WHITHER ADMINISTRATIVE LAW?

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Let me say a little about socio-economic context, and then I want to do a *tour d'horizon* of some of the more prominent issues that fall under the general rubric of "administrative law". In deciding what to focus on my judgement is inevitably influenced by the fact that I am a senior bureaucrat. But I should make it equally clear that my views are not necessarily those of the bureaucracy or of the NSW Government.

When the Kerr Committee reported two decades or more ago, the economic and administrative milieu in this country was importantly different from the situation today. Kerr and Wilenski recommended a systematic overhaul of the system of "administrative justice" in the Commonwealth and in NSW respectively. Although it may be an oversimplification of the issues involved, it will suffice for me to observe in this context, that the 1960s and 1970s saw an agenda for reform of administrative justice based on a premise that the state was expanding its influence and power over ordinary citizens; and that the traditional modes of accountability through the courts and Parliament were inadequate.

In the 1990s we need to come to grips with issues of administrative justice in a different milieu:

- a milieu in which the emphasis is on fiscal restraint and greater productivity;
- where governments are expected to provide greater value for the same money;
- where bureaucrats are required to increase productivity and guarantee citizens a reasonable quality of service;
- where risk-taking in terms of process is generally seen to be worthwhile and necessary to meet the required outcomes and produce the required results;
- a milieu in which contracting out, privatisation or at least market testing of "government" services is part of mainstream policy;
- a milieu in which government is seriously questioning the need for its participation in a whole range of activities;
- a world in which traditional "command and control" methods of regulation are being challenged and voluntary and market-based mechanisms are being examined as more efficient methods of control.

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Importantly it is a milieu in which the relationships and interdependencies of people and associations and institutions are more varied and complex. Society tends to be richer, more pluralistic, more variegated. At the same time there is less homogeneity and consensus about values and interests.

The divide between public and private has become blurred, perhaps fictitious. For example, is the College of Surgeons a private or public body? Does it have private or public functions?

Also, perhaps the boundaries between the public sector and the private sector are becoming increasingly less significant, so that the distinction between private and public law no longer makes good sense.

On the other hand it is also a milieu in which greater accountability and transparency of government administration is required. For example:

- courts have an expanded role and a greater preparedness to intervene;
- conduct and decision-making is subject to review by the Ombudsman and far more robust scrutiny by the Auditor-General;
- a variety of tribunals have the charter to review decisions;
- there are more liberal laws of standing;
- there is scrutiny by parliamentary committees;
- in NSW there is also the Independent Commission Against Corruption;
- there is freedom of information legislation and annual reports legislation.

This is not to mention the panoply of internal checks and balances and scrutiny by Treasury, Office of Public Management, Cabinet Office, Industrial Authority, etc.

Now, I am not going to make one of those speeches where a senior public servant complains about the unreasonableness and the enormous costs associated with these accountability mechanisms. Rather, what I want to suggest to you is that these mechanisms may be becoming irrelevant to where the main game is taking place.

I actually believe that the main difficulty confronting bureaucrats in relation to all this accountability has less to do with the machinery and more to do with the fact that there is a profound intolerance to risk-taking in public administration on the part of the public and the media. It is normally no answer to something that goes wrong to say - "Well we took a risk, a calculated risk, and it didn't come off". More effort is, therefore, demanded on avoiding making mistakes, than actually trying to achieve results.

In contrast, a private company might behave quite differently. Sure, there may be some very cautious shareholders. But there is equally a greater understanding that risk taking is acceptable. The normal canons of decision theory and rational calculation are more readily accepted. I do not have a ready explanation for the collective psychology of this phenomenon. Perhaps it is a function of the fact that individual instances that go wrong are more readily pictorialised and understood than a vast quantity of unproblematic cases.

In themselves the Ombudsman and Auditors-General are not problems. The

problem is that they locate problems and mistakes (that is their job), and the public thinks that public administration should make no mistakes.

There are however some more systematic problems with the existing systems.

1 I would say that there is an obsession with "process" in the current systems of review and not a focus on results.

2 There is a focus on "trouble cases", problem cases and not overall performance. By and large these are looked at as isolated and discrete cases not as part of a system.

3 There is a focus on "natural justice" and "due process".

In the introduction to her very thoughtful study of administrative procedures, Gabrielle Ganz[1] has written:

> The greatest disservice that administrative lawyers can render administrative law is to mould the administrative process in their own image. The rules of natural justice have a great deal to answer for in this respect. They are modelled on the gladiatorial combat between two parties before an impartial judge ...

Now maybe it is perfectly understandable that there is a focus on process. After all, we would soon be complaining even louder if review by the courts involved a review of the justice of the product rather than the process. So it is understandable that the courts and other review bodies, with the notable exception of the Ombudsman, have tended to focus on whether proper processes have been followed and the requirements of the law have been complied with. They tend to concentrate on whether decisions are lawful, fair and rational.

For example, Lord Diplock in *Council of Civil Service Unions and Minister for Civil Service*[2] said:

> Judicial review has I think developed to a stage today when without reiterating any analysis of the steps by which the development has come about, one can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call "illegality", the second "irrationality" and the third "procedural impropriety". That is not to say that further development on a case by case basis may not in course of time add further grounds. I have in mind particularly the possible adoption in the future of the principle of proportionality which is recognised in the administrative law of several of our fellow members of the European Economic Community; but to dispose of the instant case the three already well established heads that I have mentioned will suffice.
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> By "illegality" as a ground for judicial review I mean that the decision maker must understand correctly the law that regulates his decision-making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of dispute, by those persons, the judges, by whom the judicial power of the state is exercisable.

> By "irrationality" I mean what can by now be succinctly referred to as "Wednesbury unreasonableness" (*Associated Provincial Picture Houses Ltd and Wednesbury Corporation* [1948] 1 KB 223). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it ...
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> I have described the third head as "procedural impropriety" rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the administrative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice.

You can see that the courts are in a bind. Either they review process and make canons to guide process or there is little left for them to say unless they are prepared to embark upon review on the merits. That means of course that merit review is sometimes simply disguised as process review. A court might say that a decision-maker failed to take relevant matters into account or took irrelevant matters into account. That is getting pretty close to review on the merits. If you were also to introduce the doctrine of proportionality you would have a much more formidable tool for reviewing the merits.

All this has tended to drive bureaucrats off into a further pursuit of integrity of process. In some areas there is an absolute obsession with process. The great problem with this is that it becomes an end in itself. People worry more about the process than the products of their decisions. And they tend to build processes that are judicially water-tight. All this is very counter-productive stuff.

The other thing that is worth putting into this equation is that the character of a lot of important "public disputes" is not bilateral, it is not adversarial in that simple sense. It tends to be multilateral or "polycentric" to use Lon Fuller's terminology. These are typical of planning disputes and disputes about the environment and natural resources. To attempt to reduce such disputes to adversarial disputes with a defined *lis inter partes* is to misdescribe and misrepresent what people are disputing.

It seems to me that one of the most critical issues confronting legal policy in the area of administrative law is whether we should attempt to draw a boundary between the territory where administrative law should work and where private law should work. Of course if you decide to do that then the next issue is where or how to draw the line.

The English courts have been engaged in an attempt of sorts to do that. They have special public law procedures available under Order 53 of the High Court. This special procedure is to apply to "public bodies". Some commentators like Sir Harry Woolf[3] see it as important to make out this distinction. His view is that it is necessary to treat public law disputes as importantly different from private law disputes. Here he sees some analogy with the sharp divide found in continental legal systems such as the French *droit administratif*. Other commentators such as Sir William Wade

find the distinction to be one that needs to be got rid of.

Now I have no definitive answer to this question. But let me throw a few of the relevant considerations around.

What is attractive about Woolf's view is that on the face of it bodies that are carrying out actions in the wider public interest or the interest of a large segment of the public do seem to require some different and more expeditious treatment than private and relatively discrete disputes.

On the other hand, in terms of the real world, it is not easy to know where to draw the line. To begin with, as I have already noted, more and more functions are being "contracted out" or "privatised" - to the extent that this type of distinction becomes vague and uncertain. Second, the idea that some bodies are performing "private" functions and some "public" is just wrong - it is more a spectrum of "shades" than a clear dichotomy.

The English Court of Appeal decision in *R and Panel on Takeovers and Mergers, ex parte Datafin PLC and Anor*[4] rather illustrates the difficulty. In that case the Court held that the decisions of the self-regulatory City Take-Over Panel were subject to review by the Court, and that its decisions could be quashed on the conventional grounds of irrationality or unfairness. The essence of the decision was that in the view of Court the Panel performed a "public duty".

It would be odd or inequitable if we got the result that where you go to a public hospital rather than a private one or travel on a public bus rather than a private one, or go to a state owned bank rather than a private one - then you have a different range of remedies and legal rules applying to you, compared to the person who went private.

It could be argued that a better and more productive route is in fact to ensure the adequacy of private law remedies for persons aggrieved. Citizens should be assured of remedies based on contract/consumer protection where "privatised" or "corporatised" bodies deliver services.

The traditional approach to public services in English law has been, more or less, to eschew contract as a remedy. This can be traced back to a decision in 1778[5] in which the court decided that the Postmaster-General did not enter into any contract for the delivery of post. In subsequent decisions the courts tended to look at whether there was an action in tort for breach of statutory duty. So, individuals could sue only if the statute imposing the duty had been intended to create private rights for their benefit.

Ian Harden[6] sums up the position by saying:

> ... the law of contract often does not apply when the provider of a public service is carrying out a public legal duty. This is so even in the circumstances - which superficially look highly contractual - of a consumer paying for a marketed public service. Exceptions to this principle are of uncertain scope. Furthermore, the legal framework which does govern the legal entitlements of individuals to public services is a patchwork, composed of accidents of history and legislation and of discretionary judicial decision-making about the sort of breach of statutory duty.

A robust application of the law of contract and of ordinary private law remedies is what some would contend for. Certainly, in NSW

where we have corporatised entities (eg the Water Board) we have been at pains to make the contractual relationships as real as we can and to ensure maximum exposure to consumer/contractual remedies. There is certainly some artificiality about the artifice of a "deemed contract" published by the Government to users. Perhaps we could go further and allow people to negotiate individual arrangements with the Water Board.

But the reality probably is that unless you have a contestable market, with alternative suppliers, there will always be a need for government to safeguard the position of the consumer.

The other thing is (and maybe this is a partial explanation for the old common law position on public services) that perhaps there are some commodities or services that are just so essential for people that some different obligation or some different form of remedy needs to operate. Can you really just cut off someone's water or electricity indefinitely? Perhaps there are basic things like health care, education, water and electricity where freedom of contract cannot be allowed full sway. Michael Taggart[7] has reminded us of the old common law doctrines that placed special obligations and rules on innkeepers and carriage drivers. And governments will need to consider this in privatising and contracting out basic public services.

Certainly there seems to be scope for requiring a definition of entitlements from utilities to citizens and the provision of a credible and efficient grievance handling system. Whenever government contracts out the business of providing services to citizens it really is critical to agree clearly:

1 what the price and quality is going to be;

2 that there will be an accessible and independent means of redress.

Now it may be that this should simply be the Ombudsman. Certainly there is a need for that function and the government in NSW has insisted on this.

I have to say, too, that this is not simply a matter of providing citizens with redress. It is also fundamentally a question of governments being assured that those they franchise or contract with are carrying out their part of the bargain. So it is prudent commercial practice as well as providing a safeguard to consumers.

More generally, you will be aware of the "Citizen's Charter" or "Guarantee of Service" which is being introduced in various jurisdictions. This is a significant development and it is important for administrative lawyers to understand that this trend is deadly serious and not just "flim flam".

The interesting thing to consider here is whether the clear definition of entitlements - "guarantees" of service - may come to ground some right of action in administrative law based on "legitimate expectation". The concept of "legitimate expectation" in administrative law is potentially a powerful juridical concept. It can be taken a long way. And if you think about it - it has some analogy with the development of estoppel in contract law and equity. So maybe you can get some sort of convergence here between private law remedies based on contract/estoppel and public notions of legitimate expectation. I don't know, but convergence is an interesting alternative to Woolf's view, and maybe that's what needs to happen.

Let me outline a little of the dynamics of this policy development. This move toward requiring a better definition of citizen's

entitlements on expectations from government service providers got going for a few different reasons.

1 Politicians were concerned that the drive for greater efficiency that came out of the 1980s was not being translated into terms that the ordinary voter could understand. It was necessary to reduce this to simple guarantees about services to individuals.

2 Treasuries and central policy agencies were concerned to give greater autonomy to service delivery agencies and even in some cases to "contract out" these functions - but there needed to be robust outcome measures of value for money. There needed to be some way of saying "there is the money, this is what you are expected to produce - get on with it and we will measure your performance by your ability to achieve these results". The guarantee of service is defining those outcomes or results.

3 There is a third force behind this which is more profound. In a way it is the recognition that increasingly it is unrealistic to expect governments, cabinets to manage the affairs of government. The idea that the ballot box will present you with a group of people who have the background and experience to run a business the size of multi-nationals with enormously diverse businesses, is not really on. But that is only to say that politicians and cabinets should be concentrating on strategic policy. That is, on goals, aims and outcomes and not on ways and means.

That, as you will appreciate, brings with it a potentially radical re-orientation of the traditional Westminster system. The minister under this model is no longer the "manager" of the service provider - rather he or she is the representative of the citizen/consumer. And his or her job is to ensure that the systems are in place to deliver services at a certain price and quality.

It is, I think, important for administrative lawyers to understand that a lot of what you may take as a "fad" is not so. It is actually part of a more profound shift.

One last observation about this public/private split. I said earlier that there is not likely to be a dichotomy but a rich variety or spectrum of possibilities. That is something that is worth reinforcing from another angle - there is an increasing recognition of the "public duties or responsibilities" of private institutions and private capital. Just to give one recent example. Hilmer[8] recommends that governments introduce a regime to allow third parties to force access to essential facilities. That is not a regime that will be restricted to publicly owned facilities. It will also include privately owned facilities, and the number of those is likely to increase.

Other obvious examples are professions and financial institutions. It is interesting to note that in these cases institutions run as Ombudsmen have been either imposed by governments or have been self-imposed.

I do not know that I would subscribe to Harry Woolf's rather imperialistic view of administrative law - the sort of view that comes out of the *Datafin case*. One reason is that it seems to me that it provides the judiciary with too wide and ill-defined a brief to go roving. It therefore promotes greater uncertainty in the law. The other reason is that the traditional paradigms of administrative justice based on "natural justice" are not necessarily well adapted to

providing paradigms for all decision making processes, as Ganz claimed.

My preference would be to see a greater role for private law remedies in relation to consumer/citizen grievances and for administrative law to remain within the relatively traditional confines of core public sector activities.

One of the major issues that strikes me grows out of some of the remarks above. There is a prevailing view that representative democracy is moribund and that what is needed is greater participatory democracy.

In concrete terms what does that mean for administrative lawyers? It means that there should be greater access and opportunity for decisions to be made by the community, or at the very least greater accountability and opportunity for citizens to challenge government decisions and have them reviewed.

I have some reservations about this shift, although I also want to acknowledge that there is a legitimate basis for concern. My reservations, you may find quite predictable coming from a senior public servant. I actually think that governments should govern and that accountability needs to be systemic and not *ad hoc*. I think there is a great danger that participatory democracy actually means government by vociferous interest groups and not by the people. I also think that the authority to make decisions that compel or coerce needs to be clearly based on the authority of Parliament. It may be old-fashioned but it seems to me undesirable to entrust unelected bodies with the power to make decisions which are in the nature of value judgements, that affect sizeable sections of the public.

Having said that, I do acknowledge that there is a need to ensure transparency and openness. I happen to agree with the President of the Court of Appeal that there should mostly be a duty to give reasons for decisions where one is clearly acting as a minister or public servant affecting the rights or interests of a public citizen.

I also think that participatory democracy makes good sense if it means providing people with the opportunity to make known their interests and concerns. In many ways it is exemplified in public inquiry processes and consultation processes. I also think that it makes good sense for government to encourage communities, associations or groups of people to take on and solve problems for themselves - not to rely all the time on governments to fix things. Voluntary solutions of this sort are to be encouraged. I do, however, have concerns about the use of third party rights or the *actio popularis*.

The rationale for third party rights is not without respectable foundation. After all, the common law has longstanding recognition of the right of any citizen to enforce the criminal law, presumably because committing a crime was viewed as doing a wrong to society or the community as a whole.

In other cases the common law relied on the Attorney-General or some person authorised by the Attorney-General to look after the more diffuse and community wide interests. The credibility of that mechanism has to be questioned. The Attorney-General is a member of the government and is presumably going to think twice about granting someone permission to attack or embarrass the government.

However to provide "open slather" has the difficulty of creating a climate of uncertainty and there is no doubt that the potential for delay and uncertainty has caused some businesses not to locate in NSW and Australia. You may say that may be a good

thing if they were afraid of the impact of the operations under planning and environment legislation.

No one is suggesting that people should not be subject to proper controls and obligations. But if you consider third party rights you will see that anyone at all can bring an action. There is really no way that someone can negotiate or mediate a settlement. Because there is always the chance that having settled with A, B then comes through the door and commences a challenge. Moreover a plaintiff may have no concrete interest at all in the proceedings - there may be no stake in the dispute, nothing that the person has to trade or bargain about. It is quite unlike an ordinary civil action.

It seems to me that another argument against them is the fact that they sometimes are seen as the answer to government accountability. In a sense it is like creating "private attorneys-general". I have heard people say - "let's just have third party rights and then there will be no need for the government to worry about having to do anything - we can just say that it is up to the interest groups". This is what I mean by the need for systemic accountability.

There are positive ways around the need to set up an *actio popularis*. Harry Woolf has suggested something like a DPP or Ombudsman who can bring or screen actions.

Let me conclude on a more positive note by mentioning two initiatives in tandem, which seem to me to offer the single best hope for an accessible and responsive administrative justice, the Ombudsman and the process of mediation.

Despite the political gamesmanship that currently characterises the NSW Parliament as it heads toward a general election, there is a small but important and uncontroversial amendment to the Ombudsman Act currently going through. What the amendment does is give to the Ombudsman a clear remit to engage in mediation of disputes between citizens and government agencies. It is arguable that the Ombudsman already has this power. You may, in fact, be surprised to hear that there is any doubt that he does not already engage in mediation. But there is a doubt, and this amendment does two things - it lays to rest the uncertainty and it sends a clear signal to agencies that mediation is something to be pursued.

The amendment has the enthusiastic support of the Ombudsman and the Government. It should also gain the enthusiastic support of the public if it is given currency and taken seriously. For it is my contention that mediation is the best hope we have for responsive and affordable redress of legitimate grievances that the public have about public administration.

There are, however, some pitfalls that need to be understood and guarded against. And I will elaborate on some of those. First, let me develop a little more fully my thesis that mediation of disputes is the best hope we have for responsive and affordable administrative justice.

This is not an isolated piece of law, an isolated development. There is a general trend emerging for alternatives to the courts in the area of administrative justice. Let me give you some examples.

- Mediation has been introduced into the proceedings of the Land and Environment Court.
- Mediation has been built into the new Disabilities and Community Services regimen.

- Mediation is now annexed as a means of solving disputes in the Supreme Court.

- Mediation is a method of dispute resolution that corporations and whole sectors, including utilities are taking seriously (eg the Banking Ombudsman).

There is not, to my knowledge, a comprehensive audit of the success of various mediation approaches. But there are certain features that recommend it as the way to go.

1 It tends to be cheaper and less time consuming.

2 It is much more flexible - the parties can "customise" their solutions and are not tied into rigid remedies.

3 It frees up the courts to deal with the really intractable disputes.

Let me mention some down sides, or, as I said earlier, some pitfalls:

1 In the area of public law it may be said that the dispute is not a private one susceptible to "compromise". There are important issues of right and public duty and responsibility that should not simply be "traded away".

Indeed it may even be said that this encourages a "quasi-corruption" akin to buying rights and entitlements for public money.

2 In many areas of public law dispute, what you have are plaintiffs who represent "sections of the public" or the public interest. As I have mentioned before, we are increasingly seeing the notion of "third party rights" being mooted. Predominantly you find this in environmental and planning challenges. Suppose you "mediate" this - what comfort do you have that someone else is not going to "come through the door". Indeed, you will not even have a *res judicata*. Hence, public disputes show themselves to be problematic once again at being assimilated to "agreement" or "compromises".

3 Despite the idea that public servants may be tempted to "throw money" at vexatious claimants to get them to go away, I suspect the truth is quite the opposite. There are powerful forces pulling the typical public servant away from mediation and negotiation and into the courts. To begin with, he or she will be held accountable by a variety of mechanisms (eg Auditor-General) for the proper use of public funds. It is much easier to pay by coercion than to make a judgement that it is "a reasonable thing to do all things considered". It is much easier to point to a court order. Of course politics is often seen as a reason for keeping things out of the courts - perhaps sending them off to be "laundered" through the mediation or arbitration process. But it also often figures as a reason to send things to court rather than make a politically embarrassing or problematic compromise.

It seems to me that there are also obvious problems that the Ombudsman would need to guard against in these circumstances. After all, if mediation fails, he or she may be required to investigate

or rule on the complaint. So there needs to be a careful and credible differentiation and isolation of functions within the Ombudsman's office.

The fact that the Ombudsman will presumably be able to exercise discretion in selecting those matters suitable to mediation is also an important safeguard. It should give the public and Parliament some confidence that matters of grave public interest are not being disposed of secretively or inappropriately. It should also provide public servants with some greater confidence that cases chosen for mediation will not be seen as inappropriate for compromise and settlement.

Endnotes

1 *Administrative Procedures*, Sweet and Maxwell, London, 1974, p 1.

2 1985 1 AC 374, p 410.

3 Hamlyn Trust Lectures, Stevens and Sons, London, 1990

4 [1987] 1QB 815.

5 *Whitfield and Lord le Despencer* 1778 2 comp 754.

6 *The Contracting State*, Open University Press, Philadelphia, 1992, p 41.

7 "State Owned Enterprises and Social Responsibility", [1993] *NZ Recent Law Review* 343.

8 *National Competition Policy*, Report by the Independent Committee of Inquiry, chaired by Professor Hilmer, 1993.