# GET BEHIND ME SATAN; OR SOME RECENT DECISIONS ON THE ADMINISTRATIVE LAW ACT 1978

The Administrative Law Act 1978[1] is a remarkable piece of legislation. No longer need an aggrieved person seeking to challenge the decision of a tribunal be concerned that he may have sought an inappropriate or the wrong remedy.[2] For the Act now provides a procedure whereby a Supreme Court judge may, pursuant to a single 'application for review', exercise all or any of the powers and grant all or any of the remedies which might be exercised or granted in proceedings for a prerogative writ or in an action for a declaration or an injunction.[3] And no longer need the aggrieved person feel frustrated that the Tribunal could refuse to give reasons for its decision and that as a general rule the common law would not intervene on his behalf.[4] The Act now declares that a tribunal shall at the request of any person affected by its decision furnish that person with a statement of its reasons for the decision.[5]

The Act provides a similar procedural framework to the existing Supreme Court Rules regulating the issue of Prerogative Writs:[6] the application is to be made *ex parte*, and the resulting order — called an order for review — is of the character of an order *nisi*, returnable before a judge either in court or in chambers.[7]

It is not of course every decision of every tribunal that the Act now makes susceptible to an order for review. The Act defines 'decision' to mean

> a decision operating in law to determine a question affecting the rights of any person or to grant, deny, terminate, suspend or alter a privilege or licence and includes a refusal or failure to perform a duty or to exercise a power to make such a decision.[8]

The reach of the Act is further restricted by the definition of 'tribunal':

> a person or body of persons (not being a court of law or a tribunal constituted or presided over by a Judge of the Supreme Court) who, in arriving at the decision in question, is or are by law required, whether by express direction or not, to act in a

[1] Act No. 9234 of 1978.
[2] The usual procedure is for application to be made pursuant to 0.50 or 0.53 R.S.C.
[3] S. 7.
[4] For the general rule see *R. v. Gaming Board of Great Britain; Ex parte Benaim and Khaida* [1970] 2 Q.B. 417. But a duty to supply reasons can sometimes be implied; see, *Padfield v. Minister of Agriculture, Fisheries and Food* [1968] A.C. 997, 1032.
[5] S. 8.
[6] 0.53 R.S.C.
[7] S. 4.
[8] S. 2.

> judicial manner to the extent of observing one or more of the rules of natural justice.[9]

And it is not of course any person who has standing to apply for review or for reasons; it is only a person 'affected by a decision' which expression means

> a person whether or not a party to proceedings, whose interest (being an interest that is greater than the interest of other members of the public) is or will or may be affected, directly or indirectly, to a substantial degree by a decision which has been made or is to be made or ought to have been made by the tribunal.[10]

These three definitions are crucial to the operation of the Act; yet, it may be said, they have been drafted in a most cumbersome and indeed unnecessarily narrow manner. It would have been much simpler to adopt the method employed in the Commonwealth Administrative Decision (Judicial Review) Act 1977. In that Act a relevant decision is defined as 'a decision of an administrative character . . . other than a decision by the Governor-General'.[11] The problem of standing is solved by an equally terse definition: 'In this Act a reference to a person aggrieved by a decision includes a reference to a person whose interests are adversely affected. . . .'[12] The Commonwealth Act's definition is inclusive whereas the definition in the Victorian Act is exhaustive; moreover the Commonwealth Act does not oblige a court to inquire whether the adverse effect on the interest is 'substantial' or not. There is a further problem with the definitional sections in the Administrative Law Act: the definition of decision refers to rights, privileges or licences whereas the *locus standi* requirement is defined in terms of 'interest'. Are they equivalent, similar or distinct concepts?

Some of the radical shortcomings of the Act were highlighted in the recent unreported decision of the Supreme Court in *A.B. v. Lewis and the Law Institute of Victoria*.[13] Another interesting aspect of the Act was raised in the unreported decision in *Vithana v. Buckman*[14] where the Supreme Court was asked to determine whether the provisions of the Act applied to Commonwealth bodies.

## A.B. v. LEWIS

On the 18th May 1979, Lewis, the Secretary of the Law Institute of Victoria, sent the applicant, a solicitor, a letter which contained the following notice:

> As a result I hereby give you notice that I intend to cancel your current Practising Certificate on the grounds prescribed in s. 84(1), (c) and (d) of the Legal Profession Practice Act 1958 . . . (2) You are entitled to require the Council to hold a Full Enquiry to afford you the opportunity of giving an explanation and to raise any relevant matters, either personally or in writing. If you wish the Council to hold the Enquiry, your request in writing must reach me within seven (7) days

[9] S. 2.
[10] S. 2.
[11] S. 3(1).
[12] S. 3(4).
[13] No. M. 13740 of 1979 (Judgment delivered 21 August 1979).
[14] No. M. 13948 of 1979 (Judgment delivered 9th November 1979).

> from the date of this letter. If your written request is not received by me within the said seven days I shall cancel your current Practising Certificate.

On 21 May 1979, the applicant replied to the notice, requesting the Council of the Law Institute of Victoria to hold a full enquiry. The applicant then applied to the Supreme Court pursuant to the Act for an order to review. An order was duly made by Starke J. on the 27th June 1979 which called upon the respondents Lewis and the Law Institute of Victoria to show cause

> why the decision of the said respondents to send a notice to the above-named applicant pursuant to s. 84 of the Legal Profession Practice Act 1958 should not be reviewed.

On the return of the order to review, which came before Fullagar J., the respondents raised the following preliminary objections to the jurisdiction of the Court to make any orders under the Act: (1) that the respondents had taken no action which fell within the definition of a 'decision' within the meaning of the Act, and (2) in any case, the applicant was not a 'person affected by a decision' within the meaning of the Act.

The first problem faced by the applicant was to isolate and define those actions of Lewis which could be characterized as 'decisions'. The applicant argued that the actual sending of the notice itself constituted a relevant decision. Fullagar J. however disagreed and held that the act of sending the notice did not contain any of the required elements.

> But the sending of the notice itself is obviously so far removed from the statutory definition of 'decision' that the applicant has been forced to seize upon the decision to send the notice.

The applicant next argued that the decision of Lewis to send the s. 84(1) notice was a decision which operated in law to determine a question affecting his rights, or at least operated in law to alter a privilege or licence held by him. For the decision to send the notice represented in substance and in effect a decision that some grounds for cancellation had been made out *prima facie*, and that *prima facie* sufficient grounds existed under s. 84(1) to bring into operation the Secretary's discretion. Before the decision was arrived at to send the notice, the applicant argued, he held an unencumbered licence to practise law; after the notice was sent, however, he was no longer in that position for he had no longer any right (or for that matter licence) to continue in practice without first taking within seven days the special step of requiring a full enquiry. As a result of the decision to send the notice, that is, the applicant was faced with a dilemma: he had either to let his licence be summarily cancelled or else instigate an expensive enquiry at which he would have to defend himself against several charges.

The respondents, on the other hand, relied on the fact that s. 2 of the Act states 'Decision means a decision operating in law . . .': what was required under s. 2 therefore was a decision which of itself operated to affect rights or to alter some privilege or licence. Whilst it was true that the

decision of Lewis to send the notice was a step along the road to cancellation, such cancellation, or alteration of a licence, was not inevitable. The respondent Lewis never therefore made a decision that altered any right or licence of the applicant; at its highest the decision to send the notice was a statement that the Law Institute proposed to make such a decision in the future.

In any case, the respondents further argued, the applicant did not have standing under the Act. For at the time of his application to the Supreme Court for an order to review — 15 June 1979 — the applicant had already replied to the notice and had elected to have a full enquiry. The applicant thereby had, from that date, stripped Lewis and the Law Institute of any power to cancel, alter, or in any way affect affect his right to practice.

Fullagar J. accepted both these lines of argument and held that there was no power under the Act to make any orders against the respondents.

> On the proper analysis of this case, in my opinion, the decision to send the notice was a decision, at best for the applicant, to communicate to the applicant the Secretary's decision to cancel the practising certificate summarily and out of hand, as the Statute provides he may cancel it, if and only if the applicant did not, within a reasonable time after such communication, elect to avail himself of what might be called the alternative statutory provision for a fair trial. But even if the attack be treated as an attack upon a conditional decision to cancel in the future, the first important thing to observe is that this was a decision to do something in the future which, if in fact done, would alter rights; it was not a decision which itself altered rights.

With respect to the applicant's argument that the notice constituted a threat, and that the threat represented a change or alteration in rights, Fullagar J. said:

> In my opinion to place him under . . . a threat was not in this case operative in law to change any rights. In my opinion the material rights of the applicant, before and after the giving of the notice and before and after the decision to give it, remain unchanged.

In any case, agreed Fullagar J., the applicant did not have standing under the Act. For his Honour accepted the proposition that under the Act the applicant at the time of his application for review had to be a person affected by the decision complained of. On the 21 May 1979, however, the applicant had elected to have a full enquiry and therefore, as from 15 June 1979, the date of the applicant's application for an order under the Act, 'there has been, as it were, no operative decision of Mr Lewis, that is to say, no decision which was being acted upon or could be acted upon'. At the time of his application the applicant was not a person whose interest 'is or will or may be affected, directly or indirectly, to a substantial degree' by a requisite decision.

Certainly the line of argument accepted by Fullagar J. was open on the Act and is supported by a very strict and literal reading of s. 2. But surely it is also open to argue that if a particular result, the cancellation of a practising certificate, can only be legally achieved by the taking of a number of distinct steps, one of which is the sending of a s. 84(1) notice,

then each step being legally necessary to achieve the result has an independent operation in law. In the closely related area of natural justice, the notion that a decision which threatens interests or reasonably held expectations rather than operating to immediately affect some legal right cannot give rise to a hearing obligation, is now thoroughly discredited;[15] and to assert, as does Fullagar J., that the threat in this case was 'not operative in law to change any rights' misses the point of such cases as *Wiseman v. Borneman,*[16] *Re Pergamon Press*[17] and *Maxwell v. The Department of Trade.*[18] There is much to be said for interpreting the Act, and in particular the definitions of 'decision' and 'tribunal' in the light of such *post Ridge v. Baldwin*[19] developments;[20] the decision of Fullagar J. can only work to entrench into the Act the doctrines and dogmas of the pres *Ridge v. Baldwin* era.[21]

## VITHANA v. BUCKMAN

The question before Gray J. in this case was of fundamental importance to the operation of the Act: do the provisions of the Act apply against Commonwealth tribunals? The applicant was the holder of a Colombo Plan award, and the respondent was the Regional Director for Victoria of the Australian Development Assistance Bureau, which is a section of the Commonwealth Foreign Affairs Department. The applicant obtained an order calling upon the respondent Buckman to show cause why her decision to terminate the award should not be reviewed. The order also directed the respondent to furnish reasons for her decision. On the return of the order before Gray J. the respondent raised a preliminary objection as to the jurisdiction of the Victorian Supreme Court to make any order under the Act which purported to bind the Commonwealth.

The applicant conceded at the outset two vital points: first, that the Act did not in terms purport to bind the Commonwealth, and secondly, that in any case the State of Victoria has no inherent power to enact legislation binding on the Commonwealth. The first point of concession represents a question of construction only, and was clearly correct, for the rule is now well settled that 'the Crown is not included in the operation of a statute

[15] *E.g. R. v. Gaming Board of Great Britain; Ex parte Benaim and Khaida* [1970] 2 Q.B. 417.
[16] [1971] A.C. 297.
[17] [1971] Ch. 388.
[18] [1974] 2 All E.R. 122.
[19] [1964] A.C. 40. *Cf.* de Smith S. A., *Judicial Review of Administrative Action* (3rd ed.) 142 f.
[20] The case law development supports the proposition that the fact that the decision in question is only that a prima facie case has been made out does not of itself prevent the application of the audi alteram partem rule. It is, however, still a significant factor to be taken into account; *e.g. Pearlberg v. Varty* [1972] 1 W.L.R. 534 where the *prima facie* nature of the decision in question justified it being made *ex parte.* The matter is discussed by Sykes E. I. and Tracey R. R. S., 'Natural Justice and the Atkin Formula' (1976) 10 *M.U.L.R.* 564.
[21] Are we, for example, to be once again shackled with the restrictive doctrines of *Testro Bros Pty Ltd v. Tait* [1963] 109 C.L.R. 353.

unless by express words or by necessary implication'.[22] Nor could it be said that the Commonwealth was bound by necessary implication for it was only where the Act would be 'wholly frustrated unless the Crown were bound that it may be inferred that the Crown has agreed to be bound'.[23] The second concession, however, expresses a fundamental proposition of constitutional law: a State has power to bind the Commonwealth only if it has been invested with such power by Commonwealth legislation, in which case any exercise of power by a State Court over the Commonwealth is an exercise of a Federal and not a State jurisdiction. The common source of such a Federal jurisdiction in State courts is of course the Commonwealth Judiciary Act, and the applicant relied on s. 64 of that Act as having bestowed upon the Victorian Supreme Court jurisdiction to make orders pursuant to the Administrative Law Act binding on the Commonwealth. Section 64 reads:

> In any suit to which the Commonwealth or a State is a party, the rights of parties shall as nearly as possible be the same, and judgment may be given and costs awarded on either side, as in a suit between subject and subject.

The applicant's argument involved the following steps:

1. Section 75(iii) of the Constitution confers on the High Court original jurisdiction in all matters in which an officer of the Commonwealth is a party.

2. Section 39(2) of the Judiciary Act confers on the State Supreme courts Federal jurisdiction in all matters in which the High Court has original jurisdiction, except for matters within the exclusive jurisdiction of the High Court as defined by s. 38 of the Judiciary Act. The only relevant exception is dealt with in s. 38(e), namely matters in which a writ of *mandamus* or prohibition is sought against an officer of the Commonwealth.

3. In the exercise of Federal jurisdiction, the Supreme Court is required to apply Federal law and not State law.

4. But s. 64 of the Judiciary Act requires that the Victorian Administrative Law Act be applied in the exercise of Federal jurisdiction. In other words, the Commonwealth has, through the Judiciary Act, submitted itself to the State legislation; the Administrative Law Act becomes thereby surrogate Federal law.

The fourth step is the critical one and in support of it the applicant relied on the *Asiatic Steam Navigation Co.*[24] case and *Maguire v. Simpson.*[25] In the former case a majority of the High Court held, partly relying on s. 64 of the Judiciary Act, that the Commonwealth was entitled to take advantage of provisions in the English Merchant Shipping Act 1894 which

[22] *Commonwealth v. Rhind* (1966) 119 C.L.R. 584, 598 *per* Barwick C.J. The matter has been more recently discussed by the High Court in *China Ocean Shipping Co. v. South Australia* (1980) 27 A.L.R. 1.
[23] *Province of Bombay v. Municipal Corporation* [1947] A.C. 53 (P.C.).
[24] (1957) 96 C.L.R. 397.
[25] (1978) 52 A.L.J.R. 125.

limited the liability of ship owners. In *Maguire v. Simpson* the High Court, again in reliance on s. 64, held that the Commonwealth, in the form of the Commonwealth Bank, was subject to the N.S.W. Limitations Act. In proceedings in the N.S.W. Supreme Court to determine claims against a fund in court, the Commonwealth claimed to participate as an unsecured creditor. More than six years, however, had elapsed since its debt became due, and the Limitation Act, if applicable, would have operated to extinguish the claim. It was argued that s. 64 was confined to procedural matters only, but a majority of the High Court held that s. 64 extended to substantive rights so as to validly make the Limitation Act applicable against the Commonwealth.

Both these cases, according to the applicant, provided instances of non-Commonwealth legislation being made to apply to the Commonwealth by virtue of s. 64 of the Judiciary Act; so too, argued the applicant, does s. 64 operate to make the Administrative Law Act applicable to the Commonwealth.

The respondent on the other hand argued that whatever the precise limits of s. 64 might be with regard to matters of substantive law, it was only applicable in cases where the Commonwealth was being sued in respect of a cause of action for which a subject in like circumstances could be sued. Reliance was placed upon a passage in the judgment of Barwick C.J. in the *Maguire* case, where the Chief Justice said:

> But, more importantly I think, the ambit of the power given by s. 78 of the Constitution and the meaning of s. 64 of the Judiciary Act must be determined in the light of the tradition already established by 1900 in the Australian colonies with respect to the liability of the Crown to be sued and to suffer judgment in respect of any cause of action for which a citizen in like circumstances was liable.[26]

As the Administrative Law Act, however, is concerned with actions against 'tribunals', it was not a situation in which 'a citizen in like circumstance was liable'.

Gray J. accepted the respondent's argument and held that the Supreme Court had no jurisdiction pursuant to the Administrative Law Act to make any orders against the Commonwealth. His Honour said:

> I am disposed to the view that, whatever be the precise limits of the operation of s. 64, its operation is confined to cases where the Commonwealth stands in the same position as a subject. Where the Commonwealth is suing or being sued for damages for negligence or where it is suing or being sued as a party to a contract, s. 64 may operate to pick up any relevant State legislation and make it applicable. . . .
> The present litigation is expressly a claim by a subject against a tribunal. Section 64 speaks of the rights of the parties being the same 'as in a suit between subject and subject'. The language is not apt to encompass the application of a State Act which is exclusively concerned with proceedings against a tribunal.

The decision of Gray J. is with respect clearly correct and one has only to read the several judgment in *Maguire v. Simpson*, especially that of Gibbs J., to see that in the context of Part IX of the Judiciary Act, s. 64

[26] *Ibid.* 127.

was not intended to place the Commonwealth for all purposes and in all circumstances in an identical position to a subject.

The respondent also relied on s. 79 of the Judiciary Act as making the Administrative Law Act applicable to the Commonwealth. That section reads:

> The laws of each State, including the laws relating to procedure, evidence, and the competency of witnesses, shall, except as otherwise provided by the Constitution or laws of the Commonwealth, be binding on all courts exercising federal jurisdiction in that State in all cases to which they are applicable.

The applicant, on the other hand, argued that s. 79 was relevant only in the case where the Supreme Court was properly exercising a Federal jurisdiction. Gray J. agreed with the applicant: as the Administrative Law Act was not by s. 64 made applicable to the Commonwealth, s. 79 could therefore have no operation. The decision of Gray J. on this point is justifiable on other grounds as well. In the first place the Administrative Law Act is of a substantive rather than a procedural nature. The obligation on the tribunal to provide reasons for a decision,[27] the power in the Supreme Court to order the payment of money,[28] which in the case of the Commonwealth can only be made out of Consolidated Revenue, and the general vitiation of statutory privative clauses,[29] are surely all matters of substance rather than procedure. In any case, s. 79 is in terms declared to be subject to the laws of the Commonwealth and ss. 38 and 39 of the Judiciary Act have the combined operation of conferring exclusive jurisdiction on the High Court in all cases where a writ of *mandamus* or prohibition is sought against an officer of the Commonwealth. It is one of the fundamental propositions of the Administrative Law Act, however, to provide for an intermingling of remedies in that the Supreme Court can upon the return of the Order to Review, exercise all the powers which might be exercised upon the return of any prerogative writ;[30] this of itself may well be sufficient to make s. 79 inapplicable.

## CONCLUSION

Both *Murphy* and *Vithana* operate to cut down the reach of the Administrative Law Act. Whilst, however, the conclusion reached in *Vithana* was unavoidable and in any case probably justifiable,[31] the judgment in *A.B. v. Lewis and the Law Institute of Victoria* was not compelled by the Act. If one accepts the Act as representing a mandate to the court to remedy some of the more glaring deficiencies of applications brought under 0.50 and 0.53 R.S.C., then the judgment of Fullagar J. represents an unfortunate example of judicial conservatism.

L. Glick*

[27] S. 8.
[28] Pursuant to ss. 6 and 9.
[29] S. 12.
[30] S. 7.
[31] Witness, otherwise, the spectacle of orders for review issuing against say the Taxation Board of Review.

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