LECTURE 3

AUSTRALIAN ADMINISTRATIVE LAW COMPARED WITH OVERSEAS MODELS OF ADMINISTRATIVE LAW

Substantive protection of legitimate expectation

Lecture II in this series concluded with a discussion of the substantive enforcement in England of legitimate expectation and a reference to the emphatic rejection by Gummow J in *Kurtovic*1 of the notion that a legitimate expectation is entitled to substantive rather than procedural protection. As noted in Lecture II, although *Attorney-General (NSW) v Quin*2 does not rule out substantive protection, the judgments do not offer much encouragement to the idea. As things presently stand, the difference between English and Australian law on this point illustrates, more strikingly than anything else, the cleavage between the English approach to judicial review and the Australian approach.

The principles of English Administrative Law place great emphasis on good administration, substantive fairness and consistency and equality of treatment. These principles are designed to promote and protect the substantive integrity of administrative decision-making. By way of contrast, the principles applied in Australia are less instrumental and are directed rather to substantive and procedural due process. The strict approach to *Wednesbury* unreasonableness3 is as close as the Australian principles get to substantive fairness. These principles reflect a continuing concern — some might say an undue concern — with the prospect of judges engaging in merits review.

This concern may stem from the dual system which operates in Australia — judicial review and merits review. It has no counterpart in England. The difference, however, may well have deeper roots. It may well lie in a stronger Australian political culture which is resistant to broad ranging judicial review, whether justified or not, while accepting merits review by administrative tribunals. It may well also lie in the emergence of a different political and judicial culture in England flowing from its engagement with Europe where the long tradition of strong bureaucratic government has not been confronted in the past by a stronger parliamentary tradition of the kind that has prevailed hitherto in Australia and the United Kingdom. It may also lie in the emerging differences in judicial methodologies that is applied in the two jurisdictions and as well the pervasive influence of the separation of powers doctrine in Australia compared with an emphasis on rule of law considerations in England.

(a) Other jurisdictions — New Zealand

If we look to other jurisdictions, we should count New Zealand as reflecting the English approach. Indeed, the New Zealand Court of Appeal moved towards "substantive unfairness" as a ground of review4 before it became clearly established as a ground of review in England as a result of the recent decisions of the English Court of Appeal and the House of Lords, beginning with *R v North and East Devon Health Authority; ex parte Coughlan*.5 With the advantage of hindsight, we now learn that substantive protection of legitimate expectation emerged in England as early as 1985.6

(b) Other jurisdictions — Canada

Canada stands in a different position. Canada has accepted that a legitimate expectation may give rise to procedural protection. But, so far, Canada has not accorded a legitimate expectation substantive protection. Yet Canada has differentiated between procedural fairness and legitimate expectation. The content of the former is dictated by the nature of the applicant's interest and the nature of the power, while the doctrine of legitimate expectation looks to the conduct of the public authority in the exercise of the power, including practices, conduct and representations.7 Thus the Canadian doctrine has a relationship with estoppel but differs from it.8

To the observer familiar with both Australian and English administrative law, the Canadian distinction between procedural fairness and legitimate expectation is unconvincing, unless legitimate expectation moves forward to the point of substantive protection. At that point, it would be sensible to distinguish between the two. An expectation sufficient to generate procedural protection would not necessarily be sufficient to generate substantive protection.

At this point it is convenient to refer to *Minister for Immigration and Ethnic Affairs v Teoh*,9 not for the purpose of discussing the decision itself and what has happened to it in Australia but to trace its reception overseas, notably in Canada. In *Teoh*, substantive protection was neither given nor contended for. Nonetheless it was a case in which the legitimate expectation might well have lent itself to substantive protection if it were available as a matter of law.

In Lecture II, I mentioned that *Teoh* had twice been referred to by the Privy Council10 without exciting the convulsions experienced by its Australian detractors. Of more interest for present purposes is the treatment of *Teoh* in the Supreme Court of Canada, in the course of which the Supreme Court rejected the notion that substantive protection would be accorded to a legitimate expectation.

The facts in *Baker v Canada (Minister for Citizenship and Immigration)*11 were similar to the facts in *Teoh*. Baker, who had arrived in Canada as a visitor in 1981, was ordered to be deported in 1992 as she had not obtained permanent resident status. She had four children in Canada and applied unsuccessfully for a stay of the order on humanitarian and compassionate grounds pursuant to the Immigration Act. Her request was refused. Canada had ratified but not implemented the Convention on the Rights of the Child, so the Convention had the same status in Canada as it had in Australia when *Teoh* was decided. In the Federal Court of Appeal, Strayer JA, writing for the Court, rejected an argument, based on *Teoh*, seeking to use the Convention as a vehicle for the generation of substantive rights. More significantly, Strayer JA did not accept that an unincorporated convention could be used for imposing constraints on officials in whom the legislature has vested a wide statutory discretion. His view was based on the doctrine of the separation of powers.

On appeal, the Supreme Court of Canada held that the decision-maker had to take account of the interests of the children as an important consideration and that he was bound to give reasons for the decision. L'Heureux-Dubé J, writing in effect for the majority, concluded that the common law duty of fairness required that reasons be given. L'Heureux-Dubé J considered that the common law conception of the rule of law requires judicial review of exercises of discretionary powers to be conducted according to varying standards of intensity, depending upon the context, and that in this instance it called for the discretion to be exercised reasonably.12 And this, despite the fact that the discretion was widely expressed, was subjectively framed and constituted an exception to the general statutory scheme. The Convention played a part in identifying the appropriate standard of review and in giving content to this aspect of the common law.

Thus, the majority in *Baker* used the Convention to supplement the common law, though in a less overt and significant way than in *Teoh*. This approach, as Professor Dyzenhaus has noted,13 is not dissimilar to that adopted by Gaudron J in *Teoh*, but the judgment does not refer to *Teoh.* The minority in *Baker* (Iacobucci and Cory JJ) dissented on this point, holding that the majority's reference to the underlying values of an unimplemented treaty in the course of the contextual approach to statutory interpretation and administrative law was inconsistent with the settled principle that a treaty does not form part of domestic law until it is incorporated by legislation. Concern was expressed about disturbing the balance of powers, particularly as between the judiciary and the legislature.14

Teoh was relied upon in argument. Indeed, it was discussed critically by Strayer JA in the Federal Court. Yet it was not mentioned by L'Heureux-Dubé J in her judgment. Just what was the reason for this is by no means clear. From the judgment of Strayer JA in the Federal Court, the controversy surrounding *Teoh* in Australia was readily apparent. It may be that the majority in *Baker*, though using the Convention in the manner already described, sought to avoid a similar controversy by not linking that use overtly with *Teoh.*

Be this as it may, *Baker* has significance for us because L'Heureux-Dubé J's judgment contains the statement that, in Canada, a legitimate expectation receives procedural not substantive protection.15 Yet the judgments in *Baker* clearly acknowledge that the statutory discretion must be exercised fairly. It was on that basis that the decision-maker was bound to give reasons for the decision. Understood in light of the statement that protection of an expectation is limited to procedural protection, the duty of fairness recognised in *Baker* seems to have been viewed as a duty of procedural fairness, the consequential obligation to give reasons having that character as well.

The statement that the statutory discretion must be exercised fairly on its face goes beyond the procedural and comes much closer to the duty of substantive fairness which is a feature of the recent decisions of the English Court of Appeal. Professor Dyzenhaus is right to remind us that the *ultra vires* doctrine cannot justify the common law development by the judges of the duty of fairness, at least the duty of substantive fairness, unless one makes a fictional assumption about legislative intent. For the same reason the doctrine cannot justify the judicial imposition of standards of reasonableness,16 except on the footing that one attributes to the statute conferring the decision-making power an intention that it be exercised according to certain standards, most notably the *Wednesbury* standard of reasonableness.

It would be a mistake to regard *Baker* as excluding for all purposes substantive protection of a legitimate expectation in Canada. In *Minister of Health and Social Services v Mount Sinai Hospital Center*,17 the leading judgment stated:

> It is unnecessary … to embark on the inquiry of whether the legitimate expectation created by the course of dealings between the parties can result in a substantive remedy beyond the procedural protection provided by the right to be heard … either within an expanded doctrine of legitimate expectations or under public law promissory estoppel.18

The judgments in this case make the point that it is by no means easy to distinguish between what is substantive and what is procedural protection in particular fact situations.

The judgments also make three important points about Canadian administrative law. First, Canada has not as yet adopted the English unifying theme of "administrative fairness" of which procedural fairness and substantive fairness are connected parts.19 The absence of such a unifying theme explains why the English approach to substantive unfairness has not been followed so far.

Secondly, there was a discussion of the relationship between the doctrine of legitimate expectation and public law estoppel. Binnie J (with whom McLachlin CJC concurred) pointed out20 that an applicant who relies on the doctrine does not necessarily have to show that he or she was aware of the conduct giving rise to the expectation or that it was relied upon to the applicant's detriment.21 This is because the focus is on promoting "regularity, predictability and certainty" in government decision-making, which should not depend upon the applicant's knowledge or lack of knowledge of representations. Dependence on such factors would introduce a degree of variation into decision-making.

The notion that detrimental reliance may have no part to play in the doctrine of legitimate expectation echoes a similar strand of thinking in the recent English Court of Appeal decisions. In England, this approach is tied to the duty of administrative fairness, according to which a discretionary power should be exercised even-handedly and in a principled way. To make detrimental reliance a pre-condition of legitimate expectation would be to bring about differential exercises of a power based simply on the presence or absence of detrimental reliance upon a representation.

Indeed, to link legitimate expectation to detrimental reliance would be to link legitimate expectation to public law estoppel. Yet one of the attractions of the doctrine of legitimate expectation, at least in terms of substantive protection, was that it appeared to offer a safe harbour, free from the shoals surrounding public law estoppel. At the same time, one can see that, as a matter of fairness, there is an argument to the effect that the decision-maker should not be called upon to take into account an expectation based on a general representation to a large class unless there is reliance, detrimental or otherwise. The tensions between these views underlie the conflicting views expressed in *Teoh*.

The third point emerging from the Canadian judgments is that they discuss the intensity of review, a matter which is attracting increasing attention in both England and Canada, a matter to which I shall now turn.

Standard and intensity of review

In England and Canada, the standard or intensity of judicial review has become more complex. The reasons for this development include the human rights dimension in both countries — the *Human Rights Act 1998* in England and the Charter in Canada as well as the impact of European Community law on English administrative law. In both jurisdictions, proportionality supplements *Wednesbury* unreasonableness as a standard of review. Proportionality is not seen as a conflicting but rather as a complementary or supplementary standard of review. The use of proportionality is more significant in England than Canada, if only because the doctrine of substantive legitimate expectation is in operation in England.

It would be idle to pretend that, at this time, there is a well-considered pattern of graduated standards of review that applies in either England or Canada. Appropriate standards of review are being developed on a case by case, context specific, basis.

It is convenient to state the Canadian position first, because it follows naturally from the majority judgment in *Baker*. Canada has adopted what is called unpromisingly the "pragmatic and functional" approach to review of administrative discretions. In that case, L'Heureux-Dubé J stated:22

> [C]onsiderable deference will be given to decision-makers by courts in reviewing [the] discretion and determining the scope of the decision-maker's jurisdiction.

The judgment went on to say23

> [I]t is the intention of a legislature, when using statutory language that confers broad choices on administrative agencies, that courts should not lightly interfere with such decisions, and should give considerable respect to decision-makers when reviewing the manner in which discretion was exercised. However, discretion must still be exercised in a manner that is within a reasonable interpretation of the margin of manoeuvre contemplated by the legislature, in accordance with the principles of the rule of law, in line with general principles of administrative law … and consistent with the … Charter …

As already mentioned, there is a spectrum of standards of review for errors of law, depending upon the nature of the decision and the degree of deference that is appropriate to it. Three standards of review are applied — patent unreasonableness, unreasonableness *simpliciter* (the actual standard applied in *Baker*) and correctness. In deciding which standard should apply to a particular decision, the courts will take into account the expertise of the tribunal, the nature of the decision (including whether it is "polycentric" and whether it is "fact-based"), the statutory provisions and the surrounding legislation. The degree of choice left by the legislature to the decision-maker is an important consideration. Deference is, however, subject to the requirement that the discretion be exercised in accordance with the limits imposed by the statute, "the principles of the rule of law, the fundamental values of Canadian society, and the principles of the Charter".24 *Baker* was not a Charter case. When a Charter right or freedom is engaged, a stringent standard of review will be engaged and proportionality will be relevant.

The Canadian emphasis on deference has some resemblance to the United States administrative law doctrines of deference. It stands in strong contrast to the rejection by the High Court of the *Chevron* doctrine25 of deference, though that doctrine applies to interpretation by an agency of its statute.

English law has also moved to standards of review of varying intensity, though the standards do not correspond precisely with the Canadian standards.

In relation to decisions affecting human rights since the *Human Rights Act 1998* came into operation, there has been a predictable movement from *Wednesbury* unreasonableness to proportionality. In 1996 Bingham MR stated that the standard of review applicable to review on substantive grounds generally was unreasonableness in the sense that the decision "was beyond the range of responses open to a reasonable decision-maker". He went on to say:

> But in judging whether the decision-maker has exceeded this margin of appreciation the human rights context is important. The more substantial the interference with human rights, the more the court will require by way of justification before it is satisfied that the decision is reasonable in the sense described above.26

Now, however, as the decision of the House of Lords in *Simms*27 shows, the standard of review appropriate to decisions affecting human rights is proportionality. The decision under challenge was a prohibition against journalists visiting prisoners professionally. The applicants, who were convicted murderers, wished to give interviews to proclaim their innocence. An absolute prohibition on interviews, without regard to the purpose of an interview, was held to be an interference with freedom of speech disproportionate to any need to protect the public interest.

The proportionality standard was applied by the House of Lords more recently in *R v Secretary of State for the Home Department; ex parte Daly*,28 where a policy requiring all prisoners to be absent from their cells while searches, which extended to their legal correspondence, were carried out, interfered with the prisoners' common law entitlement to legal professional privilege. The interference went beyond any legitimate need to protect the public interest.

The difference between the standards of unreasonableness and proportionality is not as substantial as might otherwise appear. This is because proportionality is a flexible standard, the intensity of which can be adjusted to fit the context.29 The view has been expressed that proportionality-based review shades into reasonableness review.30

One aspect of proportionality as applied by English courts is the tendency to offer a margin of appreciation to the executive in its weighing of the competing claims of the individual and the public interest.31 Initially, margin of appreciation was a doctrine developed by the European Court of Human Rights under the European Convention on Human Rights, to allow for differences in the implementation of Convention obligations in different European countries.

It is the existence of this margin of appreciation accorded to the decision-maker that distinguishes proportionality from merits review. There is preserved an area of residual discretion to the decision-maker so that proportionality does not lead to the court deciding whether the impugned decision is correct. Thus, in *R v Secretary of State for the Home Department; ex parte Daly*,32 Lord Steyn felt able to say that the application of the proportionality standard "does not mean that there has been a shift to merits review".33

His Lordship was able to express this view, notwithstanding that, in the same judgment, he identified three respects in which the proportionality standard transcends the *Wednesbury* standard. To quote his words:

> First, the doctrine of proportionality may require the reviewing court to assess the balance which the decision-maker has struck, not merely whether it is within the range of rational or reasonable decisions. Secondly, the proportionality test may go further than the traditional grounds of review inasmuch as it may require attention to be directed to the relative weight accorded to interests and considerations. Thirdly, even the heightened scrutiny test developed in *Smith*34 … is not necessarily appropriate to the protection of human rights.35

It is fairly obvious that, at the higher end of intensity of review for proportionality, we are coming very close to merits review because there is little residual discretion left to the decision-maker which is immune from review. On the other hand, at the lower level where proportionality review shades into *Wednesbury* unreasonableness, there is a substantial margin of discretion left to the decision-maker. At the same time, the question of proportionality, like *Wednesbury* unreasonableness, is treated as a question of legality. Just as a decision which is *Wednesbury* unreasonable is unauthorised and therefore unlawful, so is a decision which offends the proportionality standard.

The standard of review is contextual

From what I have said so far, it emerges that, both in Canada and England, the standard of review is contextual, almost context specific. This is particularly evident in the judgment of Laws LJ in *R v Secretary of State for Education and Employment; ex parte Begbie*,36 where his Lordship, in the context of substantive protection of expectations, was addressing categories 1 and 3 of legitimate expectation identified in the earlier Court of Appeal decision, *Coughlan*.37 His Lordship noted that "the facts of the case, viewed in their context, will steer the Court to a more or less intrusive quality of review".38 Thus, strict scrutiny is less apt for substantive review where the issues of policy are wide-ranging, the effects of review are multi-layered and the decision lies well within the macro-political field.

The same comment applies to the United States where, in different contexts, public law employs both "rational basis" and "strict scrutiny" review, though these standards are mainly applied in the context of constitutional validity.39 There is, however, some similarity between questions of constitutional validity in relation to human rights and questions concerning non-constitutional human rights violations.

Of greater relevance is the controversial *Chevron*40 doctrine, despite its apparent rejection by the High Court in *Enfield City Corporation*.41 The Chevron doctrine, which applies to the interpretation of a statute administered by an agency, was expressed by Stevens J in these terms:

> If … the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.42

The theoretical foundation for the doctrine has been explained by Scalia J, on the basis that Congress has decided to leave, within permissible limits, the question of construction to the agency itself.43 Such a decision on the part of Congress is not unlikely where the matter involves technical expertise with which the agency members would be familiar.

The *Chevron* doctrine has been frequently applied, despite the separation of powers. It is to be contrasted with the Anglo-Australian approach which is founded on the court's duty to interpret and apply the law,44 the assumption being that there can be only one right legal answer to a question of construction of an agency statute.

It is instructive to look at *Chevron* in the light of Dixon J's observations in *R v Hickman*; *ex parte Fox and Clinton*,45 where his Honour appears to have contemplated that the legislature could provide for a *Chevron*-type approach. In *Enfield City Corporation*, the High Court does not seem to have contemplated this possibility or that this approach may be the foundation for Chevron.

Notwithstanding the criticism to which it has been subjected, *Chevron* has a good deal of attraction, especially in Australia where the courts generally allow significantly more latitude to the decision-maker than is the case in other jurisdictions. The case for adopting a contrary approach in relation to interpretive questions depending upon technical expertise is by no means compelling.

More important than the *Chevron* doctrine, in the context of standards of review, is the so-called "hard look" doctrine,46 which again is controversial. This doctrine seems to come close to merits review. The presumption of regularity accorded in the United States to the agency's decision does not protect it from "a thorough, probing in-depth review" by the court. In one of the leading cases, *Overton Park*,47 the Supreme Court of the United States stated that the reviewing court's role was to consider whether the decision was based on all the relevant factors and whether there had been "a clear error of judgment".48

As Justice Sackville has pointed out, the "hard look" doctrine is based upon the language of s 706(2)(A) of the *Administrative Procedure Act 1946* which requires a reviewing court to set aside "agency action, findings and conclusions" found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law".

It is unlikely that an Australian court would, by judicial interpretation, convert this formula into the "hard look" doctrine; without legislation specifically mandating a "hard look" approach, the doctrine seems unlikely to become a feature of Australian administrative law. We have not gone beyond saying that it is permissible for a court to give weight to a finding of fact by a tribunal whose special knowledge of industry specially equips it to provide an answer. When this approach is couched in terms of being permissible, as it was in *Enfield City Corporation*,49 I doubt that it can be equated to either "deference as respect" or "deference as submission", to use Professor Dyzenhaus' terminology.

Justice Sackville, in an article in the *Federal Law Review*,50 has discussed the *Chevron* doctrine and the "hard look" doctrine more comprehensively than I have been able to do.

Constitutional influences

In England, the doctrines of legislative supremacy and the separation of powers for a long time had the effect of keeping substantive review to a strict version of *Wednesbury* unreasonableness. The influence of these doctrines, seen at their height in *R v Secretary of State for the Home Department; ex parte Brind*,51 kept proportionality at bay in England. It was thought to be too close to merits review and it trespassed too far into the area of discretion reposed in the decision-maker by the legislature.

The *Human Rights Act*, with the European Convention looming in the background, altered all that. Not only are the protection of human rights now mandated, but also the role of the courts in determining whether a right is violated requires the court to balance the protection of the right against the intruding public interest to which the legislature is seeking to give effect. Such a judicial function invites the application of a proportionality test. It is enough in this situation to embrace proportionality on the footing that its application is contemplated by the legislation. Correspondingly, concern about the legislative supremacy has diminished. This is a natural corollary of protecting specific human rights by statute. Likewise, the force of separation of powers arguments has declined to some extent, though there is still some concern about preserving a limited area of unreviewable discretion to the decision-maker, in order to avoid the accusation of merits review.

There are already signs of a conflation of *Wednesbury* unreasonableness and proportionality.52 This trend is likely to continue. Stricter scrutiny in the human rights area may well encourage judges to adopt a similar approach outside human rights. There are indications of such a tendency — witness the rise of the doctrine of substantive legitimate expectation.

There is also evidence of a strong political backlash. *The Times* newspaper53 recently gave publicity to a powerful attack by the Minister for Education on judicial activism in judicial review, and to a defence of the judges by the Lord Chancellor (whose view of his responsibilities evidently differs from that of the Commonwealth Attorney-General, Mr Daryl Williams QC) and a response by Lord Woolf MR.

What has happened in Canada follows a similar pattern, though it has taken place over a longer time span and it has involved perhaps more attention to constitutional constraints, as *Baker* indicates. My impression is that, in the last three or four years, the Supreme Court of Canada has exhibited a greater degree of caution in expanding the judicial role than was evident a little earlier, though I emphasise that it is no more than an impression.

The developments in England, Canada and the United States provoke several comments. In these jurisdictions, more thorough-going review is undertaken than in Australia, without undue anxiety about constitutional restraints. Apart from the impact of the Australian political culture, it is these perceived constraints, flowing mainly from the assumed *Marbury v Madison*54 foundation, the separation of powers doctrine and the *ultra vires* doctrine, that stand in the way of stronger review in Australia. The factors which have prompted these overseas developments in judicial review, notably the protection of human rights, are not replicated in Australia where merits review is available under the *Administrative Appeals Tribunal Act 1975* (Cth) (AAT Act). Separation of powers has a much stronger influence in Australia than in England and Canada where, correspondingly, the rule of law is more influential than in Australia.

This does not mean that concepts employed in those jurisdictions have no utility for us. Proportionality in a form appropriate to our system of administrative law, for example, marked or gross disproportionality, and the margin of appreciation are instances. When you adopt a new legal concept or standard, there is no need to take on board all the characteristics with which it is invested elsewhere. Any new concept or standard must be refined so as to accord with the central characteristics, principles and goals of our system of administrative law.

Questions of law and questions of fact

The distinction between questions of law and questions of fact has been a feature of Australian law in various respects, for example, in limiting appeals to questions of law. More relevantly, it has played a part in administrative law where questions have arisen as to the extension of judicial review to findings of fact. The *Administrative Decisions (Judicial Review) Act 1977* (Cth) (AD(JR) Act) does not explicitly provide for review of findings of fact. If such a review is available, at present it can only be achieved through other remedies or under other grounds of review, including the *Wednesbury* ground. Indeed, as you know, there is authority, admittedly controversial, for the proposition that even the making of a perverse finding of fact, for which there is some evidence, is beyond the scope of judicial review.55

Yet the difficulty of distinguishing between questions of law, on the one hand, and questions of fact, not to mention questions of policy, is notorious. This difficulty unquestionably creates complications for a system of administrative law such as ours which requires questions of law and questions of fact to be treated differently. In the United States and Canada, the assumption that there is a distinction has been challenged. So far that is not the position in Australia, where the High Court has noted that the distinction "is a vital distinction in many fields of law", while acknowledging that "no satisfactory test of universal application has not yet been formulated".56

The public/private dichotomy

English administrative law has developed a distinction between public law and private law, on which the availability of judicial review depends. Thus, judicial review of decisions not made under statutory authority depends upon whether the decision-making body performs or operates as an integral part of a system which performs public law duties and is supported by public law sanctions. So a decision of the Panel on Take-overs and Mergers was subject to judicial review because it was operating as an integral part of a governmental framework for the regulation of financial activity in the City of London, was supported by a periphery of statutory powers and penalties and was under a duty in exercising what were public powers to act judicially.57

I have always thought that it is difficult to formulate a brightline distinction between public law and private law. That is why I do not regard the reasoning in *Datafin* 58 as particularly convincing. On the other hand, there is much to be said for the view that bodies exercising public or regulatory powers should be subject to judicial review. What we should be endeavouring to determine is what bodies beyond those presently subject to judicial review should be exposed to judicial review and on what grounds.

Privatisation of statutory bodies makes these questions more important than they would otherwise be, and even more so if we continue to subscribe to the *ultra vires* foundation for judicial review. The extension of judicial review to non-statutory bodies involves more difficulties than the extension of judicial review to the exercise of prerogative power. Because prerogative power involves the exercise of public power in a traditional form, recognised judicial review grounds may be appropriately applied.

The availability of declaratory relief and injunction may overcome some of the deficiencies in the availability of judicial review. But these remedies are by no means a complete answer because, absent a challenge on recognised judicial review grounds, private law may prove to be inadequate simply because it may well fail to provide appropriate grounds of review.

The culture of justification and the duty to give reasons

Professor Dyzenhaus has written persuasively on the culture of justification and our responsibility to justify our actions and decisions.59 That culture is gaining increasing support in the democratic world. It has an application to the provision of reasons for administrative decisions. In Australia, the statutory requirement that the decision-maker shall provide reasons upon request means that the absence of a common law requirement is not as significant as it is in other jurisdictions. Section 13 of the AD(JR) Act and s 8 of the AAT Act have counterparts in State legislation.

Putting the statutory requirements to one side, we are left with the decision of the High Court in *Public Service Board of NSW v Osmond*.60 Osmond vindicated the statement made by Sir William Wade only two years earlier:

> It has never been a principle of natural justice that reasons should be given for decisions. Since there is no such rule even in the courts of law themselves, it has not been thought suitable to create one for administrative bodies.61

In *Osmond*, the High Court overruled a majority decision of the NSW Court of Appeal. Kirby P, in the majority, concluded that the Board was under a common law duty to give reasons for its dismissal of the applicant's appeal to the Board from the refusal of his application for promotion to a vacant position. His Honour reasoned from the proposition that the common law requires those exercising discretionary statutory powers to act justly and fairly in the performance of their functions. His Honour's judgment gives expression to the ideas and language of modern English administrative law. The principle, invoked by his Honour, included or mandated "an obligation [on the part of decision-makers] to state the reasons for their decisions".62 Such an obligation would arise where to do otherwise would render an appeal or judicial review nugatory, subject to certain exceptions such as confidentiality and privacy.

Priestley JA considered that there was a duty to give reasons and that it was an aspect of the rules of natural justice which applied to the Board.

The High Court rejected both approaches without qualification, basing itself largely on authority which supported the proposition that natural justice does not extend to the giving of reasons. Gibbs CJ referred also to the extra burdens on administrative officers and the possibility of lack of candour on the part of decision-makers in the event that they were required to give reasons.63 With great respect, these policy arguments do not seem to have overwhelming cogency. Moreover, they need to be weighed against the advantages inherent in the giving of reasons.

Since *Osmond*, much has happened to give point to the qualifications expressed by Deane J in agreeing with Gibbs CJ. Deane J observed that the rules of natural justice are "neither standardised nor immutable" and that "their content may vary with changes in contemporary practice and standards".64 Accordingly, his Honour thought that courts should be less reluctant than they had been to conclude that there is a statutory intent that reasons for a decision should be given.

In other jurisdictions, the force of the old common law rule that there is no requirement for reasons has been eroded. Although English courts continue to state, in deference to the old law, that there is no general duty to give reasons, their explanation of why reasons are required in particular cases suggests that English administrative law is moving towards the position that there is a general *prima facie* duty to give reasons, subject to appropriate exceptions. In *R v Civil Service Appeal Board*; *ex parte Cunningham*65 and *R v Secretary of State for the Home Department*; *ex parte Doody*,66 the obligation was based upon the decision-maker's duty of fairness, the ground adopted by Kirby P. In *Doody*, Lord Mustill placed the obligation to give reasons on the duty to be fair to a convicted person in providing him with reasons why the Home Secretary had decided on a particular period of imprisonment that a prisoner, who had received a mandatory life sentence, should serve before being entitled to a review. Alternatively, his Lordship placed the obligation to give reasons on the ground that the decision was susceptible to judicial review and that reasons were necessary to detect the existence of error of a kind which would entitle the court to intervene.

As already noted, in *Baker*,67 the Supreme Court of Canada, after acknowledging the strong policy arguments favouring the giving of reasons, held that, in certain circumstances, the duty of procedural fairness requires the giving of reasons. Those circumstances include situations where there is an appeal and judicial review is available. But, evidently yielding to the notion that the requirement to give reasons might be oppressive, the Court accepted the decision-maker's file notes as a sufficient compliance with the duty.

An aspect of the giving of reasons is the making of relevant findings of fact. Whether a decision-maker is under a duty to make relevant findings of fact is in essence a matter of statutory construction. In the absence of a duty imposed by statute, there is no general common law duty to make relevant findings of fact. So much emerges from the joint judgment of McHugh, Gummow and Hayne JJ in *Minister for Immigration and Multicultural Affairs v Yusuf*,68 where their Honours point out that the relevant inquiry is whether the tribunal whose decision is being reviewed has made a reviewable error.

Procedural fairness

My concluding comment relates to procedural fairness. In Australia, England and elsewhere, the problems are largely associated with new and complex modes of decision-making which have left the simple adversarial model in their wake. Consequently, the two questions (i) is there a duty? (ii) if so, what is the content of the duty? have to be determined in a variety of contextual situations. Although initially I had seen this problem as one to be determined largely at the duty stage, and by reference to the individuality rather than the generality of the decision, I now think that the content of the duty may be more important. That is because I incline to the view that, unless statute otherwise provides, a decision-maker is in general subject to a duty of procedural fairness and that the decision-maker must be permitted some leeway of choice in deciding upon an appropriate procedure.

1 *Minister for Immigration, Local Government & Ethnic Affairs v Kurtovic* (1990) 92 ALR 93 at 129.
2 (1990) 170 CLR 1.
3 See *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223.
4 *Thomas Valley Electric Power Board v NZFP Pulp and Paper Ltd* [1994] 2 NZLR 641 at 652–653 per Cooke P and 654 per Fisher J.
5 [2000] 2 WLR 622.
6 See *Re Preston* [1985] AC 835 at 851–852, 864–867.
7 *Minister of Health and Social Services v Mt Sinai Hospital Center* [2001)] 200 DLR (4th) 193 at 210–211 per Binnie J.
8 *Ibid* at 211.
9 (1995) 183 CLR 273.
10 *Thomas v Baptiste* [1999] 3 WLR 249; *Fisher v Minister for Public Safety and Immigration (No 2)* [1999] 2 WLR 349 at 356.
11 [1999]174 DLR (4th) 193.
12 *Ibid* at 223–226 per L'Heureux-Dubé J.
13 "The Justice of the Common Law: Judges , Democracy and the Limits of the Rule of Law", an address delivered at the University of Melbourne on 8 November 2000.
14 [1999] 174 DLR (4th) at 234–235.
15 *Ibid* at 212–213.
16 "The Justice of the Common Law: Judges, Democracy and the Limits of the Rule of Law", an address delivered at the University of Melbourne on 8 November 2000.
17 [2001] 200 DLR (4th) 193.

18 *Ibid* para 95 per Bastarache (with L'Heureux–Dubé, Gonthier, Iacobucci and Major JJ concurring).
19 *Minister for Health and Social Services v Mt Sinai Hospital Centre* [2001] 200 DLR (4th) 193 at 209.
20 *Ibid* at 211.
21 In this respect, the Canadian approach is similar to the English approach and the Australian approach, as to which see *Haoucher v Minister for Immigration, Local Government and Ethnic Affairs* (1990) 169 CLR 648 at 670 per Toohey J; see also *Teoh* (where lack of knowledge of the Convention provision was not a bar to setting up the legitimate expectation).
22 *Baker v Canada (Minister for Citizenship and Immigration)* [1999] 174 DLR (4th) at 224.
23 *Ibid* at 224–225.
24 *Ibid* at 225–226, 227–228 per L'Heureux-Dubé J.
25 *Chevron USA Inc v Natural Resources Defense Council Inc* 467 US 837 (1984).
26 *R v Ministry of Defence*; *ex parte Smith* [1996] QB 517 at 554.
27 *R v Secretary of State for the Home Department*; *ex parte Simms* [2000] 2 AC 115.
28 [2001] 3 All ER 433.
29 *Ibid* at 446 per Lord Steyn.
30 M Elliott, "Scrutiny of Executive Decisions under the Human Rights Act 1998: Exactly How 'Anxious'?" [2001] JR 166 at 175l.
31 *R v Director of Public Prosecutions*; *ex parte Kebilene* [2000] 2 AC 326 at 380–381 per Lord Hope of Craighead.
32 [2001] 3 All ER 433.
33 *Ibid* at 445–446.
34 *R v Ministry of Defence*; *ex parte Smith* [1996] QB 517 at 554.
35 [2001] 3 All ER 433 at 446.
36 [2000] 1 WLR 1115.
37 *R v North and East Devon Health Authority*; *ex parte Coughlan* [2000] 2 WLR 622.
38 *Ibid* at 1130.
39 See the discussion in I Loveland, "A fundamental right to be gay under the fourteenth amendment?" [1996] *Public Law* 601.
40 *Chevron USA Inc v Natural Resources Defence Council Inc* 467 US 837 (1984).
41 *Enfield City Corporation v Development Assessment Committee* (2000) 199 CLR 135.
42 *Chevron USA Inc v Natural Resources Defence Council Inc* 467 US at 842–843.
43 A Scalia, "Judicial Deference to Administrative Interpretations of Law" [1989] *Duke LJ* 511 at 514–516.
44 See In *re Racal Communications* [1981] AC 371 at 384 per Lord Diplock.
45 (1945) 70 CLR 59l8
46 See the discussion by Justice Sackville, "The Limits of Judicial Review: Australia and the United States" (2000) 38 *Federal Law Review* 315 at 326–328.
47 *Citizens to Preserve Overton Park Inc v Volpe* 401 US 402 (1971).
48 *Ibid* at 416.
49 *Enfield City Corporation v Development Assessment Committee* (2000) 199 CLR 135 at 155.
50 "The Limits of Judicial Review: Australia and the United States" [2000] 28 *Federal Law Review* 315.
51 [1991] 1 AC 696.
52 *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2001] 2 All ER 929 at 976 per Lord Slynn of Hadley. ("Trying to keep the *Wednesbury* principle and proportionality in separate compartments seems to me to be unnecessary and confusing").
53 "Irvine 'furious' with Blunkett over speech", Wednesday October 31 2001, http://www.thetimes.co.uk/article/o,2–20011375523,00.html.
54 (1803) 1 Cranch 137.
55 *Azzopardi v Tasman UEB Industries Ltd* [1985] 4 NSWLR 139.
56 *Collector of Customs v Agfa-Gevaert Ltd* (1996) 186 CLR 389 at 395.
57 *Reg v Panel on Take-overs and Mergers*; *ex parte Datafin Plc* [1987] 1 QB 815. But cf *Reg v Disciplinary Committee of the Jockey Club*; *ex parte Aga Khan* [1993] 1 WLR 909 (which illustrates the limits of the public law doctrine).
58 *Reg v Panel on Take-overs and Mergers*; *ex parte Datafin Plc* [1987] 1 QB 815.
59 "The Justice of the Common Law: Judges, Democracy and the Limits of the Rule of Law", an address delivered at the University of Melbourne on 8 November 2000.

60 (1986) 159 CLR 656.
61 *Administrative Law* (5th ed, Oxford, 1982) at 486.
62 [1984] 3 NSWLR 447 at 467.
63 (1986) 159 CLR 656 at 668.
64 (1986) 156 CLR at 676.
65 [1991] 4 All ER 310.
66 [1994] 1 AC 531.
67 [1999] 174 DLR (4th) 193 at 216–220 per L'Heureux-Dubé J.
68 (2001) 180 ALR 1 at 19–20.