the rational development of this branch of the law requires acceptance of the view that the rules of procedural fairness are presumptively applicable to administrative and similar decisions made by public tribunals and officials.

In the *Teoh* case this required the decision maker to bring to the applicant's attention the critical issues and factors by which the administrative decision would be finally determined. Teoh was informed by the decision maker that character would be a key determinant in the final decision but that other considerations, especially family concerns, would be taken into account. To follow the path of reasoning used by the majority on the High Court is to take an unnecessarily convoluted path to the same point reached by Justice McHugh.

By importing the principles of Conventions like the United Nations Convention on the Rights of the Child via the concept of legitimate expectations, the High Court is undertaking a fundamental transformation of Australian administrative law. Every administrative decision maker, at Commonwealth/State or local government level, will now need to ensure that their decision-making processes have not neglected a crucial requirement of any one of several hundred ratified international conventions.

The majority decision in *Teoh* seems strange because other potential grounds for challenging the decision appeared far more feasible and did not need to invoke a major development in the common law. A challenge could have been mounted on the grounds that the decision maker had failed to take into account a relevant factor, made an unreasonable decision or inflexibly applied a policy. On the facts, the decision maker's processes avoided all of these errors and did not take any adverse factor into consideration without the applicant having timely notice and the opportunity to be heard on the matter. In the end the case seemed to come down to four judges considering that the decision maker had failed to adequately take the interests of the children into account in relation to Mr Teoh's application and one judge reaching the contrary conclusion.

The ten years since *Kioa v West* has seen the High Court lay the foundations for a first class system of administrative law with the notable absence of the keystone of a common law requirement to provide reasons. The foundation has been established on the theory of a combined green light/red light approach to the control of administrative decision making. A decision maker who has ensured that their decisions satisfy certain minimal threshold requirements has been free to decide without further restrictions. They have a green light. Where a decision maker fails to meet these minimum threshold requirements (opportunity to be heard in relation to adverse material, flexible application of policy or no omissions of significant relevant factors) in the full matrix of circumstances surrounding that decision they would be stopped by a red light. *Teoh* may now have given us a flashing amber approach to regulating administrative decision making. Decision makers will now have to look left, right and then take a punt that there is no applicable Convention hanging around.

The High Court can escape the confusion and uncertainty of this detour into the amber light area of controlling decision making by abandoning the concept of legitimate expectation. Three judges including the new Chief Justice, McHugh and Dawson have expressed strong reservations about the concept. With the replacement of Chief Justice Mason with Justice Gummow, the opportunity exists for the High Court to endorse Justice McHugh's preferred approach to the issue of procedural fairness as a presumptive right or absolute common law requirement which then requires a consideration of what level of procedural fairness is required in all the circumstances of any particular decision. Administrative decision makers would do better to ensure they exceed the minimal level of procedural fairness required in a particular case than to attempt to accommodate unknown legitimate expectations arising out of the decision of the Commonwealth Executive to ratify an international Convention.

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ANTI-DISCRIMINATION

Fixing the Brandy prohibition

ANDREA DURBACH reports on a recent High Court decision which rendered anti-discrimination legislation unconstitutional.

Enforcement provisions in the Commonwealth *Racial Discrimination Act* in effect since 1993 were ruled unconstitutional by the High Court in *Brandy v HREOC* (1995) 127 ALR 1 in February this year. The decision also affects the enforcement provisions of the Commonwealth sex, disability and privacy Acts. The Commonwealth has responded by reviewing key aspects of anti-discrimination legislation, seeking to devise legitimate enforcement mechanisms. Hopefully, the features of accessibility and expedition, which characterised the now invalid provisions, can be retained.

The implementation of federal human rights legislation in Australia over the last decade provided a blueprint for dispute resolution in a modern democracy. Informal and low-cost procedures characterised the operation of the legislation, which included conciliation and the expeditious registration of decisions, making them enforceable without the need for a protracted re-hearing before a court. The *Brandy* decision has dealt a blow to the progressive enforcement provision which, in the words of the President of the Australian Law Reform Commission, Alan Rose, 'was designed to save time and money and be more user-friendly'.

Following the decision, the Attorney-General, Michael Lavarch, announced a two-stage response:

(1) the interim reinstatement of the pre-1993 enforcement mechanism, to be implemented by the introduction of a Bill in late May;
(2) the appointment of a Review Committee to consider the options for a new and permanent enforcement scheme.

The challenge facing the Review Committee is to formulate a mechanism which guarantees the user-friendly emphasis of the previous legislation while ensuring enforcement of decisions rests with courts, as required by the Constitution. To this end, the Attorney-General's office has conducted a series of consultations with various organisations (including representatives of the National Association of Community Legal Centres) to discuss draft proposals prior to the Review Committee reporting to the Government in June.

The effectiveness of discrimination legislation is judged to a large extent on whether there is compliance with orders made. Despite the Government's commitment to introduce new measures appropriate to a human rights jurisdiction, reverting to the old enforcement mechanisms provides little incentive for those complained against to conciliate or settle complaints. Worse still, complainants who have substantiated their complaint before the Human Rights and Equal Opportunity Commission, will have to duplicate the process in costly proceedings in the Federal Court to enforce the decision.

While the *Brandy* decision may have resulted in unpalatable interim arrangements, it has allowed for a some considered participation in law making by those best placed to advise — the clients or users of the legislation and their advocates. The consultations with the Attorney-General's Office have triggered discussions beyond the enforcement question, covering issues such as:

the most appropriate jurisdiction for the determination of human rights matters and the possible establishment of a Human Rights Court;

the qualifications and expertise of adjudicators;

the extent to which legal representation of parties impedes the resolution of complaints;

a right of appearance by non-legal advocates for complainants;

the making of costs orders, particularly where the Commission has determined a complaint substantiated.

It is timely to reconsider the broad implications of 'anti-discrimination legislation . . . designed for the weak' but operating only for survival by the strongest (Associate Professor Phillip Tahmindjis).

Andrea Durbach is Assistant Director of the Public Interest Advocacy Centre, Sydney.

LITIGATION

Class actions get go ahead

AMANDA CORNWALL reports that class actions will be allowed in much wider circumstances in State courts following a February decision of the High Court.

In *Carnie v Esanda Finance Company Ltd* 127 ALR 76, the High Court gave a unanimous decision favouring class actions, giving a wide interpretation to Rule 13(1) of the NSW Supreme Court Rules. Of particular importance was the meaning given to the term 'same interest'. The decision makes it clear that representative proceedings can now proceed even where members of the class have separate contracts with the defendant and where damages are sought.

The case has inspired public interest lawyers around Australia because it affects the interpretation of class actions procedures in all States. Similar, though more detailed, rules exist in other States, which have been interpreted narrowly by cautious State Supreme Courts.

In his reasoning Judge McHugh said:

> The cost of litigation often makes it economically irrational for an individual to attempt to enforce legal rights arising out of a consumer contract. Consumers should not be denied the opportunity to have their legal rights determined when it can be done efficiently or effectively on their behalf by one person with the same community of interest as other consumers. Nor should the court's list be cluttered by numerous actions when one action can effectively determine the rights of many.

Mr and Mrs Carnie, farmers in New South Wales, can now bring proceedings against Esanda Finance Corporation on a representative basis, under the New South Wales Supreme Court rules. They will be acting on behalf of other consumers who entered into the same loan contracts with Esanda and were similarly affected, known as the 'class'.

Coalition for class actions

Inspired by the High Court's support for class actions, the Public Interest Advocacy Centre have teamed up with Consumer Credit Legal Centre and other groups in New South Wales to form the Coalition for Class Actions. The Coalition is concerned that the benefits of the High Court decision will be thwarted by a conservative approach to interpreting the rules by the superior courts of New South Wales.

When the Carnies appeared before the NSW Court of Appeal in 1992 the majority of the Court said that if class actions are to operate in NSW as they do in the Federal Court, there should be legislative direction.[1] The Supreme Court rules they said, were inadequate for that purpose as they do not deal with issues such as service, notice, whether people can opt in or out of the class, the conduct of proceedings, and discontinuance or settlement.

The Coalition is based on the national Coalition for Class Actions which successfully lobbied the Commonwealth Government to introduce legislative procedures for class actions in the Federal Court in 1992. Arguments for enhanced representative proceedings class actions were convincingly argued at the time in a number of reports prepared for the Government. These included two reports prepared by the Coalition for Class Actions, in 1990 and 1991, and a report by the Australian Law Reform Commission *Grouped Proceedings in the Federal Court* in 1988.

The Federal Court Model

The class actions procedures in the Federal Court have proven to be fair and effective since they came into force in 1993. There has not been a flood of unreasonable claims by nuisance consumers as predicted by its opponents in 1992.

The Coalition for Class Actions wants to see the class actions provisions in Part IVA of the *Federal Court Act* introduced for superior courts in New South Wales. They believe it would:

- provide legislative direction, and certainty on procedural issues;
- accommodate related legislative issues, such as limitations periods, which could not be covered in Court Rules;

provide consistency with the Federal Court, facilitating cross vesting; and

avoid the current opportunities for forum shopping.

One important amendment to the Part IVA model is advocated by the Coalition — a provision for appropriate mecha-