ADMINISTRATIVE LAW — THE EMERGING ROLE OF CONSTITUTIONAL AND PRIVATE LAW REMEDIES

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Edited version of a paper presented to a joint Australian Corporate Lawyers Association / Australian Institute of Administrative Law seminar held on 30 May 2001 in Canberra, entitled "Administrative Law—What Now?".

This afternoon I will address four issues.

The first three issues are related to the notion of an integrated system of administrative review as outlined by the Kerr Committee.

First is the expansion of concepts of standing upon applications in equity for injunctions or declarations directed to the enforcement of public duties; and the consequent expansion of the availability of the injunction and declaration as a public law remedy.

Second is very recent High Court consideration of the nature of "standing" requirements under the *Administrative Decisions (Judicial Review) Act 1977* (ADJR Act) and the *Administrative Appeals Tribunal Act 1975* (AAT Act).

Third is the dispensing with the separate requirement for standing on an application which enlivens the jurisdiction to grant a constitutional writ.

In the short term these three developments mean that government agencies and their officials cannot rely on the statutory administrative law regime as if it were a code of administrative review. There is an expanding class of persons with an expanding range of remedies available to them capable of enlivening the jurisdiction of the court to control the performance of public functions.

In the medium term it might well be that following the High Court's decision on the appeal in *Allan v Transurban City Link Limited*[1] (*Allan v Transurban*), the oral arguments of which occurred in Melbourne on 23 May 2001, retention of an "integrated system of administrative review" will require a more fundamental examination of the questions of the qualification of applicants for merits review and for review under the ADJR Act.

The fourth issue I address is the potential direct applicability of judicial review remedies to non statutory governmental functions and to the providers of at least some contracted out services. That was a question not addressed by the Administrative Review Council (ARC) in its contracting out report.[2] It has nevertheless been a live issue since the 1986 decision of the English Court of Appeal in the *Datafin* case.[3]

The state of Australian authority since that case suggests that public law remedies could run to public or private entities which exercise public functions, exercise functions which have

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1 (1999) 168 ALR 687.

2 "The Contracting Out of Government Services", ARC Report No. 42.

3 *R v Panel on Takeovers and Mergers, ex parte Datafin plc & Anor* [1987] 1QB 815

public law consequences or whose functions include a public element. It is now clear law that there is no requirement that the decision or conduct impugned be made under a statute.

Further there would appear to be nothing in constitutional case law to prevent the High Court from holding that the provider of an outsourced government service was, at least to the extent of the performance of that service, an "officer of the Commonwealth" for the purposes of grounding the constitutional writs jurisdiction.

I do not seek to deal in this paper with the recent developments in the law of procedural fairness and suggestions emanating from the High Court that there may be a constitutional base to requirements to act fairly. Nor do I seek to deal with Migration Act issues.

The Expansion of "Standing" in Equity

Sir Anthony Mason said:

> equitable relief in the form of the declaration and the injunction has played a critical part in shaping modern administrative law which, from its earliest days, has mirrored the way in which equity has regulated the exercise of fiduciary powers.[4]

Where legislation did not confer a private right or interest, English law developed to deny to the private citizen standing to obtain the declaration or injunction to enforce a duty owed only to the public. Rather, such relief was available only on suit by the Attorney-General or with the fiat of the Attorney-General.

That position was somewhat ameliorated by *Boyce v Paddington Borough Council*[5] in which a private party was found to have a sufficient equity to obtain an injunction to prevent the commission of a public nuisance.The rule in *Boyce's* case was developed, arguably beyond recognition, by the High Court in a series of cases.[6] Through these decisions it became clear that a citizen with "a special interest in the subject matter of the action" had standing to obtain a declaration or injunction to enforce a public duty.

That rule was flexible in nature and the subject matter of the litigation dictated what amounted to a special interest. Thus a curial assessment of the importance of the concern which a plaintiff has with the particular subject matter of the litigation and the closeness of that plaintiff's relationship to that subject matter was required. As a consequence the Court found that a member of an Aboriginal community had standing to enforce the provisions of heritage protection legislation by reason of her special connection to the particular items of heritage significance which were the subject of the litigation.[7] Similarly the union representing shop assistants had standing to enforce legislation relating to shop opening hours.[8]

The decision of the High Court in *Batemans Bay Local Aboriginal Land Council v The Aboriginal Community Development Fund Pty Limited* (*Batemans Bay Land Council*)[9]

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4 Sir Anthony Mason: "The place of equity and equitable remedies in the contemporary common law world" [1994] 110 *Law Quarterly Review* 238

5 [1903] 1 Ch 1009

6 *Australian Conservation Foundation v Commonwealth* (1980) 146 CLR 493; *Onus v Alcoa* (1981) 149 CLR 27; *Shop Distributive and Allied Employees Association [SDA] v Minister for Industrial Affairs* (1995) 183 CLR 552

7 *Onus v Alcoa*, above n 6.

8 *SDA v Minister for Industrial Affairs*, above n 6.

9 (1998) 194 CLR 247

significantly expands the availability of declarations and injunctions to enforce public law. In that case the Aboriginal Community Benefit Fund Pty Limited was established under the Corporations Law. It conducted a business of operating a contributory funeral benefit fund. The Batemans Bay Local Aboriginal Land Council was constituted by and derived its functions from the Aboriginal Land Rights Act 1983 (NSW). It also received funds through the New South Wales Aboriginal Land Council to assist in the financing of its activities. Those funds were sourced from land taxes imposed in New South Wales. The Batemans Bay Local Aboriginal Land Council proposed to establish a contributory funeral benefit fund. That was beyond the statutory functions conferred on it under the Aboriginal Land Rights Act.

The substantive issue in the case was defined by McHugh J in the following terms:

> whether a public corporation is acting contrary to a statute in the way that it disburses public funds and enters into contractual arrangements.[10]

The majority of the Court[11] stringently criticised continuing reliance on the *Boyce* principle in Australian public law. In dicta the majority said that

> it may well be appropriate to dispose of any question of standing to seek injunction or other equitable relief by asking whether the proceedings should be dismissed because the right or interest of the plaintiff was insufficient to support a justiciable controversy, or should be stayed as otherwise oppressive, vexatious or an abuse of process.[12]

That is, their Honours suggested that there might not be a requirement for standing to ground an application for an injunction or declaration to enforce public duties. Where a mere stranger to a dispute seeks such a remedy the discretion to refuse the remedy may be more readily exercised.

Their Honours based their decision on the following reason:

> The first question is why equity, even at the instance of the Attorney-General, would intervene. The answer given for a long period has been the public interest in the observance by such statutory authorities, particularly those with recourse to public revenues, of the limitations upon their activities which the legislature has imposed. Where there is a need for urgent interlocutory relief, or where the fiat has been refused, as in this litigation, or its grant is an unlikely prospect, the question then is whether the opportunity for vindication of the public interest in equity is to be denied for want of a competent plaintiff. The answer, required by the persistence and modified form of the *Boyce* principle, is that the public interest may be vindicated at the suit of a party with a sufficient material interest in the subject matter. Reasons of history and the exigencies of present times indicate that this criterion is to be construed as an enabling, not a restrictive procedural stipulation.[13]

While there may remain some particular restrictions on the availability of injunctions and declarations to enforce provisions of the criminal law, the reasoning in *Batemans Bay Land Council* establishes that in proceedings in which a plaintiff seeks to enforce a public duty, or to confine the functions of a public authority to their statutory limits, the law of standing will be “an enabling, not a restrictive, procedural stipulation”.

A stranger can now obtain declarations and injunctions to enforce such public duties. Whether the stranger will succeed will be a matter of discretion exercised by reference to factors including the nature of any interest in the subject matter of the litigation.

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10 Ibid, p 284

11 Gaudron, Gummow and Kirby JJ

12 Ibid, p 263.

13 Ibid, p 267.

Standing Under Federal Administrative Review Statutes

There are three separate tests of standing, or more accurately entitlement to apply for review, under the Federal statutory administrative review arrangements.

First, judicial review is available under the ADJR Act to a person aggrieved by a decision to which that Act applies.[14] A reference to a person aggrieved by a decision in that Act includes a reference to a person whose interests are adversely affected by the decision.[15] This "at least covers a person who can show a grievance which will be suffered as a result of the decision complained of beyond that which he or she has an ordinary member of the public".[16]

Second there is the formulation used in provisions conferring "jurisdiction" on the AAT (and providing for internal review of rights). That term varies – the usual terms include "a person whose interests are affected" by the decision[17] and "a person affected by the decision"[18]

The third relates to section 27 of the AAT Act which provides that an application may be made by or on behalf of any person whose interests are affected by the decision.

There is no textual difference between the provisions in the ADJR Act and AAT Act. It is interesting to note the characterisation of the wording of this provision (at least in the context of the Therapeutic Goods Act) given by the majority of the High Court in the *Batemans Bay Land Council*. There their Honours[19] said:

> Upon the true construction of its subject, scope and purpose, a particular statute may establish a regulatory scheme which gives an exhaustive measure of judicial review at the instance of competitors or other third parties. An example is the special but limited provision by the legislation considered in *Alphafarm Pty Limited v Smith Kline Beecham (Australia) Pty Limited* for judicial review of successful applications for registration.

In the case of *Allan v Transurban*[20] a Full Court of five Federal Court justices based their decision on the reasoning of the earlier Full Federal Court in *Alphafarm v Smith Kline Beecham (Australia) Pty Limited* referred to in that passage.

In the High Court hearing of *Allan v Transurban* the following exchange occurred between counsel for the applicant to the AAT and the Justices:

> **MR DREYFUS: …** We say that that is really where the error made by the second Full Court lies, and I wanted to take your Honours to a particular passage in the decision of the second Full Court, which is at page 216 of the appeal book, paragraph 50 of the judgment. That is where their Honours summarised the effect of the judgment. They said:
>
> > In summary, the question of standing to review an administrative decision is to be determined by reference to the interest which the applicant has in the decision which is under review. It is to be determined by reference to the nature and subject matter of the review and the relationship which the applicant individually or a representative body may have to it. An interest in the outcome of the review may give standing. But there will be no standing where the actual outcome of the review will not affect the applicant.

14 section 5(1)

15 section 3(4)(a)(i)

16 Per Ellicott J in *Tooheys Limited v Minister for Business and Consumer Affairs* (1981) 36 ALR 64

17 See for example *Alphafarm Pty Limited v Smith Kline Beecham (Australia) Pty Limited* (1994) 121 ALR 373

18 *Allan v Transurban City Link Limited* High Court M90/2000 transcript of 23 May 2001

19 Gaudron, Gummow and Kirby JJ (1998) 194 CLR 247 at 266

20 *Transurban City Link Limited v Allan* (1999) 168 ALR 687

> Then they say: "There will be a question of degree involved in many cases."
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> **GUMMOW J**: That is all put at some level of generality, which I do not understand, I am afraid.
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> **MR DREYFUS**: We say not only is it put at a level of generality, your Honours, but it is incorrect to say that the question of whether or not Mr Allan's interests are affected by the decision, or whether he is affected by the decision, is to be determined in the way that their Honours have here stated.
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> **GUMMOW J**: I mean, what *Boyce v Paddington Borough Council* has to do with this statute, I cannot imagine.
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> **MR DREYFUS**: That point was already made on the special leave application, your Honours, and I do not apprehend that anybody here before your Honours today is going to contend that it has anything to do with this case.
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> **KIRBY J**: It is all because we see it so many times that lawyers' minds get locked into common law notions and they resist looking at legislation. They hate it.
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> **MR DREYFUS**: We would respectfully endorse your Honour's comments.
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> **KIRBY J**: It happens all the time. There are so many recent cases where people will not look at the legislation."

Making every attempt to avoid the trap identified by Kirby J the following can be said:

- Gaudron, Gummow and Kirby JJ, at least in the context of the Therapeutic Goods Act, appear to regard the wording of the provisions conferring an entitlement to apply for merits review under the AAT Act and judicial review under the ADJR Act to be "special but limited".[21]

- In the case of applications to the AAT the Court seems to have contemplated in argument in *Allan v Transurban* that there will be two "gates" through which an applicant must pass; the statutory provision conferring an entitlement to apply to the AAT, and section 27 of the AAT Act.

- In argument in *Allan v Transurban* some members of the Court were clearly exploring ways in which the phrases "person affected" and "person whose interests are affected" might be given a broader meaning than has been understood to date.

- To the extent that that phrase is given a meaning in the context of merits review which is broader than it is given in the context of the ADJR Act there will be created an asymmetry in the scheme of statutory judicial review.

- Whatever meaning is given by the Court to those phrases in *Allan v Transurban* the preconditions for obtaining relief under the ADJR Act and AAT Act now appear to be significantly more stringent than are the standing requirements of equity.

It may be that the decision of the High Court in *Allan v Transurban* will be limited to an interpretation of the particular Act there in question – the Development Allowance Authority Act. If the reasoning goes further to articulate a significant difference in the content of the test for persons entitled to apply for merits review to that applying in respect to judicial review, the maintenance of an integrated statutory scheme of judicial review could require legislative amendment.

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21 Per Gaudron, Gummow and Kirby JJ in *Batemans Bay Local Aboriginal Land Council*

The Constitutional Writs

The High Court has original jurisdiction in all matters in which a writ of mandamus or prohibition or injunction is sought against an officer of the Commonwealth[22]. A counterpart jurisdiction is conferred on the Federal Court of Australia by the *Judiciary Act 1903* (Cth).[23] These writs, since *Aala's* case[24] are properly known as constitutional writs.

In *Aala's* case a majority of the Court[25] held that the Constitution confers on the High Court the jurisdiction and the power to ensure that:

> all officers of the Commonwealth .. are rendered accountable in this Court to the Constitution and the laws of the Commonwealth. Being the means by which the rule of law is upheld throughout the Commonwealth [s75(v) of the Constitution] is not to be narrowly construed or the relief grudgingly provided.[26]
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> The jurisdiction and power is to be exercised against "the background of the animating principle … [that] those exercising Executive administrative powers are as much subject to the law as those who are or may be affected by the exercise of those powers. It follows that, within the limits of their jurisdiction and consistent with their obligation to act judicially, the Courts should provide whatever remedies are available and appropriate to ensure that those possessed of Executive and administrative powers exercise them only in accordance with the laws which govern their exercise. The rule of law requires no less.[27]

In *Croome v Tasmania*[28] Gaudron, McHugh and Gummow JJ held that:

> Where the issue is whether the Federal jurisdiction has been invoked with respect to a "matter" questions of "standing" are subsumed within that issue.

It is clear that for these purposes "matter" means the subject for determination in a legal proceeding and not the legal proceeding itself.

In *Truth About Motorways*[29] a majority of the Court accepted that an application for a constitutional writ seeking the exercise of the judicial power of the Commonwealth under section 75(v) of the Constitution may be made by a "stranger".[30]

> There is no basis for concluding that either the concept of "judicial power" or the constitutional meaning of "matter" dictates that a person who institutes proceedings must have a direct or special interest in the subject matter of those proceedings… there may be cases where absent standing there is no justiciable controversy. That may be because the Court is not able to make a final and binding adjudication. To take a simple example, the Court could not make a final and binding adjudication with respect to private rights other than at the suit of a person who claimed that his or her right was infringed. Or there may be no justiciable controversy because there is no relief that the Court can give to enforce the right, duty or obligation in question.

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22 Constitution section 75(v)

23 Section 39B

24 *Re Refugee Review Tribunal; Ex parte Aala* (2000) 176 ALR 219

25 Kirby J; Gleeson CJ, Gaudron and Gummow JJ were to the same effect.

26 Per Kirby J at paragraph 140 quoting *Re Carmody ex parte Glennan* (2000) 173 ALR 145 at 147 per Kirby J.

27 Per Gaudron and Gummow JJ at paragraph 55 quoting *Enfield City Corporation v Development Assessment Commission* (2000) 199 CLR 135 at 157 per Gaudron J. On this aspect Gleeson CJ and Hayne J agree with Gaudron and Gummow JJ.

28 (1997) 191 CLR 119

29 *Truth About Motorways Pty Limited v Macquarie Infrastructure Investment Management Limited* (2000) 74 ALJR 604

30 Gleeson CJ and McHugh J at paragraph 2

> There is nothing in the word "matter" appearing in Chapter III of the Constitution which demands a particular requirement as to standing … there is no holding of this Court to that effect in the many decisions which would address the requirements of Chapter III.[31]

Truth About Motorways establishes that there is no requirement for Chapter III judicial power for there to be any reciprocity of interests between the parties to a Chapter III "matter". The lack of interest in the matter by the stranger will go to inform the exercise of the discretion whether to grant relief[32]

Aala's case then establishes that these principles apply to applications for mandamus, prohibition and injunction under section 75(v) of the Constitution and probably extend to the grant of any ancillary relief (such as certiorari or declarations) appropriate to disposal of the particular matter. It follows that in respect of applications under section 75(v) of the Constitution a stranger may succeed in an application to enforce the public duties of an officer of the Commonwealth.

Thus the "standing" requirements of the general equitable jurisdiction to grant injunctions to enforce public duties and the constitutional writs jurisdiction have developed to be significantly more liberal than the statutory administrative review regime.

Supervision of Non-Statutory Functions

In *R v Panel on Takeovers & Mergers; ex parte Datafin PLC & Anor*[33] the English Court of Appeal held that the decisions of the Panel on Takeovers & Mergers were susceptible to judicial review, even though the body had no statutory basis and exercised no statutory power. This was based on the finding that the panel exercised de facto governmental powers backed by public law sanctions. A finding of fact was that the Panel was a key element of the government's approach to industry regulation of takeovers.[34]

In his judgment Lloyd LJ argued that the source of power test (which had previously been relied upon in England to determine whether or not a body could be susceptible to judicial review and which is at the heart of the Federal statutory administrative review regime) was not decisive in relation to whether power exercised under contract could be subject to judicial review. He said[35]:

> If the source of power is a statute, or subordinate legislation under a statute, then clearly the body in question will be subject to judicial review. If, at the other end of the scale, the source of power is contractual, as in the case of private arbitration, then clearly the arbitrator is not subject to judicial review. But in between these extremes there is an area in which it is helpful to look **not just at the source of the 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 have *public law consequences*, then that may be sufficient to bring the body within the reach of judicial review.

In the New South Wales Supreme Court decision in *Norths Ltd v McCaughan Dyson Capel Cure*[36] Young J held "…the fact that the non-member may not be able to enforce such rights contractually is probably by the by. Indeed, in the light of the **public law aspects** of the Stock Exchange's work under the Securities Industry Act…it may well be that a member of

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31 Per Gaudron J at paragraphs 43-47

32 See *R v Federal Court of Australia; ex parte National Football League* (1979) 143 CLR 190 at 201

33 [1987] 1 QB 815

34 At 835

35 At 847

36 (1988) 12 ACLR 739 at 745

the public could get an order in the nature of mandamus to compel the performance of art 63…"

This approach was later adopted in *Typing Centre of New South Wales v Toose*[37]. The decision in this case raises the main issue in the *Datafin* case, namely whether the determinations of the Advertising Standards Council (a body established by charter) – were susceptible to judicial review despite the fact its powers were not derived from legislation or the prerogative. "The fact that a body is self regulating…makes it not less, but more appropriate that it should be subject to judicial review by the courts"

In holding the relevant actions to be subject to judicial review, Mathews J applied the test of asking whether the ASC exercised **public functions**, or **functions which had public law consequences**, or whether there was a **public element in its functions**.

In *Victoria v Master Builders' Association*[38] the Supreme Court of Victoria followed the *Datafin* case to decide that a government taskforce which determined eligibility to tender for government construction work was amenable to public law supervision (and obliged to accord procedural fairness). The court had regard to "the nature of the power being exercised, the characteristic of the body making the decision and the effect of determining that the exercise of the power is not amenable to review". By looking at the subject matter of the power being exercised, it was held that the task force's decisions, if taken in the exercise of a public duty and affecting rights, interests or legitimate expectations of building contractors, were amenable to judicial review whether or not they derived from common law or from prerogative rather than statute. The Supreme Court found that the applicants (builders) should be granted declaratory relief: that they were entitled to procedural fairness. The remedy was available because of the public effect of the actions of the task force.

The constitutional jurisdiction looks to the status of the person performing the function – is he, she or it "an officer of the Commonwealth"?

In *Aala's* case Gaudron and Gummow JJ approved the reasoning of Bowen CJ in *Minister for Arts Heritage and Environment v Peko Wallsend Limited*.[39] That was a case in which Peko Wallsend sought to have set aside the decision of the Cabinet to seek listing of Stage 2 of Kakadu National Park on the World Heritage List. The passage in the judgment of Bowen CJ referred to with approval by Gaudron and Gummow JJ is as follows:

> Subject to the exclusion of non justiciable matters, the Courts of this country should now accept responsibility for reviewing the decisions of Ministers or the Governor-General in Council notwithstanding the decision is carried out in pursuance of a power derived not from statute but from the common law or the prerogative …

It is probably the case that in *Aala* Hayne J agreed with Gaudron and Gummow JJ on this point.

Thus public law remedies will be available to supervise the lawful conduct of the business of the executive branch of government, whether or not that conduct is made under an enactment. Further, public law may reach to supervise the conduct of private entities where that conduct involves a "public element". The constitutional writs will run to any minister or official – and may run to private parties performing functions for or on behalf of the government.

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37 unreported SCNSW 15/12/88

38 *Victoria v Master Builders' Association (Vic)* [1995] 2 VR 121

39 (1987) 15 FCR 274

Conclusions

The AAT Act and the ADJR Act only operate with respect to decisions (and relevantly, conduct) made under legislation. Further each of those Acts limits the class of persons who might apply for remedies under them. The precise scope of those limitations is currently before the High Court for clarification in *Allan v Transurban*.

The constitutional writs jurisdiction of the High Court (and the counterpart jurisdiction conferred on the Federal Court by the Judiciary Act) has now moved to be significantly broader than that provided by the statutory administrative review regime. The general equitable jurisdiction of the Supreme Courts has also developed to provide for public law remedies on application of a class of persons significantly broader than that entitled to apply for statutory remedies under the AAT Act or ADJR Act, in respect of a broader class of governmental, or public, functions.

The following clear issues emerge from this analysis.

First, statutory authorities and statutory agencies are subject to equitable and constitutional writ supervision to ensure that they do not stray from the performance of their statutory functions.

Proceedings can be taken to achieve that outcome by strangers with no direct or indirect interest in those proceedings.

Where a statutory authority or statutory agency strays from the proper limits of its statutory functions the grant of equitable or constitutional relief will be discretionary. In the exercise of that discretion the key factor will be as articulated by McHugh J in the *Batemans Bay Land Council*:

> It is hard to see how it could ever be contrary to the public interest to require a statutory corporation to spend its money and make contracts only in accordance with the statute which creates it and defines its powers and purposes.[40]

Second, where legislation in some way limits executive power equitable prerogative and constitutional remedies will be available to prevent the executive from transgressing those limitations.

For example, in *Brown v West*[41] the Remuneration Tribunal Act provided for the setting of remuneration for Members of Parliament. The High Court unanimously held that the executive power of the Commonwealth was conditioned by the Remuneration Tribunal Act such that the Minister for Administrative Services could not validly decide to provide remuneration to Members of Parliament other than in accordance with decisions of the Remuneration Tribunal. There was no issue in that case that any decision of the Minister was made under an enactment. The Federal statutory scheme of judicial review could not have applied to it. On the current state of law even a stranger to that decision might now succeed in an application for injunctions, declarations or the writ of prohibition to prevent any part of the executive government from acting inconsistently with the legislation in question.

The consequences for public administration and public law are very wide indeed. Conceptually it will only be where legislation which deals with public governance is held to be merely directory and not imposing any form of public duty that this consequence would seem to be excluded.

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40 (1998) 194 CLR 247 at 284

41 (1990) 169 CLR 195

The **third** potential consequence arises from the various suggestions emanating from the High Court that the executive power of the Commonwealth, and perhaps the prerogatives, are conditioned by a requirement to accord procedural fairness.[42] If there be such a limitation then public law remedies would seem to be available to prevent executive conduct without according the required procedural fairness. That would be a jurisdiction wholly divorced from the statutory judicial review regimes. It could have profound implications for the conduct of commercial transactions by the Commonwealth. In principle it is difficult to see how public law can operate to supervise the commercial conduct of the Australian Stock Exchange or the Advertising Standards Council but not operate to supervise similar conduct of government.

The **fourth** is the potential for public law remedies to be available to directly supervise the delivery of "governmental" services by outsourced service providers. Injunctions and declarations could be available as a matter of equity and the prerogative writs in common law – provided there is a "public" element to the function performed. The constitutional writs might be available as a matter of constitutional law on the basis that to the extent a person performs a government function he, she or it is an "officer of the Commonwealth". In each case the criterion for application might well be the nature of the function performed rather than the source of the power. Both the AAT Act and ADJR Act are framed by reference to the source of the power exercised.

If the continuance of an integrated system of Federal administrative review is a desirable objective the basic underpinnings of the AAT Act and ADJR Act need to be revisited. That revisitation will need to better align the entitlement of persons to apply for review under the statutory provisions with the law as it has developed in equity and in constitutional law.[43] It will also need to go significantly further than the ARC's Contracting Out Report to consider the nature of supervision of the performance of functions of a governmental nature – whether they are performed by entities owned by government, forming part of government or by private entities.

42 See for example the judgment of Gaudron and Gummow JJ in *Aala*, n 24.

43 See n 2.