EXTERNAL REVIEW OF ADMINISTRATIVE ACTION:

THE AUSTRALIAN EXPERIENCE

Hong Kong, 12 October 2001

The Hon Sir Gerard Brennan AC KBE

In Australia during the last 30 years, the review of Commonwealth administrative action has been significantly reformed. The most radical of these reforms was effected by legislation. The legislation created novel mechanisms of review and expanded in some respects the common law grounds of judicial review. During the same period, the courts in Australia, like the courts in the United Kingdom, developed the law of judicial review in response to the increasing significance of the Executive branch of government in corporate and personal life. As some elements of Commonwealth administrative law are novel and as the judicial development of the law departs in some respects from English law, the scope of what became known as the "Commonwealth administrative law package" may be of interest to the legal profession of Hong Kong.

The movement to expand the review of administrative action got under way in 1969 with the appointment of an Administrative Review Committee, known as the Kerr Committee. Its work was supplemented by two later Committees, dealing with administrative discretions and prerogative writ procedures. In time, the recommendations of these Committees found legislative expression. An Administrative Appeals Tribunal ("the AAT") was created pursuant to the *Administrative Appeals Tribunal Act* in 1976. In the same year, an Ombudsman was provided for by the *Ombudsman Act.* Then a new judicial review jurisdiction was conferred on the Federal Court by the *Administrative Decisions (Judicial Review) Act* 1977 ("the ADJR Act") and a *Freedom of Information Act* 1982 ("the FOI Act") gave qualified public access to government documents. These reforms recognized that many powers, especially statutory discretionary powers, that are vested in Ministers, their departments or agencies are not suited to Parliamentary scrutiny, either because the matters that the repository of the power has to consider do not

lend themselves to review by the Parliament or because the Parliament, or even the Minister, simply does not have the time to review all decisions taken in exercise of the power. It became manifest that Parliamentary scrutiny had become inadequate to cope with the massive growth of executive power that was stimulated by the two World Wars. The Kerr Committee expressed the underlying reasons for the new law in these terms:

> "[W]hen there is vested in the administration a vast range of powers and discretions the exercise of which may detrimentally affect the citizen in his person, rights or property, justice to the individual may require that he should have more adequate opportunities of challenging the decision which has been made against him, not only by obtaining an authoritative judgment on whether the decision has been made according to law but also in appropriate cases by obtaining a review of that decision.
> [T]he very existence of machinery for review of [the] kind [proposed] is likely to produce a greater efficiency and correctness in the making of those decisions. It will be seen that our detailed proposals have been designed to achieve balance between justice to the individual and efficient administration."

Sir Anthony Mason, who was a member of the Committee, subsequently identified deficiencies in the administrative process which the reforms were designed to rectify:

> "Experience indicates that administrative decision-making falls short of the judicial model … in five significant respects. First, it lacks the independence of the judicial process. The administrative decision-maker is, and is thought to be, more susceptible to political, ministerial and bureaucratic influence than is a judge. Secondly, some administrative decisions are made out in the open; most are not. Thirdly, apart from statute, the administrator does not have to give reasons for his decision. Fourthly, the administrator does not always observe the standards of natural justice or procedural fairness. That is not surprising; he is not trained to do so. Finally, he is inclined to subordinate the claims of justice of the individual to the more general demands of public

policy and sometimes to adventitious political and bureaucratic pressures."

The new Commonwealth administrative law sought to provide remedies in the event that any of these deficiencies produced injustice in an individual case.

Merits Review of primary decisions

Internal departmental review of decisions by departmental officers was a feature of some areas of Commonwealth administration, notably in social security matters, before the administrative law package was enacted, but internal review did not always give satisfaction. And judicial review could not ensure that executive or administrative decisions are the correct or preferable decisions. The way chosen to ensure that administrative power was exercised independently, openly, with reasons given and natural justice accorded and without unduly subordinating individual interests to governmental policies and pressures – in short, the way chosen to overcome the deficiencies in administrative decision-making identified by Sir Anthony Mason – was to create an independent tribunal with authority to review prescribed decisions on their merits. The AAT was created and an Administrative Review Council ("the ARC") was appointed to monitor, and to advise Government on, the operation of the new administrative law package.

The AAT was equipped with powers to gather evidence that the bureaucracy does not have; it was staffed with experienced lawyers to preside over hearings and to interpret the relevant law; it had expert part-time members available who could bring their skills to the evaluation of

the circumstances and the exercise of any discretion. In cases that were subjected to AAT review, both the primary decision-maker and the AAT had to state his, her or its reasons for decision. The President was to be a Judge[1]. It was given power to require reasons for the primary decision[2], to summon witnesses and to examine them on oath[3]. It was bound to give interested parties an opportunity to be heard[4] and it was obliged to give reasons for its decisions[5]. Its proceedings were generally open to the public[6]. It had no power to execute the decisions it gave but, if a decision of the Tribunal overruled the primary decision, it took the place of the primary decision and was enforceable as though it were the primary decision[7]. It was not subject to ministerial direction or departmental control. These statutory powers and duties were characteristic of the judicial method and distinguished the Tribunal's exercise of its powers from the exercise of power by the ordinary echelons of administration. Moreover, if a departmental decision was defended, there was an adversarial situation on which the Tribunal was bound to adjudicate. And adjudication was most fairly conducted by adopting the judicial model. The AAT's powers and procedures were designed to produce decisions which, in comparison with the primary decision, would be based on a more adequate finding of the relevant facts or a more accurate exposition of the relevant law or a sounder exercise of the relevant discretion.

However, the judicial model had some novel issues to determine: first, how was the AAT to ascertain, to regard and to deal with

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1 Section 7.
2 Section 37; see also s 28.
3 Section 40.
4 Section 39.
5 Section 43(2).
6 Section 35.
7 Section 43(6).

government policy? secondly, what was the scope of the jurisdiction - did it overlap the jurisdiction exercised by the court in judicially reviewing a decision? In particular, could the AAT deal with decisions which had been made in excess of, or otherwise outside the power of, the primary decision-maker?

An early opportunity[8] was presented to consider both the approach to be taken in cases dealing with the deporting of aliens who had been convicted of fairly serious crime and the role of policy in AAT decision-making. It was a case in which the decision to deport did not appear, on the evidence adduced in the case, to be the preferable decision. Nevertheless, the Minister's decision was lawful and he could take a different view. Should that lead the Tribunal to refrain from making a contrary recommendation? Was the AAT merely an adviser to the minister? As President of the AAT, I said[9]:

> "[The AAT's] function is to decide appeals not to advise the Executive. The remedies which it awards may be limited or large but the remedies are incidental to the decision at which it arrives. The decision . . . is therefore to be resolved according to its opinion as to the merits of that case."

To determine whether a deportation decision was the correct or preferable one, it was necessary to determine what, if any, weight should be given to the policies of the Executive government. It was important to stress that the AAT was not bent on the frustration of government policy but sought to play a critical but constructive role in policy development. I said[10]:

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[8] *Becker's case* (1977) 1 ALD 158.
[9] (1977) 1 ALD 158, 161.
[10] (1977) 1 ALD 158, 162-163.

> "Whenever the review of a decision involves consideration of policy, it is essential that the Tribunal be fully informed as to the policy and the reasons for it. Otherwise the decisions of the Tribunal may, instead of providing a rational analysis of policy and assisting to develop principled yet flexible decision-making, intervene incongruously to disrupt the due course of administration."

At that time, the question whether there was a legal obligation on the Tribunal to apply government policy had not been determined. The Federal Court in *Drake v Minister* gave the answer to that question in *Drake v Minister for Immigration and Ethnic Affairs*[11]. Bowen CJ and Deane J said:

> "It is not desirable to attempt to frame any general statement of the precise part which government policy should ordinarily play in the determinations of the Tribunal. That is a matter for the Tribunal itself to determine in the context of the particular case and in the light of the need for compromise, in the interests of good government, between, on the one hand, the desirability of consistency in the treatment of citizens under the law and, on the other hand, the ideal of justice in the individual case."

The Federal Court sent *Drake's* case back to the AAT for rehearing with a free hand to determine the policy it would apply in deciding cases in which it had to exercise a discretion. So *Drake (No 2)*[12] presented a full opportunity to consider this critical question. A meeting of Presidential members of the AAT was held between the time when I reheard *Drake (No. 2)*[13] and the delivery of the decision. Although I accepted, of course, sole responsibility for deciding that case and stating my reasons, the principles expressed in *Drake (No 2)* were discussed and accepted by those other Presidential members who were responsible for administering

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[11] (1979) 24 ALR 577; 2 ALD 60, 70.
[12] (1979) 2 ALD 634.
[13] Ibid.

the deportation jurisdiction. In the first place, policy was an important element in reducing the risk of inconsistency, and so it was said:

> "Inconsistency is not merely inelegant: it brings the process of deciding into disrepute, suggesting an arbitrariness which is incompatible with commonly accepted notions of justice"

The Tribunal was bound to respect the constitutional authority of the Executive to determine a general policy which should guide the exercise of the deportation power but that authority had been statutorily qualified by the jurisdiction of the AAT to do justice in individual cases. These two considerations were reflected in a passage [14] with which all Presidential members agreed and which sought to maintain the independence of the Tribunal while acknowledging the authority of the Executive Government over policy:

> "When the Tribunal is reviewing the exercise of a discretionary power reposed in a Minister, and the Minister has adopted a general policy to guide him in the exercise of the power, the Tribunal will ordinarily apply that policy in reviewing the decision, unless the policy is unlawful or unless its application tends to produce an unjust decision in the circumstances of the particular case. Where the policy would ordinarily be applied, an argument against the policy itself or against its application in the particular case will be considered, but cogent reasons will have to be shown against its application, especially if the policy is shown to have been exposed to Parliamentary scrutiny.
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> "The general practice of the Tribunal will not preclude the Tribunal from making appropriate observations on Ministerial policy, and thus contributing the benefit of its experience to the growth or modification of general policy; but the practice is intended to leave to the Minister the political responsibility for broad policy, to permit the Tribunal to function as an adjudicative tribunal rather than as a political policy-maker, and to facilitate the making of consistent decisions in the exercise of the same discretionary

[14] (1979) 2 ALD 634, 645.

power."

Next, the AAT had to consider whether it could review decisions that were taken *ultra vires* the primary decision-maker. An application was made to review the merits of a decision which a court would have held to be void and of no effect. Could the AAT assume jurisdiction to set the decision aside, by an order having virtually the same effect as a curial declaration of invalidity? If the AAT could not deal with primary decisions made unlawfully but in purported exercise of a power, the ability of the AAT to rectify erroneous decisions would have been problematic. By a majority, the Full Court of the Federal Court upheld the AAT's jurisdiction to review decisions taken in excess of, but in purported pursuance, of a statutory power. Bowen CJ said:

> "[T]he Tribunal has jurisdiction provided there is a decision in fact and provided further that the decision purports to have been made in exercise of powers conferred by an enactment whether or not as a matter of law it was validly made and whether or not action on the basis there was power to make the decision was right or wrong."

The satisfactory resolution of questions of law was necessary to ensure that the law, and not some mutation within the bureaucratic culture, governed the exercise of reviewable powers at the primary level. As each new area of decision-making came under review, the relevant statute was construed and the applicable law expounded. Thereafter, it was picked up by departments and applied. Oftentimes the Tribunal's definition of the law quelled a multitude of disputes[15]. Provided the AAT clearly articulated the reasons for departing from a primary decision when

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[15] For example, a plethora of ACT rating appeals were resolved by decisions in two cases *Palmer (Nos 1 & 2)* (1978) 1 ALD 183 and (1979) 2 ALD 209.

it did so, the AAT's reasons ought to have had a helpful normative effect on primary decision-making.

An important function of external merits review is to ensure that decisions are not made in excess of the power of the decision-maker and are made in accordance with any conditions which govern the exercise of the power[16]. One of the achievements of the AAT was to blow the winds of legal orthodoxy through the corridors of bureaucratic power and to secure consistency between departmental manuals and traditions and the relevant statutory requirements. The authority and utility of the AAT are underpinned by three factors: independence, competence in decision-making and legal correctness. Both the Parliament and the public supported the functions of the AAT. Its jurisdiction has been enhanced since it was established by the creation of a right of appeal to the AAT from the exercise of an increasing list of statutory powers.

However, if the heavy artillery of the AAT were to be directed at comparatively small administrative cases, there was likely to be a waste of firepower. And, as the AAT's jurisdiction was enlarged and its remedial powers became known, the caseload increased extensively. Costs mounted and the quasi-judicial methods of the AAT which exposed the complexity of the issues that sometimes fell for determination in the exercise of administrative power were time consuming. Flexibility in AAT procedures and the conferring of jurisdiction on less high-powered Tribunals diminished this problem, though it did not entirely avoid it. Then, under financial constraints, an increased proportion of matters was

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[16] See *Collector of Customs v Brian Lawler Automotive Pty Ltd* (1979) 2 ALD 1; ALR.

determined by single member Tribunals without the benefit of the services of the specialist part-time members.

Of course, the intersection of the lines of bureaucratic authority by external review on the merits always contained the seeds of dissatisfaction on the part of the bureaucracy. Criticism, overt or covert, was to be expected on the ground of cost and complexity or on the ground that the external reviewer espoused an alien and inappropriate culture. Sir Anthony Mason commented[17]:

> "The attraction of judicial review and of tribunal review on the merits is that they offer justice to the individual by means of independent adjudication. The real thrust of the objection is a distaste for genuinely independent review and a preference for departmental decision-making because it is weighted in favour of the government viewpoint."

However, in September 1995, the Administrative Review Council submitted a report recommending the creation of an Administrative Review Tribunal ("ART") with a less sophisticated structure than the AAT. The ART would incorporate not only the AAT but several other Tribunals, and would consist of several specialist Divisions. The Government introduced legislation which would have diminished government expenditure on merits review and which went even further than the Council had recommended. The ART would not have had the protection of its independence which the AAT enjoys. It is significant that the system of merits review under the AAT Act had achieved such acceptance that the Opposition parties joined forced to defeat the government Bill in the Senate.

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[17] Administrative Review – *The Experience of the First Twelve Years* (1989) 18 Fed LR 122 at 131.

Judicial Review

In the Australian federation, the State courts of general jurisdiction possess the common law jurisdiction in judicial review. Federal courts, being creatures either of the Constitution or of Commonwealth statute, exercise only the jurisdiction conferred upon them respectively either by the Constitution or by statute. Section 75(v) of the Constitution confers on the High Court of Australia a jurisdiction in all matters in which a writ of mandamus or prohibition or an injunction is sought against an officer of the Commonwealth[18]. It has been held that certiorari will go as relief ancillary to the constitutional writs.

The *ADJR Act* withdrew from the State courts such jurisdiction as they had previously possessed to judicially review federal administrative decisions[19]. Jurisdiction to hear and determine applications under the *ADJR Act* was conferred on the Federal Court of Australia and, in recent times, on the Federal Magistrates Court[20]. That jurisdiction extended, broadly speaking, to decisions made under Commonwealth legislation[21] subject, however, to a power to exclude specific classes of decisions by regulation[22]. In addition, the Federal Court was given jurisdiction corresponding with the jurisdiction of the High Court under s 75(v)[23]. The Federal Court's jurisdiction, unlike the jurisdiction of the High Court under s 75(v), is not constitutionally entrenched and is amenable to restriction by the Parliament. Regrettably, the Parliament has limited the

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[18] Constitution, s 75(v).
[19] ADJR Act s 9.
[20] ADJR Act s 8.
[21] The critical phrase is "a decision to which this Act applies", the meaning of which is to be derived from definitions contained chiefly in s 3(1).
[22] ADJR Act s 19.
[23] By the Judiciary Act 1903 (as amended) s 39B.

grounds on which the Federal Court may review certain decisions under the *Migration Act*. That limitation channels applications into the original jurisdiction of the High Court which is already labouring under a heavy case load in its appellate and constitutional jurisdictions.

The *ADJR Act* spelt out the grounds on which an application might be made for judicial review. Broadly speaking, the statutory grounds correspond with the grounds on which one or other of the prerogative writs might be sought at common law. The law of judicial review in Australia, whether the jurisdiction is based on the Constitution, statute or the common law, has been developed in many respects similarly to the development of the law in England. In some respects, Australian developments seem to be in advance of those in England; in some respects the English developments have gone further than the cases in Australia. Thus the High Court held[24], on appeal from the Supreme Court of Victoria, that that Court had jurisdiction to judicially review a decision made by the Governor in Council when the Governor in Council had failed to give the party affected by the decision – an insurance company – an opportunity to be heard before refusing to grant it a renewal of an approval to carry on the business of workers' compensation liability insurance business. In England……..

In a case which excited considerable concern among Australian politicians, the High Court held that the repository of a statutory discretion when exercising the discretion must take into account the terms of any relevant international convention binding on Australia, even

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[24] *FAI Insurances Ltd v Winneke* (1982) 151 CLR 342.

though the terms of the convention in question have not been translated into municipal law[25].

On the other hand, there are two major developments of the English law of judicial review which have not thus far been accepted as settled law in Australia. The first relates to the scope of the concept of legitimate expectation of a substantive benefit expounded by Lord Woolf MR in *Coughlan's case*[26]; the second relates to the extension of the court's jurisdiction to judicially review administrative action or inaction by non-governmental repositories of power.

Legitimate expectation of a substantive benefit

In *Coughlan's case,* Lord Woolf identified three categories of legitimate expectations, the relief available being dependent on the category to which a particular expectation is attributed. The first category embraces changes of policy which defeat an expectation based on an earlier policy. Here the court is confined to reviewing the decision on *Wednesbury* grounds. The second category arises when the expectation is that an opportunity for consultation will be given before there is a change in policy affecting the applicant. Then the court must decide whether the procedure has been fair. And thirdly his Lordship proposed a category to cover expectations of a substantive benefit requiring "the court … when necessary to determine whether there is a sufficient overriding interest to justify a departure from what has been previously promised."

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[25] *Teoh v* CLR.

[26] *R v North and East Devon Health Authority; Ex parte Coughlan* (2001) 1 QB 213.

In *Hindley's case*[27], Lord Hobhouse of Woodborough esteemed Lord Woolf's judgment in *Coughlan* to be "valuable", but the leading speech of Lord Steyn was more reserved. He noted that there are dicta in *In re Findlay*[28] which appeared to run counter to the argument which counsel had advanced on the basis of Lord Woolf's judgment in *Coughlan*. His Lordship did not find it necessary to determine whether *Findlay's case* was distinguishable or wrongly decided. Recently, the Court of Appeal considered the concept of a legitimate expectation of a substantive benefit in *Bibi's case*[29]. In *Bibi's case*, the Court accepted that it had jurisdiction to protect a substantive legitimate expectation but adopted a somewhat different approach from the approach taken in *Coughlan*. In a joint judgment their Lordships said:

> "In all legitimate expectation cases, whether substantive or procedural, three practical questions arise. The first question is to what has the public authority, whether by practice or by promise, committed itself; the second is whether the authority has acted or proposes to act unlawfully in relation to its commitment; the third is what the court should do."

In determining whether an authority has acted "unlawfully", the Court declined to accept Lord Woolf's test that "the reneging on a promise would be so unfair as to amount to an abuse of power"[30]. In the view of the Court, that test "is an uncertain guide." But the Court said that an authority would, on any view, be abusing its powers if it decides to renege on the promise "without even considering the fact that it is in breach" of the promise[31]. In such a case, the court would ask the decision maker "to take the legitimate expectation properly into account in the

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[27] *R v Home Secretary; Ex parte Hindley* [2001] 1 AC 410 at 421.
[28] [1985] AC 318.
[29] [2001] EWCA Civ 607.
[30] [2001] EWCA Civ 607 at par 34.
[31] Ibid, par 39.

decision-making process"[32]. It does not necessarily follow that a legitimate expectation of a substantive benefit will be satisfied. In Australia, the concept of legitimate expectation has not been taken past the first two of Lord Woolf's categories. The Federal Court in a recent case[33] saw the concept as limited to a foundation for attracting a duty of procedural fairness. Their Honours said:

> "It is not necessary to review here the many authorities that have considered and developed the concept since the term was coined by Lord Denning. It is and was from the outset "a foundation for attracting a duty of procedural fairness" which extended legitimate expectations beyond enforceable legal rights - *Attorney-General (NSW) v Quin*[34] (Mason CJ) and the authorities there cited."

Lehane J has observed that the English cases have not been the subject of extended consideration by Australian Courts[35]. Whether the High Court would extend the concept of legitimate expectation to give some protection to expectations of substantive benefit and, if so, whether it would adopt the approach taken by the Court of Appeal in Bibi's case, it is impossible to say. If it were to confine statutory discretions in that way, the Court would no doubt consider Lord Woolf's dictum that the third category is likely to be "cases where the expectation is confined to one person or a few people, giving the promise or representation the character of a contract." It would be a question whether that analogy could support a remedy to protect a legitimate expectation of a substantive benefit.

The Australian reserve in embracing the concept of legitimate expectation of a substantive benefit may be due to the distinctive culture

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[32] Ibid, par 41.
[33] *Barratt v Howard* [2000] FCA 190.
[34] (1990) 170 CLR 1 at 20.
[35] *Daihatsu Australasia Pty Ltd v Deputy Commissioner of Taxation* [2000] FCA 1658 par 51.

of Australian administrative law. Perhaps there is a subliminal recognition that review of the merits is properly the concern of tribunals or departmental reviews rather than judicial review. Of course, when tribunal jurisdiction is absent or departmental review is inadequate, there is an understandable movement to invoke the jurisdiction of a court and to invite the court to mould its remedies to avoid injustice to the individual.

Extra-governmental decisions

Modern governments may aspire to avoid the inefficiencies and the burdens of external review - both judicial and merits review – by outsourcing particular functions. Outsourcing is not a term of art. It may cover a number of ways in which government may procure an entity other than a department of government to perform a particular function which government does not wish itself to perform. Whichever form the outsourcing may take, the interests of some members of the public may be affected by the performance of the authorised functions. The question is whether a member of the public can seek a public law remedy to protect the interest. A different, but perhaps related, question is whether a public law remedy is available if a non-government entity undertakes, independently of government, to perform a function which affects the public in much the same way as do the functions of government.

When government commissions a corporation to perform a particular function, some administrative, budgetary or political advantage for the government is foreseen. It is unlikely that Government would wish to attack the interests of a corporation so long as the sought for advantage was forthcoming. Indeed, the minimising of government

expenditure and the avoidance of political responsibility for any diminution in service or other public benefit are factors antithetical to a government's protection of the interests of the individual member of the public[36]. If a corporation is engaged under contract to perform a function that affects the interests of third parties, there may be little incentive for the government to be astute to protect those interests.

The effect of a breach by the contractor on the interests of a particular individual might have little influence on government. Government would be disinclined to pursue merely an award of damages and the availability of a decree of specific performance of the contract would be doubtful. Unless individual members of the public were held to be the beneficiaries of the contractor's promises and entitled to sue to compel performance of those promises[37], they would be without a private law remedy. A corporation which is performing an outsourced function would be left without effective external supervision.

Of course, the availability of independent merits review always depends on statute, but the remedies of judicial review have been developed by the courts and they have not remained static. Sometimes they have been affected by statute, such as the *ADJR Act*, but more often by the course of judicial decision. Those doctrines have been developed in response to changing social and administrative circumstances. In mediaeval times, when the courts exercised both administrative and judicial functions, they naturally monitored the performance of both central and local government and, as Holdsworth[38] points out:

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[36] Freeman, *op cit.*

[37] See the discussion in *Trident General Insurance Co Ltd v McNiece Bros Pty Ltd* (1988) 172 CLR 167.

[38] History of English Law, vol 1, p 230.

> "The fact that ... the King's Bench Division still exercises these administrative functions is one of the most striking illustrations of the manner in which the continuity of the development of the English state has preserved the mediaeval character of English legal institutions, and adapted them to modern uses."

Although it has been my view, that the exercise or non-exercise of *statutory* power was the central, if not the exclusive, subject for consideration by a court possessed of judicial review jurisdiction[39], there is growing judicial opinion that the jurisdiction is not so confined and may extend to powers that are not statutory. In those circumstances, the basis for attributing a wider scope to the judicial review jurisdiction should be examined.

In a free society, the rule of law is incompatible with any unqualified power to create, modify or extinguish rights or liabilities or otherwise to affect the interests of an individual. The law must give effect to the valid exercise of a legal power but it must deny any effect to any actions of a repository of a power if those actions are outside the limits of the power reposed. It is the function of the courts to define the limits of any power. In the familiar words of *Marbury v Madison*[40], "It is emphatically the province and duty of the judicial department to say what the law is." If the validity of a purported exercise of a limited power is challenged, it is the function of a court to determine what the limit is and, in the appropriate case, to grant a remedy to make its determination effective. The jurisdiction to enforce statutory duties and to ensure the lawful exercise of statutory powers can then be seen as an instance of the

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[39] *Annetts v McCann* (1990) 170 CLR 596, 604; *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564, 585.

[40] (1803) 5 US (1 Cranch) 137, 177.

jurisdiction to enforce the rule of law which does not exhaust the court's jurisdiction to review the exercise of non-statutory powers.

Statute is not the only source of legal power. The prerogative powers may be characterized as non-statutory[41] but they are limited and, in *Council of Civil Service Unions v Minister for the Civil Service*[42], the House of Lords held that the limits are justiciable. Lord Scarman said that "if the subject-matter in respect of which prerogative power is exercised is justiciable.... the exercise of the power is subject to review in accordance with the principles developed in respect of the review of the exercise of statutory power."[43] This view had been favoured by Mason and Wilson JJ in the earlier case *R v Toohey; Ex parte Northern Land Council*[44]. The outsourcing of government functions has seen the emergence of powers that are only partially, or remotely, sourced in statute.

In England, the statutory source of a power is no longer (if it ever was) the sole criterion of judicial reviewability. Judicial review has been extended to the supervision of what are described as "public" powers. The modern development began with the judgment of the English Court of Appeal in *Reg v Criminal Injuries Compensation Board, Ex part Lain*[45] where certiorari was granted to bring up and quash a decision made by the respondent Board though the Board was the creature not of

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41 Unless the "prerogative" powers are constitutionally conferred by s 61 of the Constitution and may be judicially reviewable under s 75(v) – a question raised by Gaudron and Gummow JJ in *Re Refugee Review Tribunal; Ex parte Aala* (2000) 75 ALJ 52, 61; [2000]HCA par 41.

42 [1985]AC 374.

43 Ibid., at 407.

44 (1981) 151 CLR 170, 219-220; 283 and see *Minister for Arts Heritage and Environment v Peko-Wallsend* (1987) 15 FCR 274, 278, 280-281, 303; *Macrae v Attorney General* (NSW) (1987) 9 NSWLR 268.

45 [1967] 2 QB 864.

statute but of the Executive and the challenged decision was made in performance of a function assigned to the Board by an instruction issued by the executive government. Lord Parker CJ said[46]:

> "We have... reached the position when the ambit of certiorari can be said to cover every case in which a body of persons, of a public as opposed to a purely private or domestic character, has to determine matters affecting subjects provided always that it has a duty to act judicially. Looked at in this way the Board in my judgment comes fairly and squarely within the jurisdiction of this court. The board are...'a servant of the Crown charged by the Crown, by executive instruction, with the duty of distributing the bounty of the Crown'. The board are clearly, therefore, performing public duties."

Diplock LJ pointed out that[47]:

> "The appointment of the board and the conferring on the board of jurisdiction to entertain and determine applications, and of authority to make payments in accordance with such determinations, are acts of government, done without statutory authority but nonetheless lawful for that".

The English Court of Appeal asserted a jurisdiction to judicially review a decision of the Panel of Take-overs and Mergers although the Panel was not created by or under legislation nor by executive action. In the *Datafin case*[48],
Lloyd LJ said[49]:

> "I do not agree that the source of the power is the sole test whether a body is subject to judicial review . . . Of course the source of power will often, perhaps usually, be decisive. If the source of power is a statute, or subordinate legislation under a statute, then

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[46] At 882.
[47] At 883.
[48] *R v Panel of Take-overs and Mergers, ex p Datafin plc (Norton Opax plc intervening)* [1987] QB 815.
[49] At page 846(H).

> clearly the body in question will be subject to judicial review. If, at the other end of the scale, the source power is contractual, as in the case of private arbitration, then clearly the arbitrator is not subject to judicial review: See *R v National Drug Council for Craft of Dental, Technicians (Disputes Committee), ex parte Neate*[50]. ...
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> But in between these extremes there is an area in which it is helpful to look not just at the source of power but at the nature of the power. If the body in question is exercising public law functions, or if the exercise of its functions has public law consequences, then that may... be sufficient to bring the body within the reach of judicial review. It may be said that to refer to 'public law' in this context is to beg the question. But I do not think that it does. The essential distinction, which runs through all the cases to which we referred, is between a domestic or private tribunal on the one hand and a body of persons who are under some public duty on the other. ... "

In *R v Jockey Club, ex p Aga Khan*[51], Bingham MR commented that the effect of the decision in *Datafin* was "to extend judicial review to a body whose birth and constitution owed nothing to any exercise of governmental power but which had been woven into the fabric of public regulation in the field of take-overs and mergers." Thus Mann LJ held in *R v Lautro ex p Ross*[52] that, where a non-statutory power may be exercised to affect the interests of a third party, an obligation to afford natural justice to the third party is a condition on a valid exercise of the power.

In *R v Cobham Hall School, Ex parte "GS"*[53], judicial review was sought of a decision made by a school principal pursuant to an Assisted Places Scheme created by an Act and supplementary Regulations. Under

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50 [1953] 1 QB 704.
51 [1993] 2 All E R 853, 864.
52 [1992] 1 All E R 422, 431-432.
53 [1997] EWHC 943.

the scheme, independent schools were able to enter into "participation agreements" with the Secretary of State for Education and Employment for the purpose of enabling pupils, who might otherwise not be able to do so, to benefit from education at independent schools. Under such agreements, participating schools remit fees that would otherwise be chargeable in respect of pupils selected for assisted places under the Scheme, and the Secretary of State reimburses the school for the fees that are remitted. Dyson J judicially reviewed the decision of a school principal to reallocate a funded place from one student to another.
The position reached in England has been recently stated[54]:

> "It is now clear that the judicial review jurisdiction and prerogative remedies are available against anybody exercising public law powers, whether they be derived from statute, the prerogative or other non-statutory powers."

The English development of the law of judicial review has had to draw a distinction between "public law powers" and powers which have their origin in private, chiefly contractual, arrangements. The criterion of justiciability adopted by the English Courts seems to be the performance of a governmental or quasi-governmental, non-contractual function. In *R v Advertising Standards Authority Ltd; Ex parte The Insurance Service Plc*[55], Glidewell LJ said:

> "The authority has no powers granted to it by statute or common law nor does it have any contractual relationship with the advertiser which it controls. Nevertheless it is clearly exercising a public law function which, if the authority did not exist, would no doubt be exercised by the Director-General of Fair Trading."

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[54] C. Lewis *Judicial Remedies in Public Law* (Sweet & Maxwell, London, 2000) p 174.
[55] [1989] Admin LR 77, 86C.

Simon Brown J stated the indicia of a public law power in *R v Chief Rabbi Ex p Wachmann*[56]:

> "To say of decisions of a given body that they are public law decisions with public law consequences means something more than that they are decisions which may be of great interest or concern to the public, or, indeed which may have consequences for the public. To attract the court's supervisory jurisdiction there must be not merely a public but potentially a government interest in the decision-making power in question... where non-governmental bodies have hitherto been held reviewable, they have generally been operating as an integral part of a regulatory system, which, although itself non-statutory, is nevertheless supported by statutory powers and penalties clearly indicative of government concern..... And certainly it is a feature of all these cases that, were there no self-regulatory body in existence, Parliament would almost inevitably intervene to control the activity in question."

And in *R v Insurance Ombudsman; Ex parte Aegon Life Insurance Ltd*[57], Rose LJ in:

> "... a body whose birth and constitution owed nothing to any exercise of governmental power may be subject to judicial review if it had been woven into the fabric of public regulation or into a system of governmental control or was integrated into a system of statutory regulation or was a surrogate organ of government or but for its existence a government body would assume control."

But when a corporation exercises a power that affects the interests of a third person and the power has arisen from a contract between the corporation and the third person, the third person's remedy (if any) must be contractual. Judicial review was not available to challenge a decision of the Greyhound Racing Club to suspend a licence because, as Fox LJ said:

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[56] (1993) 2 All E R 249,254.
[57] [1994] COD 426, 427.

> ". . . the authority of the stewards to suspend the licence of the plaintiff derives wholly from a contract between him and the defendants. I see nothing to suggest that the defendants have rights or duties relating to members of the public as such. What the defendants do in a relation to the control of greyhound racing may affect the public or a section of it but the defendants powers in relation to the matters with which this case is concerned are contractual."[58]

In Australia the decision of the House of Lords in the *CCSU* case been accepted[59]; there is also a growing[60] acceptance of the broad jurisdiction adopted by the English cases[61]. *Ex parte Lain* was also followed by Stephen J in *R v Collins ex parte ACTU-Solo Enterprises Pty Ltd*[62] and by the Full High Court in *Hot Holdings Pty Ltd v Creasy*[63], but the question in those cases was the availability of certiorari to quash a decision which, though it did not affect the legal rights of the prosecutor, had some relevant effect in law. There was no issue in those cases as to whether an exercise of a non-statutory power was judicially reviewable.

The English cases proceed on the footing that it is possible to identify a public law power even though it be reposed in a non-governmental corporation and is not sourced in statute or executive

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58 *Law v National Greyhound Racing Club* (1983) 1 WLR 1302, 1309F-G.

59 *Kioa v West* (1985) 159 CLR 550, 582-583; *Minister for Arts Heritage and Environment v Peko-Wallsend* (1987) 15 FCR 274; *Waters v Acting Administrator of the Northern Territory* (1993) 46 FCR 462; *Xenophon v State of South Australia* [2000] SASC 327 (21 December 2000).

60 In *Re Phillip Adamson and New South Wales Rugby League Limited* (1991) 31 FCR 242, 292., Gummow J had noted that the Australian authorities as to the scope of public law remedies against bodies that have no statutory or public law source were indecisive.

61 See per Beaumont J in *Chapmans v ASX* (1994) 123 ALR 215, 223-224 and the article therein cited: "Judicial Review of Discretionary Ddecisions of Australian Stock Exchange Limited" (1989) 5 Aust Bar Rev 91; *R v Wadley; ex parte Burton* [1976] Qd R 286 at 295; *Typing Centre of New South Wales v Toose* (Mathews J SCNSW, unreported 15 December 1988) cited in *Dorf Industries Pty Ltd v Toose (1994) 127 ALR 654, 666; Victoria v Master Builders Association of Victoria* [1995] 2 VR 121, 136-137, 148-149, 152-162.

62 (1976) 50 ALJR 471.

63 (1996) 185 CLR 149 at 162, 163.

action. The test adopted is not free from difficulty[64]. But if the test of public power is satisfied, the court asserts its jurisdiction to judicially review an exercise of the power that affects the interests of an individual to ensure that there is no illegality, irrationality or procedural impropriety in the exercise of the power[65] unless the individual has, by contract or otherwise, voluntarily submitted to the exercise of the power. In that event, the remedy, if any, must be found in private law.

In England, the jurisdiction to judicially review the exercise or non-exercise of statutory power was exercised chiefly by the Court of King's Bench. The prerogative writs were the means by which that Court supervised the exercise of the powers of local government and the statutory powers of the executive branch of government[66]. The purpose of the jurisdiction appears to have changed. Historically, the jurisdiction maintained the distribution of powers between central and local government and protected the prescribed order of administering justice[67]. In modern times, the emphasis is on the effect of the exercise or non-exercise of power on members of the public. The jurisdiction is seen as the means of protecting the interests of members of the public, particularly to ensure that repositories exercise their powers rationally and in accordance with the common law's standards of procedural fairness. The primary purpose of the expanded jurisdiction is not to maintain an existing distribution of governmental power[68]; it is to protect the interests of the individual by ensuring that a power which may be exercised in the

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64 The difficulties are considered by Stephen Free *Across the Public/Private Divide: Accountability and Administrative Justice in the Telecommunications Industry* (1999) 21 AIAL Forum 1, 8-10.

65 Per Donaldson MR in *Datafin* at 842.

66 Holdsworth *History of English Law*, vol 1 pp 226-229; vol x p 155; vol xiv pp 245-249.

67 As to the writ of prohibition, see *Worthington v Jeffries* (1875) LR 10 CP 379, 382; cited in *Ex parte Aala* (2000) 75 ALJ 52, 62 par 44.

68 *Attorney General (NSW) v Quin* (1990) 170 CLR 1, 35-36.

course of public administration is exercised lawfully, rationally and with procedural fairness.

Given that shift in the rationale of judicial review, it may be expected that there will be a re-orientation of the court's focus on the relevant issue. The starting point may be an inquiry into the interests of the applicant affected by the exercise of the power (not merely to determine the applicant's standing to sue) followed by an examination of the nature of the power – is it a public power or a private power? If the power arises solely out of a contract with the applicant, the power will be characterized as private and individual rights will have to be vindicated, if at all, by contractual remedies. Whether Australian law will be settled on the same lines as English law it is too early to say. But, as governments increasingly outsource their functions, some further protection of individual interests will be sought and, I expect, will be accorded. But this step haws not been definitively taken in Australia.

The similarities of Australian and English law illustrate the advantages to be derived from a vigorous exchange of ideas between common law legal systems. The disparities, on the other hand, show the importance of the endogenous law in each legal system in response to the particularities of that system. Hong Kong benefits by the catholicity of its interest in other common law systems of law but the value of its own legal system depends on its responsiveness to the constitutional and social phenomena of Hong Kong. The benefits from other systems can be derived from the books; the value of the Hong Kong legal system depends on the wisdom and integrity of the courts and, in the ultimate analysis, on the Court of Final Appeal.