases over a long period of time. Moreover, the current importance attached to the necessity of maintaining public confidence in the administration of justice, as exemplified in *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs*53 and *Kable v Director of Public Prosecutions*,54 provides another reason for supporting *Boilermakers*. Indeed, that very consideration, in all probability, covertly played a part in the adoption of the *Boilermakers* doctrine. Participation in the unruly world of industrial arbitration and labour relations was thought likely to damage public confidence in the courts, not least by Sir Owen Dixon. In any event, it is questionable whether giving the courts a merits review jurisdiction is a desirable development, quite apart from the aspect of public confidence in the judiciary.

We are left then with the borderline uncertainties arising from our inability to offer a brightline definition of judicial power. These uncertainties are, to some extent, alleviated by the "chameleon" principle according to which the character of the function will be influenced by the character of the body in which it is vested. Even if a functional rather than a purely conceptual approach were adapted to the classification of functions, these uncertainties would not entirely disappear.

As things stand, despite the lack of clear definition of judicial power, the results are reasonably workable — core judicial functions are protected and extensive tribunal jurisdiction is permitted subject to court supervision and court enforcement where necessary.

The concept of the rule of law as a source of justification and as a source of limitation of judicial review

Already I have discussed the rule of law as a justification for the application of common law principles in the judicial review of administrative decisions. The corollary of this proposition is that the rule of law provides no authority for judicial review of administrative decisions that extends beyond review for conformity with the requirements of the law. As things presently stand, that means that the rule of law provides justification for review for disconformity with the requirements of statute and common law. These requirements are not static. Statute law, for example, could be amended to provide that the decision-maker reaches the correct or preferable decision, subject to considerations of judicial power. In that event, whether review on the basis of the correct or preferable decision would involve an exercise of judicial power depends upon considerations which have already been discussed, that is, on the content of the decision. For example, does it involve policy issues? There is, of course, an element of unreality in this. Courts which are not Ch III courts have been given functions which involve consideration of policy issues.

The exclusion of judicial review by privative clauses

At common law it was considered that the legislature could validly, by means of a privative or ouster clause, curtail the availability of judicial review. Such clauses were construed by reference to the presumption that the legislature did not intend to deprive the citizen of access to the courts, except to the extent expressly stated or necessarily implied. If, however, the intention was clear, the clause would exclude review for errors of any kind. The decision was then immune from review. In cases where the intention was not clear, the *Hickman* principle might apply.55

The common law approach had its origins in a non-constitutional milieu and was necessarily subject to constitutional imperatives and limitations. It is now well settled that such a clause cannot oust the jurisdiction of the High Court to review decisions and orders which exceed constitutional limits or the jurisdiction conferred on the High Court by s 75(iii) and (v).56 There is, however, no actual decision in which a privative clause has been held invalid on the ground of contravention of s 75(v). Nor can such a privative clause preclude the High Court from reviewing decisions which involve the refusal by Commonwealth officers to discharge "imperative duties" or go beyond "inviolable limitations or restraints".57 But it has been accepted that Commonwealth legislation can: (i) protect against "a mere defect or irregularity which does not deprive the tribunal of power to make the award or order"; or (ii) provide that a decision is valid despite "some procedural defect which would otherwise result in invalidity".58 It would be a mistake to conclude that the operation of a privative clause is confined to procedural errors.59

In *Darling Casino v NSW Casino Control Authority*,60 Gaudron and Gummow JJ expressed the view that there is —

> … no constitutional reason … why a privative clause might not protect against [non-constitutional and non-jurisdictional] errors … by, within the limits of the relevant legislative powers, operating to alter the substantive law to ensure that the impugned decision or conduct or refusal or failure to exercise power is in fact valid and lawful.61

It is, of course, necessary to distinguish the position of the Federal Court from that of the High Court. The jurisdiction of the Federal Court, unlike the High Court, lies within the gift of statute. Relevantly the Federal Court exercises jurisdiction in matters arising under a law of the Parliament within the meaning of s 76(ii) of the Constitution and a "matter" may consist of something less than the entire controversy or claim in issue between the parties. It was against this background that a majority of the High Court in *Minister for Immigration & Multicultural Affairs v Thiyagarajah*62 said that the consequence of the decision in *Abebe v Commonwealth*63 was to —

> … deny any general proposition that proceedings for judicial review at least under a structure provided by a law of the Commonwealth for which s 76(ii) applies to provide federal jurisdiction for that review necessarily involve[s] the giving of effect to the whole of the legal rights and duties of the parties.64

The potential and actual difference between the jurisdictions of the High Court and the Federal Court has enabled the government, as a matter of deliberate legislative policy, to bring about a situation in which applications for relief under s 75(v), on grounds not available in the Federal Court, are made to the High Court. This imposes an unreasonable, indeed an oppressive, burden on the High Court, in relation to many matters which are unworthy of its attention.

Abebe and Eshetu,65 you will recall, involved the provisions in the amended Migration Act which drastically curtailed the available grounds of review in the Federal Court. It is to be hoped that when exercises of this kind are undertaken they will be better drafted.

The *Hickman* principle

The principle which underlies the operation of privative clauses as well as the operation of the *Hickman* principle itself has been expressed in this way:

> It is … impossible for the legislature to impose limits upon the quasi-judicial authority of a body which it sets up with the intention that any excess of that authority means invalidity, and yet, at the same time, to deprive this Court of authority to restrain the invalid action of the court or body by prohibition.66

Although there have been suggestions that the *Hickman* principle has a constitutional basis or that its genesis owes something to the presence of s 75(v),67 the principle owes nothing to the Constitution or s 75(v).

The *Hickman* principle, as stated by Sir Owen Dixon, was an endeavour to reconcile the requirements of the substantive provisions of a statute imposing limits upon the exercise of the discretionary power given to the decision-maker with a privative clause apparently intended to exclude jurisdictional review. It is therefore a principle of statutory construction and it applies to State as well as federal legislation.68 The effect of a privative clause, when the *Hickman* principle is applied to it, was expressed in the explanatory memorandum relating to the 1998 amendments to the *Migration Act 1958* (Cth) in connection with judicial review. The memorandum stated:

> A privative clause is a provision which, although on its face purports to oust all judicial review, in operation, by altering the substantive law, limits review by the courts to certain grounds."

The *Hickman* principle mandates a particular approach to a question of construction. To the extent to which the principle requires that the courts ascertain, by the ordinary processes of statutory interpretation, the scope of the jurisdiction and powers of the statutory body and the legal consequences of any departure from the relevant statutory requirements, there can be no quarrel with the principle. The availability of judicial review necessarily depends upon what the statute has to say, expressly and impliedly, about these matters. So the statute may provide, expressly or impliedly, that a failure to comply with statutory requirements does not result in invalidity.69 If the statute so provides, judicial review will not be available for non-compliance which falls within the provision ensuring that the statutory body's decision will have a valid operation.

The case, however, for treating a privative clause which takes the form of an ouster clause, that is, a clause which excludes or restricts access to the courts by way of judicial review, as evincing a legislative affirmation of validity has less to commend it. No encouragement should be given to attempts to restrict access to the courts for the determination of rights by converting provisions restricting access into provisions having substantive validity. If the legislature intends to treat non-compliance with its prescribed requirements as not resulting in invalidity, it should be encouraged to say so without achieving that result indirectly through the operation of an ouster clause. The efficacy of the legislative process will be enhanced if statutory provisions are expressed in a way that captures their intended operation.

The *Hickman* principle protects a decision not exhibiting jurisdictional error on its face from invalidation if: (i) it was a bona fide attempt to exercise the power; (ii) it relates to the subject matter of the legislation; and (iii) it is reasonably capable of reference to the power given to the body. In conformity with the authorities, a further proviso should also be added, namely that the decision does not violate any statutory requirement which is regarded as imperative or inviolable.

The *Hickman* provisos are complicated and their operation is far from clear. The qualification relating to a decision not exhibiting jurisdictional error on its face, which was formulated long before *Anisminic Ltd v Foreign Compensation*70 and *Craig v South Australia*71 were decided and at a time when the distinction between errors going to the existence of jurisdiction and errors in the exercise of jurisdiction was in vogue, is now of uncertain operation. As that distinction no longer has its former significance in relation to judicial review of tribunal decisions, it is by no means clear how the qualification is intended to operate. The proviso was intended to operate by reference to jurisdiction in its narrow sense. If it now operates by reference to the broad concept of jurisdiction in the sense of authority or power to decide, the area of operation of the *Hickman* principle is confined considerably.

According to *Craig*, if an administrative tribunal —

> … falls into an error of law which causes it to identify a wrong issue, to ask itself a wrong question, to ignore relevant material, to rely on irrelevant material, or at least in some circumstances, to make an erroneous finding or to reach a mistaken conclusion, and the tribunal's exercise or purported exercise of power is thereby affected, it exceeds its authority or powers.72

These are errors which are jurisdictional errors.

This list of jurisdictional errors is not exhaustive.73 Not all these errors would necessarily reflect jurisdictional error "on the face" of the decision, whatever these words may mean.

Because the *Hickman* principle does not, in my view, have a constitutional origin, I have not found it necessary to discuss its relationship with s 75(v). In cases to which the *Hickman* principle applies to validate the challenged exercise of power by the decision-maker, no relief under s 75(v) would be available. Conversely, if *Hickman* does not apply, then relief will be available so long as the conditions relevant to relief are made out. Only if there is a dissonance between the concept of "jurisdictional error" in the context of decisions of administrative tribunals and the concept of "jurisdictional error" for which relief under s 75(v) issues could a situation arise in which the application of the *Hickman* principle collides with that provision of the Constitution.74

The provisos were discussed in *O'Toole v Charles David Pty Ltd*,[75] *Deputy Commissioner of Taxation v Richard Walter Pty Ltd*[76] and *Darling Casino Ltd v NSW Casino Control Authority*,[77] but the discussion in those cases has not provided much in the way of illumination. A principle which depends for its application upon such an artificial and complicated formula is of doubtful utility.

The *Hickman* principle is an Australian home-grown expedient. It does not feature in the administrative law jurisprudence of any other common law jurisdiction. It is an artificial rule of construction designed to achieve a compromise which will give some effect to a privative clause but certainly not the effect which the legislature intended. One may question the propriety of a principle the effect of which is to limit access to the courts by impliedly expanding the authority and power of the decision-maker in the context of judicial review when the clause in terms goes beyond what is constitutionally permissible.

The construction given by Australian courts to privative clauses and the effect of the *Hickman* principle results in restriction of access to the courts. The Australian approach is to be compared with the English approach where the courts have taken a strong position on privative clauses. The Australian approach is also to be contrasted with that of jurisdictions where access to the courts is a guaranteed right.

My concluding comment is that it would be a mistake to make too much of this contrast. The real difference between Australia and other jurisdictions lies in the determination of Australian politicians, with the apparent backing of public opinion, to restrict access to the courts in particular areas, notably the migration area. This contagion could spread into other areas. It is a prospect which could conceivably place pressure on the rule of law. Although right of access to the courts for the determination of legal rights is a fundamental right and a central element in the rule of law, right of access to the courts presupposes the existence of a relevant legal right — or at least an arguable legal right. It would be a bleak Administrative Law landscape if, simply in order to restrict access to the courts, rights were to be eliminated or curtailed.

1 Justice Gummow, "The Permanent Legacy" (2000) 28 *Federal Law Review* 177 at 180.

2 *Bank of NSW v Commonwealth* (1948) 76 CLR 1 at 363 per Dixon J.

3 *Deputy Commissioner of Taxation v Richard Walter Pty Ltd* (1995) 183 CLR 168 at 179 per Mason CJ; *Re Refugee Tribunal; ex parte Aala* (2000) 204 CLR 82 at 92 per Gaudron and Gummow JJ; at 138–139 per Hayne J; see also at 137–138 per Kirby J.

4 *The Queen v Cook; ex parte Twigg* (1980) 147 CLR 15 at 31 per Aickin J; *Re Refugee Tribunal; ex parte Aala* (2000) 204 CLR 82 at 90–91 per Gaudron and Gummow JJ (where reference is made to the powers conferred by s. 31 of the *Judiciary Act 1903* (Cth)).

5 *Re Refugee Tribunal; ex parte Aala* (2000) 204 CLR 82.

6 Sir Owen Dixon, *Jesting Pilate* (Melbourne, 1965) at 203 et seq; "The Common Law as an Ultimate Constitutional Foundation" (1957) 31 ALJ 240.

7 Dixon, *ibid* at 199; *Cheatle v The Queen* (1993) 177 CLR 541 at 552.

8 1 *Cranch* 137 at 177 (1803) [5 US l87 at 111].

9 *Attorney-General (NSW) v Quin* (1990) 170 CLR 1 at 35–36 per Brennan J; *Enfield City Corporation v Development Assessment Commission* (2000) 199 CLR 135 at 152–153 per Gleeson CJ, Gummow and Hay ne JJ.

10 *Re Refugee Tribunal; ex parte Aala* (2000) 204 CLR 82.

11 *Enfield City Corporation v Development Assessment Commission* (2000) 199 CLR 135 at 157 per Gaudron J.

12 *Australian Communist Party v Commonwealth* (1951) 83 CLR 1 at 193.

13 *R v Kirby; ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254.

14 *Deputy Commissioner of Taxation v Richard Walter Pty Ltd* (1995) 184 CLR 168 at 178 per Mason CJ; *Re Refugee Tribunal*; *ex parte Aala* (2000) 204 CLR 82 at 139.
15 See Professor L R Zines, "Constitutional Aspects of Judicial Review of Administrative Action" (1998) 1 *Constitutional Law and Policy Review* 50.
16 C Forsyth (ed), *Judicial Review and the Constitution* (Hart Publishing, Oxford, 2000).
17 C Forsyth, "Heat and Light: a Plea for Reconciliation", *ibid* at 396.
18 *Ibid*.
19 *Reg v Hull University Visitor*; *ex parte Page* [1993] AC 682 at 701.
20 *Boddington v British Transport Police* [1999] 2 AC 143 at 171 per Lord Steyn.
21 *Ibid* at 164 per Lord Browne-Wilkinson.
22 *R v Secretary of State for the Home Department*; *ex parte Pierson* [1998] AC 539 at 587.
23 See P A Joseph, "The Demise of Ultra Vires — Judicial Review in the New Zealand Courts" [2001] *Public Law* 354 at 362–363.
24 [1998] AC 539 at 587–591 per Lord Steyn.
25 *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374. Judicial review of the prerogative has been undertaken in a number of subsequent cases.
26 (1981) 151 CLR 170 at 220–221.
27 (2000) 204 CLR 82 at 101.
28 *Ibid*.
29 (1987) 15 FCR 274 at 278, 280–281, 302–303.
30 *R v Secretary of State for the Home Department*; *ex parte Bentley* [1994] QB 349.
31 *Burt v Governor-General* [1992] 3 NZLR 672 at 681.
32 *Abebe v Commonwealth* (1999) 197 CLR 510 at 560 per Gummow and Hayne JJ (though in dissent, their Honours were not in dissent on this point).
33 *Re Panel on Takeovers and Mergers*; *ex parte Datafin Pty Ltd* [1987] QB 815.
34 *R v Football Association*; *ex parte Football League* [1993] 2 All ER 833.
35 (1863) 14 CBNS 1280 at 1295 [143 ER 414 at 420].
36 M Elliot, "The Ultra Vires Doctrine in a Constitutional Setting: Still the Central Principle of Administrative Law" [1999] *CLJ* 129.
37 For a more comprehensive discussion of the objections to the *ultra vires* doctrine, see M Aronson & B Dyer, *Judicial Review of Administrative Action* (2nd ed, LBC, 2000) at 91–94; P Craig, "Ultra Vires and the Foundations of Judicial Review" [1998] *Cambridge* LJ 63; P Craig, "Competing Models of Judicial Review" [1999] *Public Law* 428; J Jowell, "Of Vires and Vacuum: The Constitutional Context of Judicial Review" [1999] *Public Law* 448.
38 (1992) 170 CLR 596 at 598–600.
39 (2000) 75 ALJR 52 at 83.
40 *Ibid* at 60–61.
41 (1985) 159 CLR 550 at 615.
42 (1997) 190 CLR 1 at 36.
43 (2001) 75 ALJR 889 at 912.
44 *Ibid* at 896.
45 (1985) 159 CLR 550 at 614.
46 (1990) 170 CLR 596.
47 *Ibid* at 604.
48 (2000) 199 CLR 135 at 153.
49 *Cormack v Cope* (1974) 131 CLR 432 at 452 per Barwick CJ.
50 Peter Cane, "Merits Review and Judicial Review: The AAT as Trojan Horse" (2000) 28 *Federal Law Review* 213.
51 "Judicial Review: A View from Constitutional and Other Perspectives" (2000) 28 *Federal Law Review* 331.
52 *R v Kirby*; *ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254.
53 (1997) 189 CLR 1.
54 (1996) 189 CLR 51.
55 *R v Hickman*; *ex parte Fox and Clinton* (1945) 70 CLR 598 at 617–618.
56 *Darling Casino Ltd v NSW Casino Control Authority* (1997) 191 CLR 602 at 630–631.
57 *R v Metal Trades Employers' Association*; *ex parte Amalgamated Engineering Union* (1951) 82 CLR 208 at 248.
58 *Deputy Commissioner of Taxation v Richard Walter Pty Ltd* (1995) 183 CLR 168 at 180, 206–207.

59 But cf *Darling Casino Ltd v NSW Casino Control Authority* (1997) 191 CLR 602 at 632–633 per Gaudron and Gummow JJ.

60 *Ibid* at 633.

61 Citing *Deputy Commissioner of Taxation v Richard Walter Pty Ltd* (1995) 183 CLR 168 at 205.

62 (2000) 169 ALR 515.

63 (1999) 197 CLR 510.

64 (2000) 169 ALR at 523–524.

65 *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611.

66 *R v Hickman; ex parte Fox and Clinton* (1945) 70 CLR 598 at 616 per Dixon J.

67 *Deputy Commissioner of Taxation v Richard Walter Pty Ltd* (1995) 183 CLR 168 at 240 per McHugh J.

68 *Darling Casino Ltd v NSW Casino Control Authority* (1997) 191 CLR 602.

69 *Project Blue Sky v Australian Broadcasting Authority* (1998) 194 CLR 355 at 388–391 per McHugh, Gummow, Kirby and Hayne JJ (where it was pointed out that Parliament can validly provide that a breach of the legislative rules by the decision-maker will not invalidate the official's decision and pointed out that courts have accepted that it is unlikely that it was the legislative purpose that an act done in breach of a statutory provision should be invalid if public inconvenience would result from invalidity).

70 [1969] 2 AC 147.

71 (1995) 184 CLR 163.

72 *Ibid* at 179 per *curiam*.

73 *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 180 ALR 1 at 21 per McHugh, Gummow and Hayne JJ. See also at 10–12 per Gaudron J.

74 But see *Darling Casino Ltd v NSW Casino Authority* (1997) 161 CLR 602 at 633 per Gaudron and Gummow JJ. See generally Professor L R Zines, "Constitutional Aspects of Judicial Review of Administration Action" (1998) 1 *Constitutional Law and Policy Review* 50 esp at 53.

75 (1991) 171 CLR 232.

76 (1995) 183 CLR 168.

77 (1997) 191 CLR 602.

LECTURE 2

THE SCOPE OF JUDICIAL REVIEW

Statutory interpretation and the democratic process

In Lecture 1 I drew attention to the way in which the English courts succeed in giving robust effect to the common law principles of judicial review, while recognising the *ultra vires* doctrine in the case of the exercise of statutory discretions. In particular, I referred to the "assumption" on which, according to Lord Steyn, the courts approach the interpretation of a statute and the prima facie effect to be given to the statute, namely that a clear and specific provision is required to displace the traditions and principles of the common law.1

In *Coco v The Queen*,2 a majority of the High Court enunciated a similar principle of interpretation, though differently based. The majority said that an intention to interfere with fundamental rights —

> … must be manifested by unmistakable and unambiguous language. General words will rarely be sufficient for that purpose if they do not specifically deal with the question because in the context in which they appear, they will often be ambiguous on the aspect of interference with fundamental rights.

The majority observed that insistence on such an expression of intention to abrogate or curtail fundamental freedoms —

> … will enhance the parliamentary process by securing a greater measure of attention to the impact of legislative proposals on fundamental rights".3

The same approach has been advocated in England and now for the same reason. In *R v Secretary of State for the Home Department; ex parte Simms*,4 Lord Hoffmann stated:

> [T]he principle of legality means that Parliament must squarely confront what it is doing and confront the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the political process …

In this way, the principle of interpretation plays an important part in ensuring that the legislators are alerted to the implications for fundamental rights and that the executive cannot achieve statutory curtailment without specifically addressing that very topic.

The principle advocated by Lord Hoffmann is not a by-product of the *Human Rights Act 1998* (UK). It is a basic common law principle which was stated as early as 1985.5 It is consistent with parliamentary supremacy, because it can be displaced. It enhances the democratic process because it squarely raises the issue for the legislators.

Separation of powers considerations

The doctrine of the separation of powers influences administrative law principles in various ways. In *Enfield City Corporation*,6 the High Court repeated7 the statement of Brennan J in *Attorney-General (NSW) v Quin*:8

> The merits of administrative action, to the extent that they can be distinguished from legality, are for the repository of the relevant power and, subject to political control, for the repository alone.9

The basic principle of administrative law is that an administrative decision is reviewable judicially on recognised grounds and those grounds do not include review on the merits. On the other hand, it is possible, where the matters relevant to the exercise of a statutory discretion involve the exercise of judicial power, for the legislature to provide for an appeal to a federal court and that the appeal shall extend to the merits. In other words, the court could be required to give the decision which it considers to be correct on the materials before it. Such a determination by the court, though called an appeal, is an exercise of original jurisdiction by the court. In that sense, the court is not actually reviewing the decision of the decision-maker; the court arrives at its own determination and substitutes its determination for that of the decision-maker.10

It is important to note that, lying behind the principle of administrative law referred to in *Enfield City Corporation*, is the limitation on merits review stemming from the limits of judicial power. The general run of statutory discretions involving substantial policy considerations cannot be determined by federal courts simply because they lie outside federal judicial power.

Justiciability

The concept of justiciability takes account of this limitation on federal judicial review. The conclusion that federal judicial power is not engaged may arise either: (i) because the issue is not one capable of resolution by legal criteria or ascertainably objective standards; or (ii) because the issue is committed exclusively to a non-judicial agency; or (iii) because the issue is "essentially political" in character or is "policy-driven".

The second ground is sometimes expressed by saying that some matters have been traditionally regarded as not falling within the scope of judicial review — treaty-making, recognising the government of a foreign state, recognising the boundaries of a foreign state, declaring war, conduct of foreign policy, dissolving Parliament, budget and financial policy decisions and national security are often given as examples. Whether all these matters are committed by the Constitution to the executive or the Governor-General to the exclusion of judicial review is an unresolved question. The first three examples consist of executive decisions which are committed by the Constitution to the executive government and are unreviewable except on constitutional11 and perhaps scope of power grounds, if they should arise.

Whatever may be the correct formulation of the third ground, it has some support in authority. In *Chandler v Director of Public Prosecutions*,12 Lord Reid considered that the disposition and armament of the armed forces was a political question which could not be determined by the courts.13 Reflecting a similar approach was a later statement in the House of Lords:

> The formulation and the implementation of national economic policy are matters depending essentially on political judgment. The decisions which shaped them are for politicians to take …14

But, in *Chandler*, Viscount Radcliffe rejected the absolutist approach, saying that it was not enough that an issue is ordinarily known as "political". Such issues "may present themselves in courts of law if they take a triable form".15

And, in *Minister for the Arts Heritage and the Environment v Peko-Wallsend Ltd*,16 the Full Court of the Federal Court held that a decision, which involved complex political questions relating to the environment, aboriginal rights, mining and the impact of the decision on Australia's economic position, placed it beyond review.

These statements and decisions are best understood on the footing that some matters are so much part of the political process in terms of their content and the way in which they require to be resolved that they are not susceptible to judicial review at all or, perhaps more accurately, are not susceptible to judicial review on particular grounds. Reviewability is not an "all or nothing" question. A particular decision may be reviewable for want of procedural fairness but not for *Wednesbury* unreasonableness. Another decision might be reviewable in terms of the scope of the power but not otherwise.

It is difficult to justify the proposition that the courts can identify, by reference to general subject matter alone, issues which are inherently non-justiciable. Some questions relating to international relations, national security, even politics may be justiciable,17 depending upon what the precise question is. Thus, the grant of executive power in s 61 of the Constitution necessarily entails the imposition of enforceable limitations on the exercise of that power, whether it be in the area of international relations or elsewhere.18 The modern focus of the courts on the precise issue for determination rather than on a broad topic, such as international relations or national security, supports this approach.

A distinction needs to be drawn between a decision which is "essentially political" in character and one which is "policy-driven". A decision which is essentially political in character is much more likely to be unreviewable than one which is policy-driven. The policy-driven decision, depending upon its nature and the context in which it is made — it may be a decision pursuant to statute — may be reviewable on one or more but not all grounds. A "polycentric" decision is unlikely to be reviewable generally, though it will be reviewable for *ultra vires*. And it has generally been thought that Cabinet decisions are not subject to review,19 though it is conceivable that a Cabinet decision specifically determining the rights of an individual might be subject to review.20

Another aspect of justiciability in the context of judicial review is the "political questions" doctrine. This is the name given to a nebulous doctrine which has been applied sparingly by the Supreme Court of the United States in constitutional cases21 and has echoes in Australian constitutional decisions.22 To the extent that the doctrine suggests that non-justiciability extends beyond the separation of powers elements involved in grounds (i) to (iii) above, it seems to rest on uncertain, if not insecure, foundations. The doctrine provides no justification for the making of a discretionary judgment by a court that it will decline to exercise jurisdiction by way of judicial review simply because the issue or the decision is "politically controversial".23 The most that can be said and, in my view, it may go too far, is to say, as Lord Wilberforce did, that —

> … the very fact that … decisions are of a type to attract political criticism and controversy shows that they are outside the range of discretionary problems which the courts can resolve.24

Although courts have taken account in recent times of the public interest in maintaining public confidence in the administration of justice in a number of areas of the law, including the Constitution, the separation of powers and the staying of criminal prosecutions on the ground of abuse of process,25 it is difficult to see how a court could decline to exercise jurisdiction by way of judicial review because to do so might erode public confidence in the administration of justice. To decline jurisdiction for this reason would open a veritable Pandora's box. To take the very recent *Tampa Case*26 in the Federal Court as an example, justiciability was not an issue. If it had been, the Court would not have been justified in declining to exercise jurisdiction because the controversy was non-justiciable. In *Tampa*, the application was for *habeas corpus* and a claim of right was asserted which the Court was bound to deal with. Courts are under an obligation to exercise jurisdiction. That means that courts must be satisfied that the issue is non-justiciable before they decline to deal with the matter.

Another factor to which reference is often made is the institutional lack of competence of the judges to deal with political and policy considerations. This factor has been urged as a reason why judges should not engage in the review of decisions based on such considerations. It is a factor which, while relevant to justiciability, is not decisive. Institutional lack of competence may have more to say in relation to judicial deference, where that is relevant. Thus, a court will give weight to the views of an expert or specialist tribunal on matters of policy and practice with which the tribunal is familiar.

The legislative choice versus (a) the role of judicial review in enhancing democratic accountability and (b) administrative justice

Emphasis is rightly placed by many commentators on the importance of respecting the legislature's choice in reposing the decision-making power in the decision-maker. The force of this emphasis is in denying to the courts a jurisdiction to review on the merits. Once this is accepted, the legislative choice is fully respected, except in so far as the legislative choice can also validly support an argument for judicial deference, as, for example, giving weight to the view of an expert or specialist tribunal on matters within its competence. Legislative choice may also be relevant to attempts on other grounds, for example *Wednesbury* unreasonableness, to convert judicial review into review on the merits. Otherwise legislative choice has little or nothing to say about the grounds of review.

There are countervailing factors which justify judicial review. One is the rule of law which calls for administrative decisions to be made in accordance with law. A second factor is the principle of good administration which calls for the application of acceptable standards in decision-making. Another factor is the role which judicial review plays in enhancing democratic accountability. Proceedings for judicial review subject administrative decision-making to close scrutiny and, in many cases, to publicity. No other democratic process provides such a window on the administrative decision-making process. This scrutiny and publicity results not only in a form of accountability but also in a valuable democratic sanction in the form of public opinion.

It can be argued that, in some instances, judicial review proceedings are an element in what is primarily a political campaign against the making of the decision under challenge. For understandable reasons, judges do not welcome the bringing of proceedings for political purposes. However, in those instances, it is difficult to establish that the purpose in bringing the legal proceedings is such as to amount to an abuse of process. In most cases the applicant for judicial review seeks the relief to which the applicant, if successful, is entitled.

The other factor is the concept of "administrative justice". This expression has been used from time to time in order to convey the notion that administrative tribunals offer a system of justice, though the system differs from the court system. The description is a misnomer. Nonetheless it serves to indicate that administrative decision-making is supplemented by judicial review, judicial review being designed to ensure that the decisions are made in conformity with the law. In one sense, this is another way of expressing the rule of law argument.

The distinction between jurisdictional and non-jurisdictional errors of law

The distinction between jurisdictional and non-jurisdictional errors of law gave rise to continuing difficulties over a very long period of time and generated much debate. This was because prohibition and certiorari are directed to jurisdictional errors except in so far as certiorari is available to correct errors of law on the face of the record. The distinction does not have the same significance for the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (AD(JR) Act).

In essence the difference is between an error which goes to the existence of jurisdiction and an error in the exercise of jurisdiction. The distinction was a central pillar of judicial review in England and Australia until the House of Lords decided *Anisminic Ltd v Foreign Compensation Commission*.27 The precise effect of that decision on the distinction in the context of judicial review was not altogether clear until 1993 when the House of Lords decided *R v Hull University Visitor*; *ex parte Page*.28 In that case, Lord Browne-Wilkinson expressed the principle of law on which the reasoning was based when he said:

> [I]n general any error of law made by an administrative tribunal or inferior court in reaching its decision can be quashed for error of law.29

The basis of this principle is either that such a tribunal or inferior court which makes an error of law acts outside its jurisdiction and acts *ultra vires* or that jurisdiction is no longer relevant in determining whether an error of law is a basis for judicial review.

The consequence of this decision and the principle on which it is based is that the difference between certiorari for jurisdictional error and certiorari for error of law on the face of the record is no longer of relevance.

The new English approach is subject to an important qualification. It is that, in England, Parliament can confine a question of law to a particular inferior court and provide that the decision shall be final so that it is not challenged by appeal or judicial review.30 It seems that, when such a provision applies, the question is not whether the court made a wrong decision but whether it inquired into and decided a matter which it had no right to consider. This qualification appears to resurrect in a different form the difference between an error of law as to the existence of jurisdiction and an error of law within the jurisdiction. The qualification, however, has no application to a decision of an inferior court which is not protected by a statutory finality provision.

In this respect, the English approach has not been followed in Australia. In *Craig v South Australia*,31 in the context of review of inferior court decisions, the High Court maintained the distinction between errors of law going to jurisdiction and errors of law within jurisdiction. The Court went on to hold that, in the context of the availability of certiorari for error of law on the face of the record, the "record" is confined to the documents initiating and defining the matter in the inferior court and the order or determination which is challenged. Ordinarily, the transcript, the exhibits and the reasons for decision will not form part of the record, though it may be necessary, as it was in *Craig*, to examine the transcript in order to identify the nature of the application that was made. The Court noted that, although the reasons could be incorporated in the order or determination, incorporation is not achieved by words such as "accordingly" or "for these reasons".

On what constitutes the "record", *Craig* has been criticised.32 With that criticism I am not concerned, except to say that the availability of review should not depend upon the decision-maker's choice to incorporate the reasons or not. The distinction between express incorporation and implied incorporation does seem to be rather technical, though the Court supported it by the policy argument that expanding the record, thereby exposing the decision to review, could represent "a significant financial hazard" to small litigants.

To return to the issue of principle in *Craig*. The Court rejected the proposition, taken from *Anisminic*, that an inferior court commits jurisdictional error whenever it addresses the wrong issue or asks itself the wrong question.33 The Court distinguished the inferior court from the tribunal on the ground that an inferior court has jurisdiction to make an authoritative decision on questions of law, whereas a tribunal does not. This gives rise to a presumption that an inferior court has jurisdiction to decide legal questions.

The end result is to differentiate between tribunals and inferior courts and, in the case of inferior courts, to leave the existence of jurisdiction/exercise of jurisdiction divide theoretically in place but with reduced scope for operation. Even there, an error will be jurisdictional, if the court has wrongly asserted or denied jurisdiction or if it has misunderstood or disregarded "the nature or limits of its functions or powers in a case where it correctly recognises that jurisdiction does exist".34

It would be a mistake to assume that all errors of law made by an administrative decision-maker or tribunal in reaching its decision are jurisdictional errors of law. *Craig* does not stand for such a large proposition.35 Moreover, the distinction between jurisdictional and non-jurisdictional error is important in the context of the constitutional writs and certiorari (other than perhaps for error of law on the face of the record) because they do not lie for non-jurisdictional error.36

Neither the English nor the Australian position in relation to inferior courts is free from complexity. Of the two, the English position is more simple. The troublesome existence of the jurisdiction/exercise of jurisdiction distinction is banished from centre stage and review for error of law on the face of the record ceases to have much importance.

On the Australian approach, not every failure by an inferior court to have regard to a relevant consideration or to disregard a relevant consideration amounts to jurisdictional error.37 However, a mistake of that kind may result in a tribunal wrongly denying the existence of jurisdiction or wrongly confining its powers. Thus, in *Re McJannet; ex parte Minister for Employment, Training and Industrial Relations (Qld)*,38 there was no error as to jurisdictional fact. There was, nevertheless, an error on the part of the Federal Court about one of the statutory provisions and an error in applying another provision to the facts. This, according to the Court, resulted in a wrongful assumption of jurisdiction. Compared with the English approach, this is more complex and illustrates the proposition that there is no brightline distinction which enables us to identify jurisdictional errors from errors within jurisdiction.

The English view is consistent with the *ultra vires* theory of judicial review. An error of law on the part of the decision-maker results in an *ultra vires* decision. On the Australian view, in the case of an inferior court, an error of law within jurisdiction without more would not result in *ultra vires*. In relation to an administrative decision, many but not all errors of law would be jurisdictional and result in *ultra vires*. Relief under the AD(JR) Act would be available, where appropriate.

The distinction between an error of law going to the existence of jurisdiction and an error of law within jurisdiction is conceptually sustainable. On the other hand, the distinction is problematic because there are so many cases where it is difficult to conclude on which side of the divide a particular case falls. The new English approach to the problem, because it downplays the importance of the distinction, is simpler.

The power of an administrative tribunal to correct mistakes

It is convenient here to refer to a very recent decision of the High Court, *Bhardwaj v Minister for Immigration & Multicultural Affairs*,39 which deals with the power of an administrative tribunal to re-exercise its jurisdiction when it discovers that its initial decision is flawed. As no less than six judgments were delivered, the effect of the decision is not easy to state. Three propositions can be stated:

(1) The doctrine of *functus officio* has an application in administrative decisions; the decision-maker cannot re-exercise the power simply because of a change of mind.

(2) The decision-maker can re-exercise the power if the initial attempt is ineffective by reason of an error which amounts to jurisdictional error but not if it is simply an error within jurisdiction.

(3) Propositions (1) and (2) are subject to the relevant legislative intention, that is, does the statute evince an intention to permit the decision-maker to have a second go and, if so, in what circumstances?

Lying behind these three propositions is a lot of messy law about whether erroneous administrative decisions are void or voidable. To its credit, the High Court endeavours to escape from these terminological wars but it does so at the price of plunging the decision-maker into the quicksands of jurisdictional error, the mysteries of which may well baffle Immigration Tribunal members. In this area, the difference between jurisdictional and non-jurisdictional error is alive and well, despite *Craig v South Australia*.

Gleeson CJ endeavours to resolve this kind of problem by reference to statutory intention alone but his is a lone voice. There is a joint judgment by Gaudron and Gummow JJ which endeavours to revive their dissenting view in *Abebe*, an attempt which was condemned by McHugh J in his short judgment.

Bhardwaj was a case where the Tribunal, through an oversight, failed to accord natural justice to the respondent, so the Tribunal's second decision replacing its first decision was valid, the first decision being invalid for jurisdictional error.

The distinction between a question of law and a question of fact. Is judicial review available in relation to a question of fact?

Judicial review has always been based on the existence of an error of law. Traditionally judicial review has not been available simply to correct an error of fact. The *ultra vires* theory of judicial review and, for that matter, the alternative rule of law basis, proceeds on the footing that the decision under challenge is to be made in accordance with law. That requirement does not necessarily require a correct finding of fact when judicial review does not extend to merits review.

On the other hand, jurisdictional facts are subject to judicial review. That is because an error as to jurisdictional fact is considered to be an error of law. An erroneous assertion or denial of jurisdiction, for whatever reason, is an error of law.

Although the courts will not review a finding of non-jurisdictional fact *simpliciter*, there are various ways in which such a finding of fact may give rise to a question of law. A decision-maker may make a finding of fact in consequence of misdirecting himself or herself in law, for example, by applying the wrong test or failing to take account of a relevant consideration or taking account of an irrelevant consideration. Likewise, absence of evidence ("no evidence") to support a finding of fact either gives rise to a question of law or is reviewable as such on that specific ground. Insufficient evidence has not generally been recognised as a ground of review. This is on the view that to recognise it as a ground would come too close to merits review.

Giving insufficient weight to a relevant factor does not necessarily amount to failure to take account of a relevant consideration. Where, however, the decision-maker has failed to give adequate weight to a relevant factor of great importance or has given excessive weight to a relevant factor of no great importance, my own view has been that it falls under *Wednesbury* unreasonableness.40 That approach was adopted in *Chan v Minister for Immigration and Ethnic Affairs*.41 Alternatively, it may be possible to say in a given case that the weight given to relevant matters was so lacking in balance that there has been no proper exercise of the decision-making power.

In *Minister for Immigration and Ethnic Affairs v Wu Shan Liang*,42 a majority of the Court treated *Chan* as a case in which the Court held, in effect, that the determination "involved an error of law" within the meaning of s 5(1)(f) of the AD(JR) Act, on the ground that the decision-maker had misdirected himself in law. There is an obvious difficulty in characterising cases where insufficient weight is given to a relevant consideration as a *failure to take account* of a relevant consideration. Further, it has generally been thought that courts should be extremely cautious in using the giving of insufficient weight to a relevant consideration as a ground for quashing the decision-maker's decision. Otherwise, judicial review on this ground might verge on merits review.43 It should be noted, however, that, in England, courts do not appear to be as reluctant to embrace insufficient weight as a ground of review.44

The relevant/irrelevant consideration grounds have been expressed as applying to "considerations" or "factors". Whether they extend to "evidence" as distinct from "considerations" or "factors" is an unresolved question. The answer to the question may well depend upon the construction of the statute. There is, for example, support for the principle that it is to be implied that an administrative decision is to be made on the basis of the most current material available to the decision-maker.45

Further, there has been an increasing tendency to formulate the "relevant consideration" and "irrelevant consideration" grounds in terms of "relevant materials" and "irrelevant materials". If the grounds of review embrace "materials" as well as "considerations", why should not the grounds extend also to "facts"?

Associated with these matters is the question whether *Wednesbury* unreasonableness applies to fact finding. My own view has been that the *Wednesbury* unreasonableness ground applies to the decision which is subject to challenge and that it is legitimate, in demonstrating unreasonableness, to show that a material fact has been wrongly found. Of course, in order to make out the unreasonableness ground, it is not enough to show that a material fact has been wrongly found, unless that finding was not merely wrong but resulted in a conclusion that no reasonable person could reasonably have reached. The point may be stated more accurately by saying that it is the duty of the court to leave the decision of fact to the decision-maker in whom the power has been reposed by Parliament save where the decision-maker is acting perversely.46

True it is that applying the unreasonableness ground in a way that takes account of wrong fact finding gives rise to a concern that review will extend to fact finding. It has to be remembered that there is no review of fact finding *simpliciter*. As Brennan J observed in *Waterford v Commonwealth*,47 "[t]here is no error of law simply in making a wrong finding of fact".48 If review is restricted as already suggested, this concern should not be significant. There is no common law duty to make relevant findings of fact.49

In England, a more expansive view has been taken. In *Secretary of State for Education and Science v Tameside Metropolitan BC*,50 Lord Wilberforce stated that an official exercising discretionary power made a jurisdictional error if he acted on an incorrect basis of fact, even in a case where the power is conditioned on his satisfaction as to the facts.51 This proposition has not been accepted in Australia. In *Eshetu*,52 Gummow J said it was wrong as applied to a power which was expressed to be exercisable in accordance with the decision-maker's satisfaction as to the facts.

In England, however, not only has Lord Wilberforce's statement in *Tameside* been confirmed, it has been taken further. A material error of fact can be reviewed under the relevant/irrelevant consideration grounds or on the ground that there has been a failure to provide adequate reasons or on the ground of no evidence.

There is now growing support in England for the proposition that a material error of fact is reviewable.53 De Smith, Woolf and Jowell54 go so far as to say:

> The taking into account of a mistaken fact can just as easily be absorbed into a traditional legal ground of review by referring into account of an irrelevant consideration, or the failure to provide reasons that are adequate or intelligible, or the failure to base the decision on any evidence. In this limited context material error of fact has always been a recognised ground for judicial intervention.

Wade and Forsyth55 are more circumspect.

The breadth of review available in the United Kingdom is well illustrated by the following statement by Lord Hope of Craighead:

> [T]he decision … may be found to be perverse, or irrational, or grossly disproportionate to what was required. Or the decision may be found to be erroneous in respect of a legal deficiency, as for example, through the absence of evidence or of *sufficient evidence,* to support it, or *through* account being taken of irrelevant matter, or through a failure for any reason to take account of a relevant matter, or through some misconstruction of the terms of the statutory provision …56

His Lordship's statement is to be understood in the light of Lord Wilberforce's statement in *Tameside*. The change in the English position is not surprising given the emergence of more thorough-going review there.

Review for *Wednesbury* unreasonableness and the place of proportionality

In referring to *Wednesbury* unreasonableness, I have in mind Lord Greene MR's statement in *Associated Provincial Picture Theatres Ltd v Wednesbury Corporation*,57 that —

> … if a decision on a competent matter is so unreasonable that no reasonable authority could ever have come to it, then the courts can interfere.58

Unreasonableness in this sense is a ground on which a decision may be challenged at common law and under ss 5(2)(g) and 6(2)(g) of the AD(JR) Act.59

Australian courts have not displayed much enthusiasm for this ground of review, preferring to rely on other grounds of review, particularly the consideration grounds and the error of law ground. Lack of enthusiasm for *Wednesbury* unreasonableness springs from the belief that it may open the door to judicial merits review.

In conformity with this approach, Australian courts have applied unreasonableness in the terms stated by Lord Greene.60 They have not equated the ground with irrationality. This is understandable. Lord Greene expressed the ground in such a way that it may apply only to extreme or outrageous cases. Plainly his Lordship conceived of it as a fall-back ground, one which could cover obvious cases not covered by other grounds.

In England, however, a more exacting version of Lord Greene's statement has been preferred. Lord Diplock considered that conduct which was *Wednesbury* unreasonable was conduct that "no sensible authority acting with due appreciation of its responsibilities would have decided to adopt".61 Lord Cooke has perhaps taken this further by saying that the test is whether the decision "is one which a reasonable authority could reach".62 In explaining his reasons for adopting this test, his Lordship criticised the tautological expression of the test by Lord Greene and reproved him for stating the test in such a restricted form. Lord Cooke dismissed concerns that judges would engage in merits review under this ground by saying that judges were used to giving effect to the ground.

There is no occasion to treat Lord Greene's formulation of the ground as if it were holy writ. And there is much to commend the formulation by Lord Diplock. If applied literally, it would not result in merits review. The argument that some judges would use it for that purpose (even if not intending so to do) does not warrant serious consideration. Judges are well aware of their responsibilities and, if they err, they can be corrected on appeal. We should not be deterred from adopting a correct principle simply because we think that it is possible that some judges may not apply it accurately. On the other hand, we are bound to give effect to the language in s 5(2)(g) of the AD(JR) Act and this takes us back to Lord Greene's words. They are capable of the interpretation placed upon them by Lord Diplock.

Proportionality

This brings me to the concept of proportionality. Another import from European law, it has had a chequered history so far in Australia and England. In both jurisdictions the concept encountered opposition on the ground that it has the potential to lead to merits review, thereby circumventing the legislature's decision to repose the power in the decision-maker.

It is obvious that the opposition to proportionality is the stronger where a stricter version of *Wednesbury* unreasonableness applies, as it does currently in Australia.63 In England, where a less exacting version applies, it was to be expected that the objections to proportionality would become more muted. Other factors tending to favour proportionality in the United Kingdom are the *Human Rights Act 1998* (UK) and the use of proportionality by the European Court of Justice and the European Court of Human Rights. Proportionality is a concept which is particularly helpful in dealing with cases in which it is alleged that a decision results in an unacceptable violation of, or interference with, fundamental rights. Proportionality poses the question whether that result is disproportionate to the need to protect the legitimate interest which the decision-maker has sought to protect.

The current position in England is that proportionality is alive and well. In *International Trader's Ferry*,64 Lord Slynn of Hadley, speaking for a majority of the House of Lords, acknowledged that *Wednesbury* unreasonableness and proportionality were different in some ways. He went on, however, to say —

> … the distinction between the two tests in practice is in any event much less than is sometimes suggested. The cautious way in which the European Court applies this test, recognising the importance of the margin of appreciation, may mean that whichever test is adopted, and even allowance for a difference in onus, the result is the same.65

Three comments should be made about this statement. First, one should compare this statement with the earlier denunciation of proportionality by Lord Ackner and Lord Lowry in *Brind's Case*.66 Secondly, despite Lord Slynn's endeavour to play down the difference between the two tests, it has been recognised in the very recent decision *Ex parte Daly*67 that, even on the broader English version of Wednesbury unreasonableness, proportionality as a separate ground would extend judicial review68 and would in some cases yield different results because it involves greater intensity of review. That is because proportionality requires the decision-maker to assess the balance struck by the decision-maker. It may also require attention to be directed to the relative weight accorded to relevant interests and considerations. Thirdly, in England, proportionality is treated as an additional ground of review, in accordance with the suggestion initially made by Lord Diplock.69 In England, there seems to be no difficulty in using it in the context of the unreasonableness ground as an elucidation of that ground of review.

In Australia, we are free from the influences which favour making proportionality a separate ground of review. As I see it, for us, the question is whether proportionality is a concept which should inform our understanding of *Wednesbury* unreasonableness and its application. The question should be answered in the affirmative. A decision which involves the application of policy to an individual to his detriment in circumstances where there is no reasonable basis for thinking that the integrity of the policy will be significantly compromised if the decision went the other way, is *Wednesbury* unreasonable and it is unreasonable because the end result is grossly disproportionate to the interest which the decision-maker seeks to protect. Gross disproportionality in this sense often lies behind a conclusion that a decision is unreasonable. It is proportionality in this sense that is relevant to Australian Administrative Law rather than the various applications which it has in European law.

It is sometimes suggested that proportionality is only of use where there is an alleged impairment of fundamental rights or freedoms. True it is that proportionality has an accepted and important role in that area, but it is not and should not be confined to that area. It is a concept which has a potential application when the unreasonableness of a decision is in issue on the ground that the detriment to the individual occasioned by the application of a policy is grossly disproportionate to the risk of compromise of the policy if the decision went the other way.

Relevant to the relationship between *Wednesbury* unreasonableness and proportionality is what has been called the varying degrees of intensity of review. Thus, it has been accepted in England that the more substantial the interference with fundamental rights the more the court will require by way of justification before it can be satisfied that the interference is reasonable in the *Wednesbury* sense.70

Legitimate expectation

Proportionality is sometimes linked to legitimate expectation, yet another importation into the common law from Europe. Legitimate expectation also has a link with the rule of law. Hitherto, the concept of legitimate expectation has been accepted as having a role in Australian Administrative Law. The concept plays a part in extending the protection of the individual beyond protection of the individual's rights and interests.71 The High Court has now expressly left unresolved the content and continued utility of the doctrine.72

With that question, I am not concerned. Nor am I presently concerned with *Teoh's Case*,73 though I should mention that it has been referred to uncritically on two occasions by the Privy Council.74

My concern is with the substantive protection of a legitimate expectation. The question arose in *Attorney-General (NSW) v Quin*.75 Although a majority in that case rejected substantive protection of an expectation on the part of certain magistrates that they would be re-appointed to the Local Court, a new court brought into existence to replace their court as part of a court re-organisation, it would be a mistake to regard that decision as ruling out substantive protection of legitimate expectations altogether. The most that can be said is that the majority judgments tend to proceed on the footing that legitimate expectations are mainly, if not solely, relevant to the imposition of a duty of procedural fairness. So, it is best to proceed on the footing that, as yet, we have not accepted that the courts will substantively protect a legitimate expectation.

In England, it is otherwise. After some degree of initial vacillation,76 the Court of Appeal has, in a series of recent decisions,77 affirmed the availability of substantive protection of a legitimate expectation. In *R v Home Secretary; ex parte Hindley*,78 the House of Lords made reference to the first of these decisions, *Coughlan*. Although Lord Hobhouse of Woodborough described Lord Woolf's judgment in *Coughlan* as "valuable",79 Lord Steyn (with whom the other Law Lords agreed) observed80 that there appeared to be dicta in *In re Findlay*81 which were opposed to the argument on substantive legitimate expectation.82 But his Lordship did not stop to consider whether *Findlay* was distinguishable or wrong on this point.

Since then the House of Lords appears to have endorsed the substantive protection of legitimate expectations. In *R v East Sussex County Council*; *ex parte Reprotech (Pebsham) Ltd*,83 Lord Hoffman, in a speech in which the other Law Lords spoke with approval of the first of the Court of Appeal decisions, *R v North and East Devon Health Authority*; *ex parte Coughlan*,84 said:

> In any case, I think that it is unhelpful to introduce private law concepts of estoppel into planning law. As Lord Scarman pointed out in *Newbury District Council v Secretary of State for the Environment*, estoppels bind individuals on the ground that it would [be] unconscionable for them to deny what they have represented or agreed. But these concepts of private law should not be extended into 'the public law of planning control, which binds everyone'.
>
> There is of course an analogy between a private law estoppel and the public law concept of a legitimate expectation created by a public authority, the denial of which may amount to an abuse of power. But it is no more than an analogy because remedies against public authorities also have to take into account the interests of the general public which the authority exists to promote. Public law can also take into account the hierarchy of individual rights which exist under the *Human Rights Act 1998*, so that, for example, the individual's right to a home is accorded to a high degree of protection while ordinary property rights are in general far more limited by considerations of public interest.
>
> It is true that in early cases such as the *Wells* case and *Lever Finance Ltd v Westminster (City) London Borough Council*, Lord Denning MR used the language of estoppel in relation to planning law. At that time the public law concepts of abuse of power and legitimate expectation were very undeveloped and no doubt the analogy of estoppel seemed useful. In the *Western Fish* the Court of Appeal tried its best to reconcile these invocations of estoppel with the general principle that a public authority cannot be estopped from exercising a statutory discretion or performing a public duty. But the results did not give universal satisfaction: see the comments of Dyson J in the *Powergreen* case. It seems to me that in this area, public law has already absorbed whatever is useful from the moral values which underlie the private law concept of estoppel and the time has come for it to stand upon its own two feet.

These remarks indicate how the substantive protection of legitimate expectations has occupied a space in public law which is occupied in private law by estoppel. Just how Australian law will develop in this area remains to be seen, more particularly in view of the difficulty the High Court had in dealing with the notion of estoppel in *Attorney-General (NSW) v Quin*.85

In its decisions, the Court of Appeal has held that judicial review for substantive unfairness is not limited to *Wednesbury* unreasonableness. The essence of these decisions is that, when government or official conduct has given rise to a substantive benefit, an administrative decision based on government policy which disappoints the expectation is capable of judicial review on the ground of substantive unfairness.

It is convenient to state briefly the principles as the English Court of Appeal has formulated them in *R v London Borough of Newham and Bibi and Attaya Al-Nashed (Bibi)*.86 The common law requires that a legitimate expectation be considered by the decision-maker if it falls within the ambit of his discretionary power. Further, effect should then be given to the expectation, unless there are reasons recognised by law for not doing so. In the event that effect is not given to the expectation, fairness requires that the decision-maker gives reasons for the conclusion. If policy considerations adverse to giving effect to the expectation are relevant to the making of the decision, the decision-maker must make the decision in the light of the legitimate expectation. Failure to do so will result in vitiation of the decision on the ground either of failure to take into account a relevant consideration or abuse of power.

It should not be assumed, however, that these are only grounds of review available for failing to give effect to a legitimate expectation. Where the expectation is taken into account but subordinated to policy, the decision, it would seem, may be open to challenge for *Wednesbury* unreasonableness and for disproportionality.

In *Bibi*, the Housing Authority made a promise to the applicants that it would provide legally secure housing accommodation within eighteen months. The Authority refused to honour its promise. The Court held that, in coming to its decision, the Authority failed to take account of the legitimate expectation. The Authority's decision was therefore vitiated. The Court declined to make the decision itself. It was for the Authority to consider the matter afresh. The making of the decision was committed to the Authority, not to the Court. But the Court made a declaration that the Authority was under a duty to consider the applications for suitable housing on the basis that the applicants have a legitimate expectation, that they will be provided by the Authority with suitable accommodation on a secure tenancy.

The exposition by the Court of Appeal of substantive protection of a legitimate expectation does not impinge upon the freedom of government or of an authority to change its policy. Any undertaking given by government or an authority may be modified, even revoked, subject to judicial review.87 Neither modification of existing policy nor adoption of a new policy displaces the decision-maker's duty to take account of a legitimate expectation.

An interesting illustration of substantive protection of legitimate expectations is to be found in the Hong Kong Court of Final Appeal's recent decision in *Ng v Director of Immigration*.88 There, as a result of representations made by government officials, certain persons had a legitimate expectation that they would be treated in the same way as the plaintiffs who, in an earlier case, had established a right of abode in Hong Kong. A subsequent change in the law, stemming from an Interpretation, issued by the NPC Standing Committee in Beijing and binding on the Hong Kong courts under Art 158 of Hong Kong's Basic Law, denied the government the power and authority to give effect to the legitimate expectation. It was, however, permissible for the Director to exercise his statutory powers in such a way as to permit these persons to remain in Hong Kong, though not permissible to accord them a right of abode. In refusing to allow them to remain in Hong Kong and making orders for their removal, the Director had not taken their legitimate expectation into account. The orders were set aside on the ground that the Director had failed to have regard to a relevant consideration.

By contemporary Australian standards, the English approach, which applies in Hong Kong under the Basic Law, is revolutionary. If, however, one accepts that a legitimate expectation is a legal concept which is entitled to protection, it is in principle unsatisfactory to restrict protection to procedural protection and to stop short of substantive protection. There are other justifications for extending judicial review to substantive protection. It is important, as a matter of good administration and integrity in government, that government and public authorities should be held to their promises and representations, excluding, presumably, election promises and representations upon which, ironically, electors are not expected to rely. Further, substantive protection, provided that the decision is ultimately left to the decision-maker, does not result in the court imposing its solution on the decision-maker. And, as explained by the Court of Appeal, substantive protection does not result in any expansion of *Wednesbury* unreasonableness. Substantive protection rests on the ground of failure to take account of a legitimate expectation.

On the other hand, before one gets to this ground, it is necessary to conclude that there is a duty to take account of the expectation. The basis for erecting this duty is the notion of substantive fairness. There is little, if any, support for the adoption of substantive fairness as a guiding principle in Australian Administrative Law. The long judgment of Gummow J in *Minister for Immigration, Local Government and Ethnic Affairs v Kurtovic*[89] ends with the unequivocal statement:

> I reject the view that a legitimate expectation to a favourable exercise of a discretion is entitled to substantive, rather than procedural protection as a matter of law.

1 *R v Secretary of State for the Home Department*; *ex parte Pierson* [1998] AC 539 at 587.
2 (1994) 179 CLR 427.
3 *Ibid* at 437–438.
4 [1999] 3 WLR 328 at 412.
5 It was explicitly stated by Lord Browne-Wilkinson (then Browne-Wilkinson LJ) in *Wheeler v Leicester City Council* [1985] AC 1054 at 1065. Although the Court of Appeal majority decision was overruled, the House of Lords upheld the dissenting judgment of Browne-Wilkinson LJ.
6 *Enfield City Corporation v Development Assessment Commission* (2000) 199 CLR 135.
7 *Ibid* at 413.
8 (1990) 170 CLR 1.
9 *Ibid* at 36.
10 As to the distinction between a hearing de novo and more traditional forms of appeal, see *Coal and Allied v Australian Industrial Relations Commission* [2000] 203 CLR 194 at 203 per Gleeson CJ, Gaudron and Hayne JJ.
11 See *Horta v Commonwealth* (1994) 181 CLR 183 at 195–196.
12 [1964] AC 763.
13 *Ibid* at 791.
14 *R v Secretary of State for the Environment*; *ex parte Hammersmith & Fulham LBC* [1991] 1 AC 52 at 97.
15 [1964] AC at 798.
16 (1987) 75 ALR 218.
17 Peter Cane, "Merits Review and Judicial Review: The AAT as Trojan Horse" (2000) 28 *Federal Law Review* 213 at 216–217.
18 *Re Ditfort*; *ex parte Deputy Commissioner of Taxation (NSW)* (1988) 19 FCR 347 at 369 et seq.
19 See *Minister for the Arts Heritage and the Environment v Peko-Wallsend* ibid; *South Australia v O'Shea* (1987) 163 CLR 378.
20 *Ibid* at 387 per Mason ACJ.
21 *Baker v Carr* 369 US 186 at 217 (1962).

22 *Victoria v Commonwealth* (1975) 134 CLR 87 at 134–135 per McTiernan J (dissenting); *Gerhardy v Brown* (1984) 159 CLR 70 at 137–139 per Brennan J; *Richardson v Forestry Commission* (1988) 164 CLR 261 at 295–296 per Mason CJ and Brennan J.

23 *Century Minerals & Mining NL v Yeomans* (1989) 40 FCR 564 at 587.

24 *Gouriet v Union of Post Office Workers* [1978] AC 435 at 482.

25 *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1966) 189 CLR 1; *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51; *Jago v District Court (NSW)* (1989) 168 CLR 23.

26 *Ruddock v Vadarlis* (2001) 183 ALR 1.

27 [1969] 2 AC 147.

28 [1993] AC 682.

29 *Ibid* at 702.

30 *Ibid* at 693.

31 (1996) 184 CLR 163.

32 See the discussion in M Aronson & B Dyer, *Judicial Review of Administrative Action* (2nd ed, LBC, 2000) at 182–186.

33 *Anisminic v Foreign Compensation Compensation* [1967] 2 AC 147.

34 (1996) 184 CLR at 177.

35 (1996) 184 CLR at 179; see also *Coal and Allied v Australian Industrial Relations Commission* (2000) 203 CLR 194 at 208–209 per Gleeson CJ, Gaudron and Hayne JJ (where their Honours concluded that relief was not available if the error made by the tribunal was non-jurisdictional).

36 See *Re McBain*; *ex parte Australian Catholic Bishops Conference* [2002] HCA 16 (18 April 2002).

37 *Abebe v Commonwealth* (1999) 197 CLR 510 at 552 per Gaudron J.

38 (1995) 184 CLR 620.

39 [2002] HCA 1 (14 March 2002).

40 *Minister for Aboriginal Affairs v Peko Wallsend Ltd* (1986) 162 CLR 24 at 41 per Mason J.

41 (1989) 169 CLR 379.

42 (1996) 185 CLR 259 at 273 per Brennan CJ, Toohey, McHugh and Gummow JJ. See also *Minister for Immigration & Multicultural Affairs v Eshetu* (1999) 197 CLR 611 at 626–627 per Gleeson CJ and McHugh J.

43 *Minister for Immigration & Multicultural Affairs v Eshetu* (1999) 197 CLR 611 at 627 per Gleeson CJ and McHugh J.

44 See *Reid v Secretary of State for Scotland* [1999] 2 WLR 28 at 54 per Lord Hope of Craighead.

45 *Minister for Aboriginal Affairs v Peko Wallsend Ltd* (1986) 162 CLR 24 at 45 per Mason J. See *Craig v South Australia* (1996) 184 CLR 163 at 179 per *curiam* (where the references are to relevant *material* and irrelevant *material*). Note also *Minister for Immigration & Multicultural Affairs v Yusuf* (2001) 180 ALR 1 at 22 per McHugh, Gummow and Hayne JJ ("ignoring relevant material or relying on irrelevant *material* in a way that affects the exercise of power is to make an error of law" (my emphasis)).

46 *Ibid*; see also *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 358–359 per Mason CJ (with whom Brennan J concurred); 366–368 per Deane J.

47 (1987) 163 CLR 54.

48 *Ibid* at 77.

49 *Minister for Immigration & Multicultural Affairs v Yusuf* (2001) 180 ALR at 19–20 per McHugh and Hayne JJ.

50 [1977] AC 1014.

51 *Ibid* at 1047.

52 (1999) 197 CLR 611 at 655–656.

53 *R v Criminal Injuries Compensation Board*; *ex parte A* [1999] 2 AC 330 at 344–345 per Lord Slynn of Hadley; *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2001] 2 All ER 929 at 976–977 per Lord Slynn of Hadley, at 978 per Lord Nolan.

54 *Judicial Review of Administrative Action* (5th ed, 1995) at 228.

55 *Administrative Law* (7th ed, 1994) at 316–318.

56 *Reid v Secretary of State for Scotland* [1999] 2 WLR 28 at 54 (emphasis added).

57 [1948] 1 KB 223.

58 *Ibid* at 230.

59 The AD(JR) formulation of the ground is taken from the statement by Lord Greene MR.

60 *Parramatta City Council v Pestell* (1972) 128 CLR 305 at 322–323, 327, 331–332.

61 *Secretary of State for Science and Education v Tameside Metropolitan BC* [1977] AC 1014 at 1064.

62 *R v Chief Constable of Sussex; ex parte International Trader's Ferry Ltd* [1998] 3 WLR 1260 at 1288–1289.

63 Note, however, that it is now accepted that a discretionary power conferred by statute must be exercised reasonably (*Kruger v Commonwealth* (1997) 190 CLR at 36). This principle may provide a basis for relaxing the test of reasonableness at common law.

64 [1998] 3 WLR 1260.

65 *Ibid* at 1277 (with the concurrence of Lord Nolan and Lord Hope of Craighead).

66 *R v Secretary of State for the Home Department*; *ex parte Brind* [1991] 1 AC 696 at 762–763, 763.

67 2001 UKHL 26, 23 May 2001.

68 Michael J Beloff QC, "English Public Law — Europhiliac or Eurosceptic" in P Rishworth (ed), *The Struggle for Simplicity in the Law* (Butterworths, Wellington, 1997) 273 at 285.

69 *Council of the Civil Service Union v Minister for the Civil Service ("GCHQ Case")* [1985] AC 374 at 410.

70 *R v Ministry of Defence*; *ex parte Smith* [1996] QB 517; *R v Secretary of State for the Home Department*; *ex parte Simms* [1999] 3 WLR 328 at 340.

71 Though an expansion in the content of "interests" could conceivably render it unnecessary.

72 *Sanders v Snell* (1998) 196 CLR 329 at 348 per Gleeson CJ, Gaudron, Kirby and Hayne JJ.

73 *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273.

74 *Thomas v Baptiste* [1999] 3 WLR 249; *Fisher v Minister of Public Safety and Immigration (No. 2)* [1999] 2 WLR 349 at 356.

75 (1990) 170 CLR 1.

76 See *R v Secretary of State for the Home Department*; *ex parte Hargreaves* [1997] 1 WLR 906 at 921, 924–925 (where an attempt to review for substantive unfairness a decision which denied a legitimate expectation on policy grounds was rejected).

77 *R v North and East Devon Authority*; *ex parte Coughlan* [2000] 2 WLR 622; *R v Secretary of State for Education and Employment*; *ex parte Begbie* [2000] 1 WLR 1115; *R v Secretary of State for the Home Department*; *ex parte Zeqiri* [2001] EWCA Civ 342; *R v London Borough of Newham and Bibi and Attaya Al-Nashed* [2001] EWCA Civ 607; reversed on appeal [2002] UKHL 3.

78 [2001] 1 AC 410 at 421.

79 *Ibid* at 421.

80 *Ibid* at 421.

81 [1985] AC 318.

82 His Lordship's comment should not be understood as throwing doubt on the doctrine of substantive protection of a legitimate expectation. It seems that the comment was directed to the question whether the particular legitimate expectation relied upon in *Hindley* was contrary to the reasoning in *Findlay*.

83 [2002] UKHL 8.

84 *Ibid*.

85 (1990) 170 CLR 1.

86 *Ibid*.

87 *R v North and East Devon Authority*; *ex parte Coughlan* [2000] 2 WLR 622 at 647.

88 [2002] HKCFA 1. The author was one of the majority judges.

89 (1990) 92 ALR 93 at 129.

LECTURE 3

AUSTRALIAN ADMINISTRATIVE LAW COMPARED WITH OVERSEAS MODELS OF ADMINISTRATIVE LAW

Substantive protection of legitimate expectation

Lecture II in this series concluded with a discussion of the substantive enforcement in England of legitimate expectation and a reference to the emphatic rejection by Gummow J in *Kurtovic*1 of the notion that a legitimate expectation is entitled to substantive rather than procedural protection. As noted in Lecture II, although *Attorney-General (NSW) v Quin*2 does not rule out substantive protection, the judgments do not offer much encouragement to the idea. As things presently stand, the difference between English and Australian law on this point illustrates, more strikingly than anything else, the cleavage between the English approach to judicial review and the Australian approach.

The principles of English Administrative Law place great emphasis on good administration, substantive fairness and consistency and equality of treatment. These principles are designed to promote and protect the substantive integrity of administrative decision-making. By way of contrast, the principles applied in Australia are less instrumental and are directed rather to substantive and procedural due process. The strict approach to *Wednesbury* unreasonableness3 is as close as the Australian principles get to substantive fairness. These principles reflect a continuing concern — some might say an undue concern — with the prospect of judges engaging in merits review.

This concern may stem from the dual system which operates in Australia — judicial review and merits review. It has no counterpart in England. The difference, however, may well have deeper roots. It may well lie in a stronger Australian political culture which is resistant to broad ranging judicial review, whether justified or not, while accepting merits review by administrative tribunals. It may well also lie in the emergence of a different political and judicial culture in England flowing from its engagement with Europe where the long tradition of strong bureaucratic government has not been confronted in the past by a stronger parliamentary tradition of the kind that has prevailed hitherto in Australia and the United Kingdom. It may also lie in the emerging differences in judicial methodologies that is applied in the two jurisdictions and as well the pervasive influence of the separation of powers doctrine in Australia compared with an emphasis on rule of law considerations in England.

(a) Other jurisdictions — New Zealand

If we look to other jurisdictions, we should count New Zealand as reflecting the English approach. Indeed, the New Zealand Court of Appeal moved towards "substantive unfairness" as a ground of review4 before it became clearly established as a ground of review in England as a result of the recent decisions of the English Court of Appeal and the House of Lords, beginning with *R v North and East Devon Health Authority; ex parte Coughlan*.5 With the advantage of hindsight, we now learn that substantive protection of legitimate expectation emerged in England as early as 1985.6

(b) Other jurisdictions — Canada

Canada stands in a different position. Canada has accepted that a legitimate expectation may give rise to procedural protection. But, so far, Canada has not accorded a legitimate expectation substantive protection. Yet Canada has differentiated between procedural fairness and legitimate expectation. The content of the former is dictated by the nature of the applicant's interest and the nature of the power, while the doctrine of legitimate expectation looks to the conduct of the public authority in the exercise of the power, including practices, conduct and representations.7 Thus the Canadian doctrine has a relationship with estoppel but differs from it.8

To the observer familiar with both Australian and English administrative law, the Canadian distinction between procedural fairness and legitimate expectation is unconvincing, unless legitimate expectation moves forward to the point of substantive protection. At that point, it would be sensible to distinguish between the two. An expectation sufficient to generate procedural protection would not necessarily be sufficient to generate substantive protection.

At this point it is convenient to refer to *Minister for Immigration and Ethnic Affairs v Teoh*,9 not for the purpose of discussing the decision itself and what has happened to it in Australia but to trace its reception overseas, notably in Canada. In *Teoh*, substantive protection was neither given nor contended for. Nonetheless it was a case in which the legitimate expectation might well have lent itself to substantive protection if it were available as a matter of law.

In Lecture II, I mentioned that *Teoh* had twice been referred to by the Privy Council10 without exciting the convulsions experienced by its Australian detractors. Of more interest for present purposes is the treatment of *Teoh* in the Supreme Court of Canada, in the course of which the Supreme Court rejected the notion that substantive protection would be accorded to a legitimate expectation.

The facts in *Baker v Canada (Minister for Citizenship and Immigration)*11 were similar to the facts in *Teoh*. Baker, who had arrived in Canada as a visitor in 1981, was ordered to be deported in 1992 as she had not obtained permanent resident status. She had four children in Canada and applied unsuccessfully for a stay of the order on humanitarian and compassionate grounds pursuant to the Immigration Act. Her request was refused. Canada had ratified but not implemented the Convention on the Rights of the Child, so the Convention had the same status in Canada as it had in Australia when *Teoh* was decided. In the Federal Court of Appeal, Strayer JA, writing for the Court, rejected an argument, based on *Teoh*, seeking to use the Convention as a vehicle for the generation of substantive rights. More significantly, Strayer JA did not accept that an unincorporated convention could be used for imposing constraints on officials in whom the legislature has vested a wide statutory discretion. His view was based on the doctrine of the separation of powers.

On appeal, the Supreme Court of Canada held that the decision-maker had to take account of the interests of the children as an important consideration and that he was bound to give reasons for the decision. L'Heureux-Dubé J, writing in effect for the majority, concluded that the common law duty of fairness required that reasons be given. L'Heureux-Dubé J considered that the common law conception of the rule of law requires judicial review of exercises of discretionary powers to be conducted according to varying standards of intensity, depending upon the context, and that in this instance it called for the discretion to be exercised reasonably.12 And this, despite the fact that the discretion was widely expressed, was subjectively framed and constituted an exception to the general statutory scheme. The Convention played a part in identifying the appropriate standard of review and in giving content to this aspect of the common law.

Thus, the majority in *Baker* used the Convention to supplement the common law, though in a less overt and significant way than in *Teoh*. This approach, as Professor Dyzenhaus has noted,13 is not dissimilar to that adopted by Gaudron J in *Teoh*, but the judgment does not refer to *Teoh.* The minority in *Baker* (Iacobucci and Cory JJ) dissented on this point, holding that the majority's reference to the underlying values of an unimplemented treaty in the course of the contextual approach to statutory interpretation and administrative law was inconsistent with the settled principle that a treaty does not form part of domestic law until it is incorporated by legislation. Concern was expressed about disturbing the balance of powers, particularly as between the judiciary and the legislature.14

Teoh was relied upon in argument. Indeed, it was discussed critically by Strayer JA in the Federal Court. Yet it was not mentioned by L'Heureux-Dubé J in her judgment. Just what was the reason for this is by no means clear. From the judgment of Strayer JA in the Federal Court, the controversy surrounding *Teoh* in Australia was readily apparent. It may be that the majority in *Baker*, though using the Convention in the manner already described, sought to avoid a similar controversy by not linking that use overtly with *Teoh.*

Be this as it may, *Baker* has significance for us because L'Heureux-Dubé J's judgment contains the statement that, in Canada, a legitimate expectation receives procedural not substantive protection.15 Yet the judgments in *Baker* clearly acknowledge that the statutory discretion must be exercised fairly. It was on that basis that the decision-maker was bound to give reasons for the decision. Understood in light of the statement that protection of an expectation is limited to procedural protection, the duty of fairness recognised in *Baker* seems to have been viewed as a duty of procedural fairness, the consequential obligation to give reasons having that character as well.

The statement that the statutory discretion must be exercised fairly on its face goes beyond the procedural and comes much closer to the duty of substantive fairness which is a feature of the recent decisions of the English Court of Appeal. Professor Dyzenhaus is right to remind us that the *ultra vires* doctrine cannot justify the common law development by the judges of the duty of fairness, at least the duty of substantive fairness, unless one makes a fictional assumption about legislative intent. For the same reason the doctrine cannot justify the judicial imposition of standards of reasonableness,16 except on the footing that one attributes to the statute conferring the decision-making power an intention that it be exercised according to certain standards, most notably the *Wednesbury* standard of reasonableness.

It would be a mistake to regard *Baker* as excluding for all purposes substantive protection of a legitimate expectation in Canada. In *Minister of Health and Social Services v Mount Sinai Hospital Center*,17 the leading judgment stated:

> It is unnecessary … to embark on the inquiry of whether the legitimate expectation created by the course of dealings between the parties can result in a substantive remedy beyond the procedural protection provided by the right to be heard … either within an expanded doctrine of legitimate expectations or under public law promissory estoppel.18

The judgments in this case make the point that it is by no means easy to distinguish between what is substantive and what is procedural protection in particular fact situations.

The judgments also make three important points about Canadian administrative law. First, Canada has not as yet adopted the English unifying theme of "administrative fairness" of which procedural fairness and substantive fairness are connected parts.19 The absence of such a unifying theme explains why the English approach to substantive unfairness has not been followed so far.

Secondly, there was a discussion of the relationship between the doctrine of legitimate expectation and public law estoppel. Binnie J (with whom McLachlin CJC concurred) pointed out20 that an applicant who relies on the doctrine does not necessarily have to show that he or she was aware of the conduct giving rise to the expectation or that it was relied upon to the applicant's detriment.21 This is because the focus is on promoting "regularity, predictability and certainty" in government decision-making, which should not depend upon the applicant's knowledge or lack of knowledge of representations. Dependence on such factors would introduce a degree of variation into decision-making.

The notion that detrimental reliance may have no part to play in the doctrine of legitimate expectation echoes a similar strand of thinking in the recent English Court of Appeal decisions. In England, this approach is tied to the duty of administrative fairness, according to which a discretionary power should be exercised even-handedly and in a principled way. To make detrimental reliance a pre-condition of legitimate expectation would be to bring about differential exercises of a power based simply on the presence or absence of detrimental reliance upon a representation.

Indeed, to link legitimate expectation to detrimental reliance would be to link legitimate expectation to public law estoppel. Yet one of the attractions of the doctrine of legitimate expectation, at least in terms of substantive protection, was that it appeared to offer a safe harbour, free from the shoals surrounding public law estoppel. At the same time, one can see that, as a matter of fairness, there is an argument to the effect that the decision-maker should not be called upon to take into account an expectation based on a general representation to a large class unless there is reliance, detrimental or otherwise. The tensions between these views underlie the conflicting views expressed in *Teoh*.

The third point emerging from the Canadian judgments is that they discuss the intensity of review, a matter which is attracting increasing attention in both England and Canada, a matter to which I shall now turn.

Standard and intensity of review

In England and Canada, the standard or intensity of judicial review has become more complex. The reasons for this development include the human rights dimension in both countries — the *Human Rights Act 1998* in England and the Charter in Canada as well as the impact of European Community law on English administrative law. In both jurisdictions, proportionality supplements *Wednesbury* unreasonableness as a standard of review. Proportionality is not seen as a conflicting but rather as a complementary or supplementary standard of review. The use of proportionality is more significant in England than Canada, if only because the doctrine of substantive legitimate expectation is in operation in England.

It would be idle to pretend that, at this time, there is a well-considered pattern of graduated standards of review that applies in either England or Canada. Appropriate standards of review are being developed on a case by case, context specific, basis.

It is convenient to state the Canadian position first, because it follows naturally from the majority judgment in *Baker*. Canada has adopted what is called unpromisingly the "pragmatic and functional" approach to review of administrative discretions. In that case, L'Heureux-Dubé J stated:22

> [C]onsiderable deference will be given to decision-makers by courts in reviewing [the] discretion and determining the scope of the decision-maker's jurisdiction.

The judgment went on to say23

> [I]t is the intention of a legislature, when using statutory language that confers broad choices on administrative agencies, that courts should not lightly interfere with such decisions, and should give considerable respect to decision-makers when reviewing the manner in which discretion was exercised. However, discretion must still be exercised in a manner that is within a reasonable interpretation of the margin of manoeuvre contemplated by the legislature, in accordance with the principles of the rule of law, in line with general principles of administrative law … and consistent with the … Charter …

As already mentioned, there is a spectrum of standards of review for errors of law, depending upon the nature of the decision and the degree of deference that is appropriate to it. Three standards of review are applied — patent unreasonableness, unreasonableness *simpliciter* (the actual standard applied in *Baker*) and correctness. In deciding which standard should apply to a particular decision, the courts will take into account the expertise of the tribunal, the nature of the decision (including whether it is "polycentric" and whether it is "fact-based"), the statutory provisions and the surrounding legislation. The degree of choice left by the legislature to the decision-maker is an important consideration. Deference is, however, subject to the requirement that the discretion be exercised in accordance with the limits imposed by the statute, "the principles of the rule of law, the fundamental values of Canadian society, and the principles of the Charter".24 *Baker* was not a Charter case. When a Charter right or freedom is engaged, a stringent standard of review will be engaged and proportionality will be relevant.

The Canadian emphasis on deference has some resemblance to the United States administrative law doctrines of deference. It stands in strong contrast to the rejection by the High Court of the *Chevron* doctrine25 of deference, though that doctrine applies to interpretation by an agency of its statute.

English law has also moved to standards of review of varying intensity, though the standards do not correspond precisely with the Canadian standards.

In relation to decisions affecting human rights since the *Human Rights Act 1998* came into operation, there has been a predictable movement from *Wednesbury* unreasonableness to proportionality. In 1996 Bingham MR stated that the standard of review applicable to review on substantive grounds generally was unreasonableness in the sense that the decision "was beyond the range of responses open to a reasonable decision-maker". He went on to say:

> But in judging whether the decision-maker has exceeded this margin of appreciation the human rights context is important. The more substantial the interference with human rights, the more the court will require by way of justification before it is satisfied that the decision is reasonable in the sense described above.26

Now, however, as the decision of the House of Lords in *Simms*27 shows, the standard of review appropriate to decisions affecting human rights is proportionality. The decision under challenge was a prohibition against journalists visiting prisoners professionally. The applicants, who were convicted murderers, wished to give interviews to proclaim their innocence. An absolute prohibition on interviews, without regard to the purpose of an interview, was held to be an interference with freedom of speech disproportionate to any need to protect the public interest.

The proportionality standard was applied by the House of Lords more recently in *R v Secretary of State for the Home Department; ex parte Daly*,28 where a policy requiring all prisoners to be absent from their cells while searches, which extended to their legal correspondence, were carried out, interfered with the prisoners' common law entitlement to legal professional privilege. The interference went beyond any legitimate need to protect the public interest.

The difference between the standards of unreasonableness and proportionality is not as substantial as might otherwise appear. This is because proportionality is a flexible standard, the intensity of which can be adjusted to fit the context.29 The view has been expressed that proportionality-based review shades into reasonableness review.30

One aspect of proportionality as applied by English courts is the tendency to offer a margin of appreciation to the executive in its weighing of the competing claims of the individual and the public interest.31 Initially, margin of appreciation was a doctrine developed by the European Court of Human Rights under the European Convention on Human Rights, to allow for differences in the implementation of Convention obligations in different European countries.

It is the existence of this margin of appreciation accorded to the decision-maker that distinguishes proportionality from merits review. There is preserved an area of residual discretion to the decision-maker so that proportionality does not lead to the court deciding whether the impugned decision is correct. Thus, in *R v Secretary of State for the Home Department; ex parte Daly*,32 Lord Steyn felt able to say that the application of the proportionality standard "does not mean that there has been a shift to merits review".33

His Lordship was able to express this view, notwithstanding that, in the same judgment, he identified three respects in which the proportionality standard transcends the *Wednesbury* standard. To quote his words:

> First, the doctrine of proportionality may require the reviewing court to assess the balance which the decision-maker has struck, not merely whether it is within the range of rational or reasonable decisions. Secondly, the proportionality test may go further than the traditional grounds of review inasmuch as it may require attention to be directed to the relative weight accorded to interests and considerations. Thirdly, even the heightened scrutiny test developed in *Smith*34 … is not necessarily appropriate to the protection of human rights.35

It is fairly obvious that, at the higher end of intensity of review for proportionality, we are coming very close to merits review because there is little residual discretion left to the decision-maker which is immune from review. On the other hand, at the lower level where proportionality review shades into *Wednesbury* unreasonableness, there is a substantial margin of discretion left to the decision-maker. At the same time, the question of proportionality, like *Wednesbury* unreasonableness, is treated as a question of legality. Just as a decision which is *Wednesbury* unreasonable is unauthorised and therefore unlawful, so is a decision which offends the proportionality standard.

The standard of review is contextual

From what I have said so far, it emerges that, both in Canada and England, the standard of review is contextual, almost context specific. This is particularly evident in the judgment of Laws LJ in *R v Secretary of State for Education and Employment; ex parte Begbie*,36 where his Lordship, in the context of substantive protection of expectations, was addressing categories 1 and 3 of legitimate expectation identified in the earlier Court of Appeal decision, *Coughlan*.37 His Lordship noted that "the facts of the case, viewed in their context, will steer the Court to a more or less intrusive quality of review".38 Thus, strict scrutiny is less apt for substantive review where the issues of policy are wide-ranging, the effects of review are multi-layered and the decision lies well within the macro-political field.

The same comment applies to the United States where, in different contexts, public law employs both "rational basis" and "strict scrutiny" review, though these standards are mainly applied in the context of constitutional validity.39 There is, however, some similarity between questions of constitutional validity in relation to human rights and questions concerning non-constitutional human rights violations.

Of greater relevance is the controversial *Chevron*40 doctrine, despite its apparent rejection by the High Court in *Enfield City Corporation*.41 The Chevron doctrine, which applies to the interpretation of a statute administered by an agency, was expressed by Stevens J in these terms:

> If … the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.42

The theoretical foundation for the doctrine has been explained by Scalia J, on the basis that Congress has decided to leave, within permissible limits, the question of construction to the agency itself.43 Such a decision on the part of Congress is not unlikely where the matter involves technical expertise with which the agency members would be familiar.

The *Chevron* doctrine has been frequently applied, despite the separation of powers. It is to be contrasted with the Anglo-Australian approach which is founded on the court's duty to interpret and apply the law,44 the assumption being that there can be only one right legal answer to a question of construction of an agency statute.

It is instructive to look at *Chevron* in the light of Dixon J's observations in *R v Hickman*; *ex parte Fox and Clinton*,45 where his Honour appears to have contemplated that the legislature could provide for a *Chevron*-type approach. In *Enfield City Corporation*, the High Court does not seem to have contemplated this possibility or that this approach may be the foundation for Chevron.

Notwithstanding the criticism to which it has been subjected, *Chevron* has a good deal of attraction, especially in Australia where the courts generally allow significantly more latitude to the decision-maker than is the case in other jurisdictions. The case for adopting a contrary approach in relation to interpretive questions depending upon technical expertise is by no means compelling.

More important than the *Chevron* doctrine, in the context of standards of review, is the so-called "hard look" doctrine,46 which again is controversial. This doctrine seems to come close to merits review. The presumption of regularity accorded in the United States to the agency's decision does not protect it from "a thorough, probing in-depth review" by the court. In one of the leading cases, *Overton Park*,47 the Supreme Court of the United States stated that the reviewing court's role was to consider whether the decision was based on all the relevant factors and whether there had been "a clear error of judgment".48

As Justice Sackville has pointed out, the "hard look" doctrine is based upon the language of s 706(2)(A) of the *Administrative Procedure Act 1946* which requires a reviewing court to set aside "agency action, findings and conclusions" found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law".

It is unlikely that an Australian court would, by judicial interpretation, convert this formula into the "hard look" doctrine; without legislation specifically mandating a "hard look" approach, the doctrine seems unlikely to become a feature of Australian administrative law. We have not gone beyond saying that it is permissible for a court to give weight to a finding of fact by a tribunal whose special knowledge of industry specially equips it to provide an answer. When this approach is couched in terms of being permissible, as it was in *Enfield City Corporation*,49 I doubt that it can be equated to either "deference as respect" or "deference as submission", to use Professor Dyzenhaus' terminology.

Justice Sackville, in an article in the *Federal Law Review*,50 has discussed the *Chevron* doctrine and the "hard look" doctrine more comprehensively than I have been able to do.

Constitutional influences

In England, the doctrines of legislative supremacy and the separation of powers for a long time had the effect of keeping substantive review to a strict version of *Wednesbury* unreasonableness. The influence of these doctrines, seen at their height in *R v Secretary of State for the Home Department; ex parte Brind*,51 kept proportionality at bay in England. It was thought to be too close to merits review and it trespassed too far into the area of discretion reposed in the decision-maker by the legislature.

The *Human Rights Act*, with the European Convention looming in the background, altered all that. Not only are the protection of human rights now mandated, but also the role of the courts in determining whether a right is violated requires the court to balance the protection of the right against the intruding public interest to which the legislature is seeking to give effect. Such a judicial function invites the application of a proportionality test. It is enough in this situation to embrace proportionality on the footing that its application is contemplated by the legislation. Correspondingly, concern about the legislative supremacy has diminished. This is a natural corollary of protecting specific human rights by statute. Likewise, the force of separation of powers arguments has declined to some extent, though there is still some concern about preserving a limited area of unreviewable discretion to the decision-maker, in order to avoid the accusation of merits review.

There are already signs of a conflation of *Wednesbury* unreasonableness and proportionality.52 This trend is likely to continue. Stricter scrutiny in the human rights area may well encourage judges to adopt a similar approach outside human rights. There are indications of such a tendency — witness the rise of the doctrine of substantive legitimate expectation.

There is also evidence of a strong political backlash. *The Times* newspaper53 recently gave publicity to a powerful attack by the Minister for Education on judicial activism in judicial review, and to a defence of the judges by the Lord Chancellor (whose view of his responsibilities evidently differs from that of the Commonwealth Attorney-General, Mr Daryl Williams QC) and a response by Lord Woolf MR.

What has happened in Canada follows a similar pattern, though it has taken place over a longer time span and it has involved perhaps more attention to constitutional constraints, as *Baker* indicates. My impression is that, in the last three or four years, the Supreme Court of Canada has exhibited a greater degree of caution in expanding the judicial role than was evident a little earlier, though I emphasise that it is no more than an impression.

The developments in England, Canada and the United States provoke several comments. In these jurisdictions, more thorough-going review is undertaken than in Australia, without undue anxiety about constitutional restraints. Apart from the impact of the Australian political culture, it is these perceived constraints, flowing mainly from the assumed *Marbury v Madison*54 foundation, the separation of powers doctrine and the *ultra vires* doctrine, that stand in the way of stronger review in Australia. The factors which have prompted these overseas developments in judicial review, notably the protection of human rights, are not replicated in Australia where merits review is available under the *Administrative Appeals Tribunal Act 1975* (Cth) (AAT Act). Separation of powers has a much stronger influence in Australia than in England and Canada where, correspondingly, the rule of law is more influential than in Australia.

This does not mean that concepts employed in those jurisdictions have no utility for us. Proportionality in a form appropriate to our system of administrative law, for example, marked or gross disproportionality, and the margin of appreciation are instances. When you adopt a new legal concept or standard, there is no need to take on board all the characteristics with which it is invested elsewhere. Any new concept or standard must be refined so as to accord with the central characteristics, principles and goals of our system of administrative law.

Questions of law and questions of fact

The distinction between questions of law and questions of fact has been a feature of Australian law in various respects, for example, in limiting appeals to questions of law. More relevantly, it has played a part in administrative law where questions have arisen as to the extension of judicial review to findings of fact. The *Administrative Decisions (Judicial Review) Act 1977* (Cth) (AD(JR) Act) does not explicitly provide for review of findings of fact. If such a review is available, at present it can only be achieved through other remedies or under other grounds of review, including the *Wednesbury* ground. Indeed, as you know, there is authority, admittedly controversial, for the proposition that even the making of a perverse finding of fact, for which there is some evidence, is beyond the scope of judicial review.55

Yet the difficulty of distinguishing between questions of law, on the one hand, and questions of fact, not to mention questions of policy, is notorious. This difficulty unquestionably creates complications for a system of administrative law such as ours which requires questions of law and questions of fact to be treated differently. In the United States and Canada, the assumption that there is a distinction has been challenged. So far that is not the position in Australia, where the High Court has noted that the distinction "is a vital distinction in many fields of law", while acknowledging that "no satisfactory test of universal application has not yet been formulated".56

The public/private dichotomy

English administrative law has developed a distinction between public law and private law, on which the availability of judicial review depends. Thus, judicial review of decisions not made under statutory authority depends upon whether the decision-making body performs or operates as an integral part of a system which performs public law duties and is supported by public law sanctions. So a decision of the Panel on Take-overs and Mergers was subject to judicial review because it was operating as an integral part of a governmental framework for the regulation of financial activity in the City of London, was supported by a periphery of statutory powers and penalties and was under a duty in exercising what were public powers to act judicially.57

I have always thought that it is difficult to formulate a brightline distinction between public law and private law. That is why I do not regard the reasoning in *Datafin* 58 as particularly convincing. On the other hand, there is much to be said for the view that bodies exercising public or regulatory powers should be subject to judicial review. What we should be endeavouring to determine is what bodies beyond those presently subject to judicial review should be exposed to judicial review and on what grounds.

Privatisation of statutory bodies makes these questions more important than they would otherwise be, and even more so if we continue to subscribe to the *ultra vires* foundation for judicial review. The extension of judicial review to non-statutory bodies involves more difficulties than the extension of judicial review to the exercise of prerogative power. Because prerogative power involves the exercise of public power in a traditional form, recognised judicial review grounds may be appropriately applied.

The availability of declaratory relief and injunction may overcome some of the deficiencies in the availability of judicial review. But these remedies are by no means a complete answer because, absent a challenge on recognised judicial review grounds, private law may prove to be inadequate simply because it may well fail to provide appropriate grounds of review.

The culture of justification and the duty to give reasons

Professor Dyzenhaus has written persuasively on the culture of justification and our responsibility to justify our actions and decisions.59 That culture is gaining increasing support in the democratic world. It has an application to the provision of reasons for administrative decisions. In Australia, the statutory requirement that the decision-maker shall provide reasons upon request means that the absence of a common law requirement is not as significant as it is in other jurisdictions. Section 13 of the AD(JR) Act and s 8 of the AAT Act have counterparts in State legislation.

Putting the statutory requirements to one side, we are left with the decision of the High Court in *Public Service Board of NSW v Osmond*.60 Osmond vindicated the statement made by Sir William Wade only two years earlier:

> It has never been a principle of natural justice that reasons should be given for decisions. Since there is no such rule even in the courts of law themselves, it has not been thought suitable to create one for administrative bodies.61

In *Osmond*, the High Court overruled a majority decision of the NSW Court of Appeal. Kirby P, in the majority, concluded that the Board was under a common law duty to give reasons for its dismissal of the applicant's appeal to the Board from the refusal of his application for promotion to a vacant position. His Honour reasoned from the proposition that the common law requires those exercising discretionary statutory powers to act justly and fairly in the performance of their functions. His Honour's judgment gives expression to the ideas and language of modern English administrative law. The principle, invoked by his Honour, included or mandated "an obligation [on the part of decision-makers] to state the reasons for their decisions".62 Such an obligation would arise where to do otherwise would render an appeal or judicial review nugatory, subject to certain exceptions such as confidentiality and privacy.

Priestley JA considered that there was a duty to give reasons and that it was an aspect of the rules of natural justice which applied to the Board.

The High Court rejected both approaches without qualification, basing itself largely on authority which supported the proposition that natural justice does not extend to the giving of reasons. Gibbs CJ referred also to the extra burdens on administrative officers and the possibility of lack of candour on the part of decision-makers in the event that they were required to give reasons.63 With great respect, these policy arguments do not seem to have overwhelming cogency. Moreover, they need to be weighed against the advantages inherent in the giving of reasons.

Since *Osmond*, much has happened to give point to the qualifications expressed by Deane J in agreeing with Gibbs CJ. Deane J observed that the rules of natural justice are "neither standardised nor immutable" and that "their content may vary with changes in contemporary practice and standards".64 Accordingly, his Honour thought that courts should be less reluctant than they had been to conclude that there is a statutory intent that reasons for a decision should be given.

In other jurisdictions, the force of the old common law rule that there is no requirement for reasons has been eroded. Although English courts continue to state, in deference to the old law, that there is no general duty to give reasons, their explanation of why reasons are required in particular cases suggests that English administrative law is moving towards the position that there is a general *prima facie* duty to give reasons, subject to appropriate exceptions. In *R v Civil Service Appeal Board*; *ex parte Cunningham*65 and *R v Secretary of State for the Home Department*; *ex parte Doody*,66 the obligation was based upon the decision-maker's duty of fairness, the ground adopted by Kirby P. In *Doody*, Lord Mustill placed the obligation to give reasons on the duty to be fair to a convicted person in providing him with reasons why the Home Secretary had decided on a particular period of imprisonment that a prisoner, who had received a mandatory life sentence, should serve before being entitled to a review. Alternatively, his Lordship placed the obligation to give reasons on the ground that the decision was susceptible to judicial review and that reasons were necessary to detect the existence of error of a kind which would entitle the court to intervene.

As already noted, in *Baker*,67 the Supreme Court of Canada, after acknowledging the strong policy arguments favouring the giving of reasons, held that, in certain circumstances, the duty of procedural fairness requires the giving of reasons. Those circumstances include situations where there is an appeal and judicial review is available. But, evidently yielding to the notion that the requirement to give reasons might be oppressive, the Court accepted the decision-maker's file notes as a sufficient compliance with the duty.

An aspect of the giving of reasons is the making of relevant findings of fact. Whether a decision-maker is under a duty to make relevant findings of fact is in essence a matter of statutory construction. In the absence of a duty imposed by statute, there is no general common law duty to make relevant findings of fact. So much emerges from the joint judgment of McHugh, Gummow and Hayne JJ in *Minister for Immigration and Multicultural Affairs v Yusuf*,68 where their Honours point out that the relevant inquiry is whether the tribunal whose decision is being reviewed has made a reviewable error.

Procedural fairness

My concluding comment relates to procedural fairness. In Australia, England and elsewhere, the problems are largely associated with new and complex modes of decision-making which have left the simple adversarial model in their wake. Consequently, the two questions (i) is there a duty? (ii) if so, what is the content of the duty? have to be determined in a variety of contextual situations. Although initially I had seen this problem as one to be determined largely at the duty stage, and by reference to the individuality rather than the generality of the decision, I now think that the content of the duty may be more important. That is because I incline to the view that, unless statute otherwise provides, a decision-maker is in general subject to a duty of procedural fairness and that the decision-maker must be permitted some leeway of choice in deciding upon an appropriate procedure.

1 *Minister for Immigration, Local Government & Ethnic Affairs v Kurtovic* (1990) 92 ALR 93 at 129.
2 (1990) 170 CLR 1.
3 See *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223.
4 *Thomas Valley Electric Power Board v NZFP Pulp and Paper Ltd* [1994] 2 NZLR 641 at 652–653 per Cooke P and 654 per Fisher J.
5 [2000] 2 WLR 622.
6 See *Re Preston* [1985] AC 835 at 851–852, 864–867.
7 *Minister of Health and Social Services v Mt Sinai Hospital Center* [2001)] 200 DLR (4th) 193 at 210–211 per Binnie J.
8 *Ibid* at 211.
9 (1995) 183 CLR 273.
10 *Thomas v Baptiste* [1999] 3 WLR 249; *Fisher v Minister for Public Safety and Immigration (No 2)* [1999] 2 WLR 349 at 356.
11 [1999]174 DLR (4th) 193.
12 *Ibid* at 223–226 per L'Heureux-Dubé J.
13 "The Justice of the Common Law: Judges , Democracy and the Limits of the Rule of Law", an address delivered at the University of Melbourne on 8 November 2000.
14 [1999] 174 DLR (4th) at 234–235.
15 *Ibid* at 212–213.
16 "The Justice of the Common Law: Judges, Democracy and the Limits of the Rule of Law", an address delivered at the University of Melbourne on 8 November 2000.
17 [2001] 200 DLR (4th) 193.

18 *Ibid* para 95 per Bastarache (with L'Heureux–Dubé, Gonthier, Iacobucci and Major JJ concurring).
19 *Minister for Health and Social Services v Mt Sinai Hospital Centre* [2001] 200 DLR (4th) 193 at 209.
20 *Ibid* at 211.
21 In this respect, the Canadian approach is similar to the English approach and the Australian approach, as to which see *Haoucher v Minister for Immigration, Local Government and Ethnic Affairs* (1990) 169 CLR 648 at 670 per Toohey J; see also *Teoh* (where lack of knowledge of the Convention provision was not a bar to setting up the legitimate expectation).
22 *Baker v Canada (Minister for Citizenship and Immigration)* [1999] 174 DLR (4th) at 224.
23 *Ibid* at 224–225.
24 *Ibid* at 225–226, 227–228 per L'Heureux-Dubé J.
25 *Chevron USA Inc v Natural Resources Defense Council Inc* 467 US 837 (1984).
26 *R v Ministry of Defence*; *ex parte Smith* [1996] QB 517 at 554.
27 *R v Secretary of State for the Home Department*; *ex parte Simms* [2000] 2 AC 115.
28 [2001] 3 All ER 433.
29 *Ibid* at 446 per Lord Steyn.
30 M Elliott, "Scrutiny of Executive Decisions under the Human Rights Act 1998: Exactly How 'Anxious'?" [2001] JR 166 at 175l.
31 *R v Director of Public Prosecutions*; *ex parte Kebilene* [2000] 2 AC 326 at 380–381 per Lord Hope of Craighead.
32 [2001] 3 All ER 433.
33 *Ibid* at 445–446.
34 *R v Ministry of Defence*; *ex parte Smith* [1996] QB 517 at 554.
35 [2001] 3 All ER 433 at 446.
36 [2000] 1 WLR 1115.
37 *R v North and East Devon Health Authority*; *ex parte Coughlan* [2000] 2 WLR 622.
38 *Ibid* at 1130.
39 See the discussion in I Loveland, "A fundamental right to be gay under the fourteenth amendment?" [1996] *Public Law* 601.
40 *Chevron USA Inc v Natural Resources Defence Council Inc* 467 US 837 (1984).
41 *Enfield City Corporation v Development Assessment Committee* (2000) 199 CLR 135.
42 *Chevron USA Inc v Natural Resources Defence Council Inc* 467 US at 842–843.
43 A Scalia, "Judicial Deference to Administrative Interpretations of Law" [1989] *Duke LJ* 511 at 514–516.
44 See In *re Racal Communications* [1981] AC 371 at 384 per Lord Diplock.
45 (1945) 70 CLR 59l8
46 See the discussion by Justice Sackville, "The Limits of Judicial Review: Australia and the United States" (2000) 38 *Federal Law Review* 315 at 326–328.
47 *Citizens to Preserve Overton Park Inc v Volpe* 401 US 402 (1971).
48 *Ibid* at 416.
49 *Enfield City Corporation v Development Assessment Committee* (2000) 199 CLR 135 at 155.
50 "The Limits of Judicial Review: Australia and the United States" [2000] 28 *Federal Law Review* 315.
51 [1991] 1 AC 696.
52 *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2001] 2 All ER 929 at 976 per Lord Slynn of Hadley. ("Trying to keep the *Wednesbury* principle and proportionality in separate compartments seems to me to be unnecessary and confusing").
53 "Irvine 'furious' with Blunkett over speech", Wednesday October 31 2001, http://www.thetimes.co.uk/article/o,2–20011375523,00.html.
54 (1803) 1 Cranch 137.
55 *Azzopardi v Tasman UEB Industries Ltd* [1985] 4 NSWLR 139.
56 *Collector of Customs v Agfa-Gevaert Ltd* (1996) 186 CLR 389 at 395.
57 *Reg v Panel on Take-overs and Mergers*; *ex parte Datafin Plc* [1987] 1 QB 815. But cf *Reg v Disciplinary Committee of the Jockey Club*; *ex parte Aga Khan* [1993] 1 WLR 909 (which illustrates the limits of the public law doctrine).
58 *Reg v Panel on Take-overs and Mergers*; *ex parte Datafin Plc* [1987] 1 QB 815.
59 "The Justice of the Common Law: Judges, Democracy and the Limits of the Rule of Law", an address delivered at the University of Melbourne on 8 November 2000.

60 (1986) 159 CLR 656.
61 *Administrative Law* (5th ed, Oxford, 1982) at 486.
62 [1984] 3 NSWLR 447 at 467.
63 (1986) 159 CLR 656 at 668.
64 (1986) 156 CLR at 676.
65 [1991] 4 All ER 310.
66 [1994] 1 AC 531.
67 [1999] 174 DLR (4th) 193 at 216–220 per L'Heureux-Dubé J.
68 (2001) 180 ALR 1 at 19–20.