

## NATURAL JUSTICE: PROCEDURAL FAIRNESS “NOW WE SEE THROUGH A GLASS DARKLY”<sup>1</sup>

*Robert Lindsay\**

### **The History of natural law**

Procedural fairness has its origin in natural law. Aristotle, in discussing natural law, observed that the laws of nature are immutable and have the same validity everywhere “as fire burns both here and in Persia”.

Cicero characterised it as: “the law which was never written and which we were never taught, which we never learned by reading, but which was drawn from nature herself, in which we have never been instructed, but for which we were made, which was never created by man’s institutions, but which is in born in us”.

St Thomas Aquinas saw it as eternal law, which man can apprehend with unaided reason but which, because it flows from God’s reason and not man’s, cannot be created or changed by man.

Specific principles were formulated as arising from this concept. Seneca spoke of the principle that a man must be heard before he is condemned. The rule that a person should not be judged in his own cause goes back to Roman principles. St John records Nicodemus as saying to the Pharisees, who sent officers to apprehend Jesus, “does our law judge any man before it hears him?”

In more modern times, natural law principles have been reflected in various written constitutions, inspired by the natural law principles that the philosophers Locke, Rousseau and Paine espoused<sup>2</sup>. The *audi alteram partem* rule (the rule that the other party should be heard) and the principle that no man should be judge in his own cause are invoked by way of judicial control of administrative and judicial functions.

### **Procedural fairness in administrative law**

Lord Diplock has described the rules of natural justice as a legal doctrine meaning “no more than the duty to act fairly.....”. Since the House of Lords decision in 1964 in *Ridge v Baldwin*, procedural fairness is no longer restricted by distinctions between “judicial” and “administrative” functions or between rights and privileges.<sup>3</sup> In administrative law, natural justice is a well defined concept which initially comprised essentially two fundamental rules of fair procedure: that a person may not be judge in his/her own cause; and that a person’s defence must always be fairly heard. There has been some expansion of the application of “fairness” in recent times.

These rules apply to administrative power and sometimes, also, to powers created by contract<sup>4</sup>. A decision which offends against these principles of natural justice is a nullity.

---

\* *Robert Lindsay is a barrister at Sir Clifford Grant Chambers in Perth W.A.. This article is based on a paper presented at a Legalwise Seminar held in Perth, 25 March 2010.*

## The Role of the Constitution

In Australia, the principle of fairness has developed from a heightened consciousness of constitutional principle. Countries with written constitutions, such as Australia and Canada, have not accepted the wider basis for judicial review that Scotland, England and New Zealand, which do not have modern written constitutions, have chosen to recognise. This is because of the constitutional context in which judicial review occurs in Australia. As Justice Gummow has said:

“the subject of administrative law cannot be understood or taught without attention to its constitutional foundation”.<sup>5</sup>

The separation of judicial power from legislative and executive power in Australia has meant that judicial review is anchored in the principle of ultra vires, which requires before intervention that the relevant administrative act or decision was in breach of or unauthorised by law; that it was beyond the scope of the power given to the decision maker by the law; or that the relevant decision had failed to comply with the law.

Conversely, in Scotland, England and New Zealand, the basis is essentially that the common law itself will justify and authorise courts in developing their own laws to control administrative action. The rationale for Australia’s approach is that the Federal judicial power should be separate from legislative and executive power, and that this limits the power of the judiciary in relation to the functions which it can perform. The development of the common law of Australia is by reference to constitutional principle. As the late Justice Selway explains<sup>6</sup>, the need for the common law to develop in a uniform and consistent fashion, having regard to the constitutional element, explains why on the one hand judicial deference to the legal interpretation of the administrative decision makers has been rejected by the High Court, notwithstanding that the decision was in a State and not a Federal jurisdiction. The distinction between legality and merit review, and between jurisdictional error inviting the intervention of the courts and non- jurisdictional error, which does not, may also be traced to the Constitution.

It has been strongly argued that the constitutional foundation means that because the principle of ultra vires prevails as the source of judicial review, this precludes merits review and that the jurisdiction of a court to review administrative action, at least for statutory powers, is to be found in the relevant statute. The prevailing view of the High Court is that which Brennan J stated in *Attorney General (NSW) v Quin*<sup>7</sup> (*‘Quin’*):

“The duty and jurisdiction of the Court to review administrative action do not go beyond the declaration enforcing the law which determines the limits and governs the exercise of the repositories’ power. If, in so doing, the Court avoids administrative injustice or error, so be it; but the Court has no jurisdiction simply to cure administrative injustice or error. 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”.

On this basis procedural fairness will not extend to courts correcting substantive unfairness.

### **The Source of power to correct procedural unfairness: statute or common law?**

Yet within the constitutional constraint there remains a difference of view as to the source of power for procedural unfairness, though there is considerable overlap between the two.

Sir Anthony Mason has pointed to the difference in the exercise of judicial review. On the view that the foundation is to be found in the common law, it has been framed that, 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.

The other view, which is currently prevalent, is that statutory ultra vires is the foundation, and 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<sup>8</sup>. There is the presumption that in the event of ambiguous legislation it is not intended that common law rights should be invaded.

In regard to procedural fairness, Sir Anthony points to Byles J's dictum in *Cooper v Wandsworth Board of Works* that:

".....although there are no positive words in the statute requiring that the parties shall be heard, yet the justice of the common law will supply the omission of the legislature"<sup>9</sup>.

Sir Anthony Mason has said that this may be regarded as a "Delphic utterance" which supports either statutory implication or common law creation depending upon the eye of the beholder<sup>10</sup>. Brennan J in *Annetts v McCann*<sup>11</sup> saw the starting point as the statutory basis for judicial review and this has been adopted by Gleeson CJ and Hayne J<sup>12</sup>. The starting point may be important in the context of judicial review of procedural fairness. Sir Anthony Mason said that 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<sup>13</sup>.

### **The Application of procedural unfairness**

The rapid development of procedural unfairness can be seen in the Migration cases. As late as 1977 the High Court ruled in *R v Mackellar; ex parte Ratu*<sup>14</sup> that the Minister, in ordering deportation of a Tongan, who had overstayed a visitor's visa, was not required to observe the principles of natural justice. However, in 1985, *Kioa v West*<sup>15</sup> effectively reversed the Mackellar decision. Mr Kioa was providing pastoral support to other illegal immigrants and an internal immigration department memorandum said:

"Mr Kioa's alleged concern for other Tongan illegal immigrants in Australia and his active involvement with other persons who are seeking to circumvent Australia's laws must be a source of concern".

It was held that the remarks were extremely prejudicial and the failure to give Mr Kioa a chance to respond to them gave rise to a breach of natural justice.

In 1990, the High Court ruled that the Minister was obliged by the rules of natural justice to provide a hearing to Mr Haoucher<sup>16</sup> before rejecting a recommendation of the Administrative Appeals Tribunal that he be not deported.

In 2000, an application was made under section 75(v) of the Constitution for a constitutional writ against the Commonwealth. Mr Aala was denied natural justice in that a Tribunal had indicated that it had before it earlier Tribunal and Court papers when, through an inadvertent oversight, the Tribunal did not have four hand-written documents provided by Mr Aala at an earlier stage to the Federal Court. In failing to have regard to the documents the decision maker deprived the applicant of a chance to answer by evidence and in argument adverse inferences were made relevant to credibility. Gaudron and Gummow JJ said:

".....if an officer of the Commonwealth exercising power conferred by statute does not accord procedural fairness and if that statute has not, on its proper construction, relevantly (and validly) limited or extinguished any obligation to accord procedural fairness the officer exceeds jurisdiction....."<sup>17</sup>.

Procedural unfairness may take other forms. In *re Minister for Immigration and Multicultural Affairs; ex parte Applicant S120 of 2002*<sup>18</sup> (*'Applicant S120'*) the comments of McHugh and Gummow JJ can be viewed as accepting that, where a Tribunal makes findings which are

“illogical, irrational, or lacking a basis in findings or inferences of fact supported on logical grounds”, this may result in jurisdictional error,<sup>19</sup> though this would not be so where there is some evidence, albeit such evidence being regarded as insufficient, for the Tribunal to arrive at its adverse conclusion<sup>20</sup>.

The principle expressed in *Applicant S120* has similar features to the English Court of Appeal decision in *Associated Provincial Picture Houses Limited v Wednesbury Corporation*<sup>21</sup> (*Wednesbury*) which held that the exercise of a discretion will be invalid if the result is “so absurd that no sensible person could ever dream that it lay within power”. In Australia, *Wednesbury* unreasonableness will only be entertained if it can be said that the Tribunal’s unreasonableness is such that it should be regarded by a Tribunal as exceeding its jurisdiction. It is only the unreasonableness of the *Wednesbury* kind, and not simply “unreasonableness”, that can found intervention.

### **Application of natural justice principles to disciplinary bodies**

Much of the High Court authority is directed to migration cases, yet the doctrine may range far wider, including matters such as university disciplinary committees that report to a council senate; departmental committees that report to a minister or chief executive officer; and conduct by medical, accounting and other professional bodies, provided such bodies are governed by statutory regulation. These authorities almost invariably have their own internal rules which govern the procedures to be followed; the modes of proof and, in some cases, how far legal or other representation will be permitted. Questions sometimes arise as to whether the hearing is to be conducted orally or in writing, how far cross-examination will be permitted; and where legal representation is not allowed, whether those who face the disciplinary process, can resort to legal advice.

As Brennan J said in *Quin*, judicial review is not a free standing right of review to correct administrative error and, as a public law doctrine, a statutory or regulatory foundation for its operation has ordinarily to be found.<sup>22</sup>

Many of the rules governing procedural fairness are collected in J R S Forbes, *Justice and Tribunals* (Federation Press, 2002).

### **Jurisdictional error**

As has been seen, procedural unfairness is anchored in Australia in the wider principle of jurisdictional error. In *Craig v South Australia*<sup>23</sup> it was said by the High Court that an Administrative Tribunal (as distinct from a Court):

“.....falls into an error of law which causes it to identify wrongly, 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 the power to exercise a power is thereby affected, it exceeds its authority or powers<sup>24</sup>.”

These factors were not intended as an exhaustive list of jurisdictional errors<sup>25</sup>. However, every failure by a Tribunal to have regard to relevant considerations or to disregard irrelevant considerations does not necessarily amount to jurisdictional error. Judicial review is based on the existence of an error of law because, traditionally, judicial review has not been available simply to correct an error of fact. Conversely, jurisdictional facts are subject to judicial review because an error as to jurisdictional fact is considered to be an error of law<sup>26</sup>. The absence of evidence to support a finding of fact gives rise to a question of law, though insufficient evidence has not generally been regarded as grounds for review in Australia.

### Judicial review remedies

Jurisdictional error is central to the operation of remedies for judicial review in the High Court, where jurisdiction is to be found in section 75(iii) and section 75(v), although neither is a source of substantive rights except in so far as the grounds of jurisdiction necessarily recognises the principles of general law, according to which the jurisdiction to grant the remedies is exercised<sup>27</sup>.

The Federal Court's jurisdiction is derived from the *Administrative Decisions (Judicial Review) 1977 Act* (Cth) (ADJR Act) and from section 39B(1) of the *Judiciary Act 1903* (Cth). The other source of Federal Court jurisdiction is to be found under section 39B(1A) which confers jurisdiction arising under any laws made by the Parliament. Under the ADJR Act the Federal Magistrates Court has the same jurisdiction as the Federal Court, and the same original jurisdiction under the Migration Act in relation to migration decisions as the High Court has under section 75(v). This is set out in section 39B of the *Judiciary Act, 1903*.

The *Administrative Appeals Tribunal Act 1975* provides that where an enactment states that applications may be made to the Tribunal for review of decisions made in the exercise of powers conferred by a particular enactment, or the review of decisions made in an exercise of powers conferred by another enactment, then review may lie to that Tribunal.

In summary, therefore, there are remedies by way of a writ of mandamus, prohibition and injunction vested in the High Court under section 75(v) of the Constitution where sought against an officer of the Commonwealth, and similar powers are given to both the Federal Court and the Federal Magistrates Court in regard to those remedies. All these Courts also have power to give remedies of *certiorari* and declarations in habeas corpus where these are associated with one of the nominated remedies. The High Court has powers under the Judiciary Act to give broad remedies when its jurisdiction is invoked under section 75(iii) of the Constitution. The Federal Court has power to make orders and issue writs under section 23 of the *Federal Court of Australia Act 1976*.

The *Supreme Court Act 1935* (WA) vests in the Supreme Court of Western Australia general and appellate jurisdiction, which includes judicial review of prerogative writs. Also, notably, there are provisions in the *State Administrative Tribunal Act 2004*, which allow the Tribunal to make original primary decisions as well as well as exercise review powers where an enabling act invests jurisdiction in the Tribunal<sup>28</sup>.

The Supreme Courts of each state receive the supervisory jurisdiction of the English Courts and, therefore, do not face the same constitutional restraints as Federal Courts and the High Court.

It has been observed that a broader application of judicial scrutiny has been impeded in Australia by the restriction, contained in the ADJR Act, confining decisions subject to review to those decisions that are brought "under enactment". With the privatisation of many activities previously performed in the public sector, the Courts now face the need to develop principles as to which bodies are amenable to judicial review.

### Legitimate expectation in decision making

Legitimate expectation as a form of procedural fairness has long been recognised in administrative law. In *Schmidt v Secretary of State for Home Affairs*<sup>29</sup>, Denning MR used the expression to apply to a migrant's right to make representation to a decision maker where his permit was to be cancelled before its expiry date. In *Heatley v Tasmanian Racing and Gaming Commission*<sup>30</sup>, the expectation on the part of members of the public was that they would continue to receive the customary permission to go onto racecourses upon the

payment of a stated fee to the racecourse owner. If members of the public present themselves at the gate of a football ground, a racecourse, or a dog racing course and tender the stated entrance fee, upon receiving permission to enter they then have what is properly called the right against all the world to remain there for the duration of the relevant event<sup>31</sup>. Again, in *Sanders v Snell*<sup>32</sup>, there was a legitimate expectation that a contract would continue until terminated in accordance with the two months notice provision and it was not suggested that the subject of the lease by the respondents had to be established. It was said in *Attorney General (NSW) v Quin*<sup>33</sup> by Brennan J that expectation is seen merely as indicating “the factors and kind of factors which are relevant to any consideration of what are the things which must be done or afforded” to accord procedural fairness to an applicant for the exercise of administrative power.

In *Teoh v Minister for Immigration and Ethnic Affairs*<sup>34</sup> (*Teoh*) the legitimate expectation was of a more controversial nature. A majority in the High Court held that the best interests of the children would be a primary consideration in decisions affecting children, based upon wording of an article in the Convention on the Rights of the Child. In stating that a Convention could assist in the proper construction of a statute in which the language is ambiguous, the majority were merely adopting what had previously been said in *Lim v Minister of Immigration*<sup>35</sup>, but Mason CJ and Deane J said such a convention could also guide the development of the common law. Conversely, a legitimate expectation does not bind the decision maker. Mason CJ and Deane J stated that:

“Legitimate expectations are not to be equated with the rules or principles of law.....the existence of legitimate expectation does not control the decision maker to act in a particular way. That is the difference between a legitimate expectation and a binding rule of law.”

Nonetheless, their Honours said that an unincorporated treaty or convention was “not to be dismissed as any platitudinous or ineffectual act”<sup>36</sup> and procedural fairness required that such a legitimate expectation should be considered by the decision maker. This had not been the view of the primary judge, French J (as he then was), nor of McHugh J, who dissented in *Teoh*.

Eight years later, the High Court granted leave in *re Minister for Immigration and Multicultural Affairs; ex parte Lam*<sup>37</sup> (*Lam*) by which time McHugh J was the only surviving sitting member of the High Court judges who had heard *Teoh*. *Lam* may be seen as standing for three principal propositions<sup>38</sup>. First, that legitimate expectation is not a free standing administrative doctrine, but simply an aspect of procedural fairness. McHugh and Gummow JJ said “the notion of legitimate expectation serves only to focus attention on the content of the requirement of natural justice in a particular case”<sup>39</sup>. Secondly, there is a requirement for an expectation or, at least, there is a basis for a reasonable inference that an expectation is being created. *Teoh* himself would have had no expectation. Prior to *Teoh*, no-one had reason to suppose a general ratification of an incorporated treaty would give rise to an expectation. On the other hand, it was conceded that it was not merely those expectations for which there was a natural conscious appreciation that a benefit or privilege was to be conferred and that the applicant had turned his mind to the matter, that would be considered<sup>40</sup>. After all, in *Haucher v Minister for Immigration and Ethnic Affairs*<sup>41</sup> an expectation was founded in a detailed policy statement by the Minister to the House of Representatives as to what would guide the exercise by the Minister of the statutory power of deportation. But, contrary to the majority view in *Teoh*, McHugh and Gummow JJ did not see ratification of any Convention as a “positive statement” made to “the Australian people” requiring an executive government to act in accordance with the convention<sup>42</sup>.

Thirdly, the *Lam* decision reiterated previous Australian case law which held that the concept of legitimate expectations is directed to procedure and not the outcome. To put it another way, expectation is with the decision making process and not the decision itself<sup>43</sup>.

Legitimate expectation as a facet of procedural fairness is precisely that: procedural fairness and not a source of substantive rights.

In *Lam*, Gleeson CJ referred to the Privy Council case of *Attorney General (HK) v Shiu*<sup>44</sup> where the respondent had entered Hong Kong illegally. The government publicly announced its policy to deport illegal immigrants. It said that people such as the respondent would be interviewed and each case would be treated on its merits and that statement came to the knowledge of the respondent. He was made the subject of a deportation order without any consideration of the individual merits of his case. He had no opportunity to explain that he was not an employee but a partner in a business which employed several workers. At his interview he was not allowed to say anything except in answer to the questions put to him by the official who was interviewing him. The Privy Council held that the policy statement that each case would be considered on its merits meant that the respondent had a right to a fair hearing, which he had been denied, though their Lordships left open the wider question as to whether, as a matter of general principle, a person in the respondents position would ordinarily have a right to a fair hearing before a removal order was made. Their Lordships said that it was unfair that he had been denied an enquiry into the individual merits of his case and that it was inconsistent with good administration. Gleeson CJ said that if good administration was a separate and independent ground for quashing the removal order, as distinct from a reason in legal policy for binding the authorities to the requirements of fairness, it would not relate easily to the exercise of jurisdictions in Australia under section 75(v) of the Constitution, since the constitutional jurisdiction does not exist to allow the judiciary to impose upon the executive branch its ideas of good administration. The failure of a decision maker to take a procedural step resulted in a loss of opportunity to make representation. In Shiu's case it was the existence of a subjective expectation and reliance that resulted in unfairness.

In *Lam*, the department had advised the applicant that his visa was liable to cancellation and that he would have an opportunity to comment. The applicant was told that the matters to be taken into account would include "the best interests of any children" with whom he might have an involvement. A departmental officer later wrote to the applicant requesting contact details of his children's carers and advised that they wished to contact the carers to assess the applicant's relationship with the children. Although contact details were provided, no further steps were taken to contact the children. McHugh and Gummow JJ found that an expectation arose from the conduct of the person proposing to make recommendations to the Minister, the failure to meet that expectation did not reasonably found a case of denial of natural justice, and that the applicant had no vested right to oblige the department to act as it indicated it would, and that it did not result in the applicant failing to put to the department any material that he might have otherwise urged upon it. Nor would the carers have supplemented in any significant way what had been supplied by the applicant.

One cannot help but suspect that special leave was granted in *Lam's* case to enable review of *Teoh's* case following the departure of the three members of the High Court who formed the majority in *Teoh*. *Lam's* argument for special leave was scarcely a strong one. McHugh and Gummow JJ stated that the law of Australia should be as that expressed by McHugh J in his dissenting *Teoh* judgment, at least in so far as there is no need for any distinct doctrine of legitimate expectation<sup>45</sup>. It is only where natural justice conditions the exercise of legitimate expectation that it has any role to play.

### **Procedural fairness as against substantive protection: the English position**

It can be seen that, given the current composition of the High Court, a trend in Australia towards substantive protection is unlikely. The past views about the limits of procedural fairness held by the current Chief Justice, Justice Gummow and Justice Hayne have been openly declared. The constitutional separation of powers and, most notably, *Lam's* case,

militate against a development towards substantive protection. This attitude also has implications for any development of public law estoppel, abuse of power and proportionality as doctrines likely to be accepted in Australia.

In *Lam*, McHugh and Gummow JJ (with whom Callinan J agreed) emphatically affirmed earlier decisions of the High Court that there should be nothing “to disturb [substantive protection] by adoption of recent developments in English law with respect to substantive benefits or outcomes<sup>46</sup>”. In 2001, the English Court of Appeal held that legitimate expectations can be enforced as substantive rights in *R v North and East Devon Health Authority; ex parte Coughlan*<sup>47</sup> (*Coughlan*). In that case, the relevant decision maker had promised a disabled person that premises to which she was being shifted would be her “own for life”. Later it was decided to close those premises. It was held the disabled person should have been afforded a fair hearing before that decision was taken. However, the Court of Appeal went further. It held that a legitimate expectation could be the source of substantive rights. It based this upon the view that the failure of the decision maker to accord the expectation would involve an “abuse of power”. Lord Woolf MR also referred to an earlier decision of the English Court of Appeal in which it had been said that, in its application to substantive benefits, the doctrine of legitimate expectations is “akin to an estoppel”.

In *R v Inland Revenue Commissioners; ex parte Preston*<sup>48</sup> Lord Templeman had placed “abuse of power” in conjunction with breach of the rules of natural justice as remedies for judicial review. In *R v Secretary of State for Education and Employment; ex parte Begbie*<sup>49</sup> Laws LJ had spoken of “abuse of power” as the rationale for the general principles of public law.

### Private law estoppel

In *R v East Sussex County Council; ex parte Reprotech (Pebshan) Ltd*<sup>50</sup> Lord Hoffman, in a speech concurred in by the other Law Lords, approved the Coughlan decision and said:

“There is, of course, an analogy between a private law estoppel and the public law concept of the 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.....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”.

As Sir Anthony Mason points out, these remarks indicate how the substantive protection of legitimate expectations has occupied the space in public law which is occupied in private law by estoppel<sup>51</sup>.

In England, the common law requires that a legitimate expectation be considered by the decision maker; that effect should be given to the expectation unless there are legal reasons for not doing so; and that, if effect is not given to the expectation, fairness requires the decision maker to give reasons for the conclusion. If there are policy considerations which militate against giving effect to the expectation, the decision maker must make the decision in the light of the legitimate expectation, and failure to do so will vitiate the decision. In *R v London Borough of Newham and Bib*<sup>52</sup> the Housing Authority made a promise to the applicants that it would provide legally secure housing accommodation within 18 months. The Authority did not honour its promise. The English Court of Appeal held that, in coming to its decision, the Authority failed to take account of the legitimate expectation and that therefore the decision was vitiated. The Court declined to make the decision itself, but it was for the Authority to consider the matter afresh. 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 had a legitimate expectation that they would be provided by the Authority with suitable accommodation in a secure tenancy.

The late Justice Selway said that Lord Woolf's comment in *Coughlan* that the over-riding principle he views, as supporting administrative law, is preventing "abuses of power" and that this cannot be explained by any theory based upon *ultra vires*<sup>53</sup>. In *Lam*, McHugh and Gummow JJ said that *Coughlan* is concerned with judicial supervision of administrative decision making by the application of certain minimum standards, and that this represented an attempted assimilation into the English common law of doctrines derived from European civilian systems. Furthermore, without a written constitution, there is no distinct legal concept of a State, to which distinct principles could be attached, as there is in Australia<sup>54</sup>.

Legitimate expectation has some common features with estoppel. In both England and Australia estoppel has been held not to apply in public law. Estoppel depends upon an unambiguous representation which has induced an assumption by the applicant, and the applicant has reasonably acted in reliance upon it. Where there is evidence that the applicant would rely upon the representation which the administrator has departed from, the Courts have held in private law cases that it would be unconscionable to permit the administrator to depart from the assumption. It can be seen therefore that estoppel may form a substantive protection<sup>55</sup>.

In *Minister for Immigration, Local Government and Ethnic Affairs v Kurtovic*<sup>56</sup>, Gummow J dismissed the concept of unfairness in a substantive sense, though French CJ speaking extrajudicially allowed that estoppels applying in public law are not foreclosed by current authority<sup>57</sup>.

### **The potential for development of substantive protection in Australian administrative law: never say never**

Since retiring Sir Anthony Mason, writing extra-judicially, has said:

"If, however, one accepts that a legitimate expectation is a legal concept which is entitled 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<sup>58</sup>".

It is the perceived constraints flowing from the Australian separation of powers doctrine and the *ultra vires* doctrine that has meant that in Scotland, England, Canada and New Zealand more thorough going review is undertaken than in Australia.

Perhaps these constraints upon administrative action in Australia are more perceived than actual. After all, the Commonwealth Constitution is itself a document founded upon the common law and gives expression to common law principles. One of the common law's most ancient principles is that of natural justice, the early history of which is adumbrated at the beginning of this paper. The common law, of which natural justice is part, informs the exercise of judicial power under the Constitution. Recently French J<sup>59</sup> cited the comments of Mason CJ, Dawson and McHugh JJ in *Leeth v The Commonwealth*<sup>60</sup> where any attempt by the legislature to cause a court to act contrary to natural justice would be to impose a non-judicial requirement inconsistent with the exercise of judicial power. On 23 June 2010 in *Saeed v Minister for Immigration and Citizenship* 2010 HCA 203, in a joint judgment the High Court decided section 51A of the *Migration Act 1958 (Cth)* did not apply to an offshore applicant and therefore the Court did not determine the further argument as to whether

section 51A, which stated the section was an exhaustive statement of natural justice “in relation to the matters it deals with” was an impermissible direction to the Court undermining the exercise of judicial power under Chapter III of the Constitution.

The required observance by administrative decision makers of the principles of natural justice, breach of which can render their decisions *ultra vires*, ought not to be seen as an invasion of the administrative function by courts if the judicial intervention extends beyond procedural to substantive rights, as it does already in Britain. After all, *Wednesbury's* unreasonableness, to which Australian Courts have given at least partial acceptance, has some similar features to proportionality. Proportionality requires the reviewing court to assess the balance which the decision maker has struck, and may require consideration of the relative weight given to different factors. In *R v Secretary of State the Home Department ex parte Daly*<sup>61</sup> the House of Lords applied proportionality where prison policy required all persons to be absent from their cells while searches, which extended to their legal correspondence, were carried out. It was held that to do so interfered with the prisoners' common law entitlement to legal professional privilege. It was considered that the interference went beyond any legitimate need to protect the public interest.

As Sir Anthony Mason says, the *Boilermakers* case<sup>62</sup> seems “to be set in concrete”.

The incompatibility test favoured by Williams J in the *Boilermakers* case, but rejected by the Privy Council, would have enabled a court to perform administrative as well as judicial functions as long as the administrative functions are compatible with the court's judicial functions. But it should not follow that a court is performing administrative functions because it imposes upon administrative decision makers obligations to require observance of, for example, minimum standards of human rights, to require honest dealing between government, its citizens and the wider community, and to check abuse of power whatever form that abuse may take.

Substantive protection can surely be given effect within an evolving definition of what constitutes *intra* and *ultra vires* action, without incurring the accusation that the courts are invading an administrative decision maker's discretionary powers because these powers are required to be exercisable within suitable evolving common law boundaries.

#### Endnotes

- 1 Paul's letter to the Corinthians 1 Chapter 13 v 12: “For now we see through a glass darkly; but then face to face; now I know in part; but then shall I know even as also I am known”.
- 2 See CG Weeramantry, *The Law in Crisis* (Capemoss, 1975) pp 185-187
- 3 *Ridge v Baldwin* [1964] AC 40
- 4 Sir William Wade, *Administrative Law* (Oxford University Press, 8th ed) p 436
- 5 Justice Gummow, 'A Permanent Legacy' (2000) 28 *Federal Law Review* 177 at [180]
- 6 Bradley Selway, 'The Principle behind common law and judicial review of administrative action – the search continues' (2002) *Federal Law Review* 8
- 7 (1990) 170 CLR 1
- 8 See C Forsyth, *Judicial Review and the Constitution* (Heat and Light a plea for Reconciliation *ibid* at [396]) (Hart Publishing, 2000)
- 9 1863 14 CBNS 1280 at [1295] [143ER 414 at 420]
- 10 Sir Anthony Mason, 'The Foundations & Limitations of Judicial Review' 31 *AIAL Forum* at p 9
- 11 (1992) 170 CLR 596
- 12 *Re Minister of Immigration Multi-cultural Affairs ex parte Miah* 2001 75 ALJR 889 at 896 citing *Kioa v West* 1985 159 CLR 550
- 13 Sir Anthony Mason, 'The Foundations and Limitations of Judicial Review' 31 *AIAL Forum* at p12
- 14 (1977) 137 CLR 461
- 15 (1985) 159 CLR 550 at [615]
- 16 (1990) 169 CLR 648
- 17 *Re Refugee Tribunal: ex parte Aala* [2000] 204 CLR 82 at [41]
- 18 (2003) 198 ALR 59
- 19 (2003) 198 ALR 59 at [34]

- 20 In *Reid v Secretary of State for Scotland* [1999] 2AC 512 at 541-2 Lord Clyde said “.....the decision may be found to be erroneous..... as for example, through the absence of evidence or of sufficient evidence to support it.....” (emphasis added) cited by McHugh and Gummow JJ in S120 of 2002 as representing the broader basis for the review in Britain.
- 21 [1948] 1 KB 223 per Lord Greene MR
- 22 See for example *McAleeer v UWA (No 3)* [2008] FCA 1490 where Siopis J found no legal basis for staying for abuse of process disciplinary charges brought against a Professor under a collective agreement (1995) 184 CLR 163
- 23 Craig *ibid* at [179]
- 24 *MIMA v Yusuf* (2001) 180 ALR 1 at [21]
- 25 Sir Anthony Mason, 'The Scope of Judicial Review' 31 *AIAL Forum* at [31]
- 26 Sir Anthony Mason, 'The Foundation and the Limitations of Judicial Review' 31 *AIAL Forum* 1-4
- 27 Robert Lindsay, 'The Constitutional and Statutory Breadth of Judicial Review under Australian Federal and State Law' 52 *AIAL Forum* 32
- 28 [1969] 2CH 149 at [170]–[171]
- 29 (1977) 137 CLR 487 at [514]
- 30 *ibid* Aitken J at [536]
- 31 (1998) 196 CLR 328
- 32 (1990) 170 CLR 1
- 33 (1995) 183 CLR 273
- 34 (1992) 176 CLR 1 at [38]
- 35 *Teoh* at [34]
- 36 (2002) 195 ALR 502
- 37 See article, Henry Burmester AO QC, 'Teoh Revisited after Lam' 40 *AIAL Forum* 33
- 38 Lam *ibid* McHugh & Gummow JJ at [105]
- 39 *Lam* at [91]
- 40 (1990) 169 CLR 648 at [681]
- 41 Lam *ibid* at [99]
- 42 Lam *ibid* at [105]
- 43 [1983] 2 AC 629
- 44 Lam *ibid* McHugh & Gummow JJ at [83]
- 45 Lam *ibid* Callinan at [148]
- 46 [2001] QB 213 (2001)
- 47 (1985) AC 835 at [862]
- 48 (2000) IWLR 1115 at [1129]
- 49 (2002) UKHL 8
- 50 'The Scope of Judicial Review' 31 *AIAL Forum* at [40]
- 51 [2001] EWCA Civ 607; reversed on appeal 2002 UKHL 3
- 52 *ibid* 2002 Federal Law Review 8 at p 6
- 53 Lam *ibid* McHugh and Gummow JJ at [73] and [74]
- 54 See Alexandra O'Mara, 'Estoppel against Public Authorities' 42 *AIAL Forum* 1
- 55 *MIEA v Kurtovic* [1990] 21 FCR 193
- 56 'The Equitable Geist in the Machinery of Administrative Justice' (2003) 39 *AIAL Forum* 1
- 57 'The Scope of Judicial Review' (2001) 31 *AIAL Forum* 43
- 58 *International Finance Trust Company Ltd v NSW Crime Commission* (2009) HCA 49 (12 November 2009) at [55]
- 59 (1992) 174 CLR 344 at [470]
- 60 (2001) 3 All ER 433, 446-7
- 61 *R v Kirby; ex parte Boilermakers Society of Australia* (1956) 94 CLR 254