THE UNIVERSITY VISITOR: VISITATORIAL PRECEDENT AND PROCEDURE IN AUSTRALIA

by

ROBERT J. SADLER*

Universities were once regarded as a societal opiate. Nowadays individual rights transgress the teaching machinery. The medieval university looked backwards; it claimed to be a library of old knowledge. The modern university looks forward, and is a factory of new knowledge. The relationships between students, staff and the university itself have grown to parallel those of the world of industry. Universities, however, have remained unique creatures with special problems not familiar to the rest of society or, for that matter, the courts. At least in theory the law purports to accommodate this. Since the foundation of the ancient English universities at Oxford and Cambridge in the twelfth and thirteenth centuries respectively, their teaching bodies provided that intramural disputes were to be outside the jurisdiction of the courts and inside the cognizance of the founder's delegate, the visitor.

Visitatorial jurisdiction will not be dealt with at length in this article. That has been examined in detail elsewhere.[1] This commentary will be concerned with two as yet unexplored facets of visitatorial activity. First, the exercise of visitatorial jurisdiction in Australia and second, matters of visitatorial procedure. Before dealing at length with these issues, however, it is necessary to briefly outline the sources of the visitatorial office and to state the ambit of the visitatorial province.

SOURCES OF VISITATORIAL JURISDICTION: A BRIEF NOTE

The visitor has all those powers which inhere in the founder — the financial benefactor[2] of an eleemosynary corporation. These are twofold. First, he can inspect and inquire into the corporation's activities. According to Megarry V.-C., 'such visitations are at least obsolescent'.[3] Of this Sir Henry Winneke, himself a university visitor, recently observed that 'this probably means something more than they are growing out of date. It

* B.Ec., LL.B. (Hons.) (*Monash*).

1 See J. W. Bridge, 'Keeping Peace in the Universities: The Role of the Visitor' (1970) 86 *L.Q.R.* 531; Y. Oullette, 'Le Controle Judiciaire Sur L'Universite' (1970) 48 *Can. Bar Rev.* 631; W. Ricquier, 'The University Visitor' (1977-1978) 4 *Dalh.L.J.* 647. See also R. J. Sadler, 'The University Visitor in Australia: *Murdoch University* v. *Bloom*' (1980) 7 *Mon. L.R.* 59; P. Willis, Case Note (1979) 12 *M.U.L.R.* 291; J. W. Bridge, 'The Rev. John Bracken v. The Visitors of William and Mary College: A Post-Revolutionary Problem in Visitatorial Jurisdiction' (1979) 20 *Wm. & M. L.R.* 415.

2 *Green* v. *Rutherforth* (1750) 1 Ves. Sen. 462, 472 (27 E.R. 1144, 1149). See also *Case of Sutton's Hospital* (1613) 10 Co. Rep. 1, 33a (77 E.R. 960, 973-975).

3 *Patel* v. *University of Bradford Senate* [1978] 1 W.L.R. 1488, 1493.

means that they are dead, and, probably beyond redemption'.[4] The second and more familiar role of the visitor in university affairs is that concerned with the resolution of complaints and appeals. It is this second aspect of visitatorial activity with which this article is concerned.

England

The precise origins of visitatorial authority are unknown. However, it has been observed that it was not until the early years of the Reformation that visitatorial authority became associated with the corporate entity.[5] It is this association upon which the authority of the present-day visitor is based.

Historically, corporations were regarded as being of two types, ecclesiastical or lay. The former were corporations established in furtherance of the church and were subject to episcopal visitation at both diocesan and parochial levels.[6] Lay corporations were either eleemosynary or civil. Civil corporations, being municipal and later commercial corporations, were bodies of temporal purpose and therefore subject to control by the courts of law.[7] Conversely, eleemosynary corporations were founded for the perpetual distribution of charity and alms-giving. In the context of educational establishments, eleemosynary corporations are those founded *ad studendum et orandum*, for the promotion and support of learning and literary ends.[8] The government and control of such foundations is entirely intra-mural. At the apex of the judicial arm of this government is the visitor. This office attaches as a necessary incident to all eleemosynary corporations.[9] There is no doubt that all Australian universities are eleemosynary corporations.[10]

The earliest eleemosynary institutions of an educational nature were colleges of the ancient English universities. The colleges, as the principal teaching bodies, were subject to visitation by the founders — invariably great ecclesiastics — their heirs or appointees whereas the universities were ecclesiastical and therefore subject to episcopal visitation.[11]

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4 Occasional Address delivered at degree-conferring ceremony, Monash University, 28 March 1980. A copy of the address is held in the University Offices, Monash University, and was partly published in 'The Role of Our Visitor' (1980) 3 *Monash Reporter* 5.

5 Cf. R. Pound, 'Visitatorial Jurisdiction Over Corporations in Equity' (1936) 49 *Harv. L.R.* 369, at p. 370.

6 *Case of Sutton's Hospital* (1613) 10 Co. Rep. 1, 31a; *Philips* v. *Bury* (1692) 1 Ld. Raym. 5, 7-8; 1 *Bl. Comm.* 468.

7 Strictly, these corporations were visitable by the King, in the King's Bench: 1 *Bl. Comm.* 469; Holdsworth, IX *History of English Law* (7th ed., 1956) at pp. 57-58.

8 Shelford, *The Law of Mortmain* (1836) 23, Bridge, (1970) *op. cit.* 533-534.

9 *Appelford's Case* (1672) 1 Mod. Rep. 82, 85; *Philips* v. *Bury* (1694) Skin. 447, 484; *Ex Parte McFadyen* (1945) 45 S.R. (N.S.W.) 200, 201; *Tudor on Charities* (6th ed., 1967) 317.

10 Cf. Bridge, (1970) *loc. cit.*; Ricquier, *op. cit.* at pp. 650-651; Willis, *op. cit.* at pp. 293-294; *Vanek* v. *Governor of University of Alberta* [1975] 5 W.W.R. 429 at p. 437; *R.* v. *Dunsheath; ex parte Meredith* [1951] 1 K.B. 127 at p. 132. Also *cf. e.g.* 16 Vict. 34 (Preamble); *Ryde Municipal Council* v. *Macquarie University* (1978) 53 A.L.J.R. 179 at pp. 183, 189-190.

11 1 *Bl. Comm.* 470-471; see also M. H. Curtis, *Oxford and Cambridge in Transition: 1558-1642* (1959).

Australia

Australian universities have not adopted the English collegiate teaching tradition although it was only due to pressure from the 'professorial board' that the first Australian university, the University of Sydney, when founded in 1850, did not adopt provisions akin to those in the *University of London Act* which provided for collegiate teaching.[12] Moreover, the founders took the unusual step of completely severing secular education from religious instruction. A parliamentary committee of 1849 demanded not only that the University, 'must belong to no religious denomination, and require no religious test' but also that, 'the Visitor must be a layman'.[13] The University of Sydney, and its sister, the University of Melbourne, founded in 1853, are the parent tertiary teaching institutions in Australia. All those universities which were subsequently founded conformed generally to their example. As a result all but six[14] of the University Acts contain provisions appointing the state Governor as visitor and giving him authority, 'to do all things which appertain to visitors'.

In the six Australian universities in which there are no 'statutory visitors' there is much debate as to what functionary fulfills the visitatorial role.[15] Since the founder of an eleemosynary institution is defined as that person or institution who provided the funds for its establishment[16] then plainly the state parliaments are the founders, not the King-in-Parliament as would have been the case during the formative era of those laws governing visitatorial appointments, or the Sovereign personally.[17] In the absence of a delegation of the founder's visitatorial powers those powers remain in the founder. Thus, it is suggested, should a complainant seek visitatorial assistance in a university which does not have a 'statutory visitor', his/her proper course is to address a petition to the relevant parliament. On receipt of that petition parliament would no doubt exercise its right to delegate its visitatorial powers to such person or persons as it deems appropriate. This is both inconvenient and unsatisfactory. For parliament to delegate its visitatorial powers a process similar to that required to enact legislation would have to be undertaken. This cumbersome process will be time consuming and

12 See generally H. E. Barff, *A Short Historical Account of the University of Sydney* (1902).

13 'Report from the Select Committee on the Sydney University', 21 September 1849, 1, in *Votes and Proceedings of the Legislative Council* (N.S.W.), 1849, Vol. 1 at p. 539. The first University Visitor in Australia was Sir Charles Fitz-roy who was visitor of the University of Sydney from its inauguration. The first Australian visitor to exercise his jurisdiction was Viscount Canterbury who was visitor of Melbourne University in 1871, see text at n. 37 *ff*.

14 *I.e.* University of Queensland, James Cook University of North Queensland, Griffith University, University of New England, University of New South Wales and the Australian National University.

15 See T. G. Matthews, 'The Office of the University Visitor' (1980) 11 *U.Qld.L.J.* 152, Oullette, *loc. cit.*

16 *Green* v. *Rutherforth* (1750) 1 Ves. Sen. 462, 472. See also *Case of Sutton's Hospital* (1613) 10 Co. Rep. 1, 33a.

17 *Cf. Town Investment Ltd.* v. *Department of the Environment* [1978] A.C. 359.

possibly costly for the aggrieved petitioner. Yet, this can readily be prevented by a clear provision in the relevant legisation either appointing a visitor or, in accordance with the approach of the Albertian legislature,[18] doing away with the visitatorial office altogether.

JURISDICTIONAL PARAMETERS: AN OUTLINE

Visitatorial jurisdiction in Australia stems directly from a delegation of the parliaments' visitatorial powers. In a large majority of Australian universities this delegation is expressed by the University Acts in the following manner:

> The Governor shall be the Visitor of the University and shall have authority to do all things which appertain to Visitors as often as to him seems meet.[19]

What exactly are all those 'things which appertain to Visitors'? The line of demarcation between those complaints which come under the jurisdiction of the visitor on the one hand, and that class of cases which come under the jurisdiction of the courts on the other was stated by Kindersley V.-C. in *Thomson* v. *University of London*[20] in the following manner:

> Whatever relates to the internal arrangements and dealings with regard to the government and management of the house, of the domus, of the institution, is properly within the jurisdiction of the Visitor, and this Court will not interfere in those matters; but when it comes to a question of right of property, or rights as between the University and a third person *dehors* the University, or with regard, it may be, to any breach of trust committed by the corporation, that is, the University, and so on, or any contracts by the corporation, not being matters relating to the mere management and arrangement and details of their domus, then, indeed, this Court will interfere.

It has often been observed that a useful short-hand description of the visitatorial province is to regard it as confined to matters of a 'domestic or internal' nature.[21]

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18 See Letter from D. P. Jones, [1980] *Public Law* 112; *University Amendment Act* 1976 (Alb.) c. 88.

19 *Monash University Act* 1958 (Vic.) s. 42; *Melbourne University Act* 1958 (Vic.), s. 47; *La Trobe University Act* 1964 (Vic.) s. 42; *Deakin University Act* 1974 (Vic.) s. 38; *University and University Colleges Act* 1900 (N.S.W.) s. 17. Cf. *Tasmania University Act* 1951 (Tas.) s. 16; *University of Adelaide Act* 1971 (S.A.) s. 20; *Flinders University of South Australia Act* 1966 (S.A.) s. 24; *University of Newcastle Act* 1964 (N.S.W.) s. 30; *Macquarie University Act* 1964 (N.S.W.) s. 30; *University of Wollongong Act* 1972 (N.S.W.) s. 36; *University of Western Australia Act* 1911 (W.A.) s. 7; *Murdoch University Act* 1973 (W.A.) s. 9. Whilst acting qua Visitor the various Governors do so as persona designata and not in their capacities as representatives of the Crown; see e.g. *Melbourne University Act* 1958 (Vic.) ss. 3 and 47; *Tasmanian University Act* 1951 (Tas.) s. 16; *Dr. Walker's Case* (1735) Cast. Hard. 212, 218. Cf. *Patel* v. *University of Bradford Senate* [1978] 1 W.L.R. 1488, 1492.

20 (1864) 33 L.J. Ch. 625, 634.

21 *Murdoch University* v. *Bloom* [1980] W.A.R. 193, noted Sadler, *loc. cit.*; *Thorne* v. *University of London* [1966] 2 Q.B. 237 at p. 242; *R.* v. *Dunsheath; ex parte Meredith* [1951] 1 K.B. 127, 132.

For the purposes of this article, it will suffice to state a number of propositions outlining the judicially determined parameters of the jurisdiction. It should be remembered that such an exercise inevitably leads to distortion through over simplification.

1. Visitatorial jurisdiction *ratione personae* embraces all persons who subject themselves to rules enacted pursuant to the foundation instrument. It extends also to questions of disputed membership.[22] The dispute need not necessarily be between *corporators* of the university.[23]

2. The visitor does not have jurisdiction over a complaint, even though it is between members of the university, if it concerns compliance with the general law, that is, the law applicable to all persons without reference to the character of the parties as members of the university. In this sense it can be said that the visitor's jurisdiction is confined to disputes arising under the foundation instrument.[24] However, even a dispute so arising is not necessarily within the visitor's cognizance. If the right or duty in dispute can be characterised as public — thus giving rise to a public interest in its enforcement — the proper forum for enforcement is the courts.[25]

3. Disputes arising out of a contractual relationship between the parties are only within visitatorial jurisdiction if they concern rights or duties which relate to and effect the management of the university as a whole[26] as opposed to predominantly private rights or duties. This facet of visitatorial jurisdiction may also be confined to those matters which stem from the exercise of discretions conferred upon internal bodies by the contract in question.[27]

4. It is invariably said that visitatorial jurisdiction is exclusive.[28] This, it is suggested, is an over-simplification. The courts have never expressed the opinion that the visitor's jurisdiction is exclusive where the complaint is one of ultra vires or of a non-jurisdictional error of law, nor have any of the cases which espouse exclusivity of visitatorial jurisdiction been

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22 *Patel* v. *University of Bradford Senate* [1978] 1 W.L.R. 1488 (Ch.D.) aff'd [1979] 2 All E.R. 582 (C.A.).

23 *Ex Parte McFadyen* (1945) 45 S.R. (N.S.W.) 200 at p. 203; *Thomson* v. *University of London* (1864) 33 L.J.Ch. 625. *Contra Ex Parte Davison* (1772) unreported, applied in *R.* v. *Grundon* (1775) 1 Cowp. 315 at pp. 317, 319-322. Cf. *Herring* v. *Templeman* [1973] 3 All E.R. 569 at p. 572.

24 *Ex Parte McFadyen* (1945) 45 S.R. (N.S.W.) 200 at p. 203; *Ex Parte King; re University of Sydney* (1944) 44 S.R. (N.S.W.) 19 at p. 31; *R. v. St. John's College, Cambridge* (1963) 4 Mod. 233.

25 *Ex Parte King, re University of Sydney* (1944) 44 S.R. (N.S.W.) 19 at p. 31; *King* v. *University of Saskatchewan* (1969) 1 D.L.R. (3d) 721 (Sask. C.A.) aff'd (1969) 6 D.L.R. (3d) 120 (Can. S.C.); *Re Webb and Simon Fraser University* (1978) 83 D.L.R. (3d) 244 (B.C.S.C.). But *cf. R.* v. *Dunsheath; ex parte Meredith* [1951] 1 K.B. 127.

26 *Murdoch University* v. *Bloom* [1980] W.A.R. 193; *cf. Bell* v. *University of Auckland* [1969] N.Z.L.R. 1029. See also *McWhirter* v. *Governors of the University of Alberta* (1976) 63 D.L.R. (3d) 684; *Vanek* v. *Governors of the University of Alberta* [1975] 5 W.W.R. 429; *Riddle* v. *University of Victoria* (1978) 84 D.L.R. (3d) 164 (B.C.S.C.) aff'd [1979] 3 W.W.R. 289 (B.C.C.A.).

27 *Murdoch University* v. *Bloom* [1980] W.A.R. 193. See also Sadler *op. cit.* 63.

28 E.g. *Patel* v. *University of Bradford Senate* [1978] 1 W.L.R. 1488, 1493-1494 (Ch.D.) aff'd [1979] 2 All E.R. 582 (C.A.); *Thorne* v. *University of London* [1966] 2 Q.B. 237.

concerned with such matters. Jurisdictional errors or errors of law are such a fundamental violation of a complainant's rights that one would expect at least a concurrent jurisdiction in the courts. Such errors go beyond matters appropriate for final resolution by a purely domestic forum.[29] It must be admitted, however, that there is no direct authority in support of this view, although there are cases which indicate that the jurisdiction of the visitor is not in all cases exclusive. For instance, in *R. v. Dunsheath; ex parte Meredith*[30] a King's Bench Divisional Court refused to issue mandamus to direct the Chairman of Convocation of London University to summon an extraordinary meeting of Convocation, as prima facie required by the university statutes, on the ground that the matter was 'internal' and an *alternative forum* for redress lay with the visitor. In giving judgment for the Court, Lord Goddard C.J. said:

> This court has always... refused to issue a mandamus if there is another remedy open to the party seeking it. This is one of the reasons, no doubt, why, where there is a Visitor of a corporate body, the court will not interfere in a matter within the province of the Visitor.[30a]

Thus, the Court regarded itself as having jurisdiction but refused to intervene since the alternative jurisdiction of the visitor was available to the plaintiff.

It is therefore suggested that a concurrent curial/visitatorial jurisdiction exists over disputes concerning jurisdictional errors or non-jurisdictional errors of law. In light the strong decisions in *Patel* v. *University of Bradford Senate*[31] and *Thorne* v. *University of London*[32] it cannot be disputed that the visitor's jurisdiction is exclusive in cases involving a non-jurisdictional error of fact or where the decision reached, although within power and not legally incorrect, is not the preferable decision.[33] It should be added that in those cases involving a concurrent curial/visitatorial jurisdiction once the complainant has proceeded in the forum of his choice the decision of that forum will end the cause of action and prevent consideration of the complaint by the forum not first elected.[34]

VISITATIONS IN AUSTRALIAN UNIVERSITIES

Given a rudimentary understanding of the ambit of visitatorial jurisdiction it is now possible to consider the exercise of that jurisdiction in Australia. It was observed above that visitatorial authority derives from the principle that those who endow a corporation have a right to super-

29 *Cf.* S. A. de Smith, 'Aston's Villa — Replay for Visitors' [1974] *Camb. L.J.* 23 at pp. 24-25.
30 [1951] 1 K.B. 127.
30a Id, 131-132.
31 [1978] 1 W.L.R. 1488 (Ch.D.) aff'd [1979] 2 All E.R. 582 (C.A.).
32 [1966] 2 Q.B. 237.
33 In Victoria a concurrent curial/visitatorial jurisdiction may well have been achieved by the *Administrative Law Act* 1978.
34 See *Port of Melbourne Authority* v. *Anshun Pty. Ltd.* [1980] V.R. 321, 324-326.

vise and control its internal government and conduct. The visitor, therefore, administers a system of law theoretically distinct from the law of the land. His 'law' is the intentions of the founder as expressed in the foundation instrument and considerations of what is expedient for the community concerned. His means are not a public power of dispute resolution according to the general law but a form of private discretion. It follows that in exercising this discretion visitors are not *bound* to apply the common law. It seems reasonable to assume, then, that as a guide to intervention visitors will look to principles articulated in past invocations of visitatorial authority. Thus, it is the aim of this section to glean a number of propositions, presaged as visitatorial precedent, which emanate from the exercise of visitatorial jurisdiction in Australia.

In Australia it appears that visitors have exercised their jurisdiction on five occasions: in 1871, 1884 and 1979 at Melbourne University, at the University of Tasmania in 1962 and at Murdoch University in 1980. Petitions and subsequent refusals to accept jurisdiction are more common and have occurred, for instance, at Melbourne University in 1879,[35] the University of Western Australia in 1923,[36] Sydney University in 1944[37] and Monash University in 1974.[38]

Australian visitors have articulated a number of considerations which have influenced them in the exercise of their jurisdiction. Briefly stated these considerations are:

(a) the visitor will act according to the intentions of the founder, express or implied, in the foundation instrument. This broad principle carries with it the corollary that the well-being of the university will in all cases operate as an important constraint upon visitatorial discretion;

(b) the visitor is a tribunal of last resort. He will refuse relief if recourse has not been had to internal and accessible avenues of relief;

(c) the visitor will not encroach upon the discretion of an internal body if that body has exercised its discretion honestly;

(d) the jurisdiction of the visitor is not available to those who delay substantially in bringing their petition.

It is instructive to consider each of these factors in turn and outline the events which led to their application.

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35 All relevant documentation of the event is held by the University of Melbourne Archives in a bound volume entitled *Visitations 1879 & 1884.* See also Sir Ernest Scott, *A History of the University of Melbourne* (1936) at pp. 89-91.

36 See generally W. Somerville, Vol. II, *A Blacksmith Looks at a University* (1946, Unpublished Manuscript, University of Western Australia Archives) at pp. 713-716; F. Alexander, *Campus at Crawley: A Narrative and Critical Appreciation of the First Fifty Years of the University of Western Australia* at pp. 278-279.

37 Which gave rise to, and is briefly discussed in, *Ex Parte McFadyen* (1945) 45 S.R. (N.S.W.) 200.

38 Interview with J. D. Butchart, Academic Registrar, Monash University, 7 March 1980. The petition arose out of the facts investigated by the Ombudsman and reported in *First Report of the Ombudsman, 30 October 1973 to 30 June 1974,* Victoria at pp. 154-157.

The Founder's Intentions

Above all else the visitor will be giuded by the intentions of the founder as evidenced in the instrument of foundation. This overriding consideration is either implied or expressed in each of the five Australian visitations but most clearly from those at Melbourne University in 1871 and 1884.

The first exercise of visitatorial authority in Australia, at Melbourne University in 1871, was a direct result of a power-struggle between the then recently constituted Senate and the Council of the University.[39] Upon the resignation of the Professor of Classical and Comparative Philology and Logic the Council established a Selection Board in the United Kingdom to screen candidates for the vacant Chair. The Board was instructed, *inter alia*, that the successful applicant must be a graduate of one of the universities of Oxford, Cambridge or Dublin, must not be a 'man in holy orders', or affiliated with any political association. The Senate objected to the purported delegation of the Council's power of selection and the imposition of selection criteria. Consequently, in June 1871, six Senators petitioned the Governor, Viscount Canterbury, as visitor to the University, praying that he visit the University and resolve the dispute. After some initial reluctance to accept the petition[40] the Visitor eventually agreed to hear counsels' submissions. In a reserved judgment it was held that the Council had not acted contrary to the founder's intentions as expressed in the foundation instrument.[41] The Visitor's reasoning is illustrative of the importance he placed upon the intentions of the founder. For example, it was alleged that to limit potentially successful candidates to men 'not in holy orders' was an improper restriction upon the Council's discretion. This, it was submitted, was a 'negative religious test' contrary to s. 12 of the University Act which provided that, 'no religious test shall be administered to any person in order to entitle him to be admitted' to the University. The Visitor, however, reasoned that this so-called 'negative religious test' was not, 'contrary to the intentions of the founder of the University as evidenced by the general tenor of the Act of Incorporation'.[42] He accepted the submission that:

> The imposition of any religious test... would be contrary to the intentions of the founder, and contrary to the law which embodies and is intended to give effect to those intentions. But if the condition that the candidate be selected for the vacant classical professorship shall not be in holy orders be at variance with the intentions of the founder, and contrary to the provisions of the 12th section of the Act of Incorporation, the 2nd section of the same

39 All relevant documentaion of the event is contained in the University of Melbourne Archives in a bound volume entitled *Visitation 1871*. See also Scott, *op. cit.* 85-89.

40 Letter: Canterbury to Madden, 21 July 1871. Located in University of Melbourne Archives: ibid.

41 Judgment was delivered on 18 September 1871, and is reported in (1871) 2 A.J.R. 87. It is also discussed, in part, in *Clark* v. *University of Melbourne* (No. 2) [1979] V.R. 66 at 70-71.

42 *University of Melbourne Visitation* (1871) 2 A.J.R. 87 at p. 91 col. 1.

> Act errs in the same direction... for it is there enacted that... four-fifths of the Council of the University shall be 'laymen'.[43]

The Visitor concluded that the condition in question was not a religious test but merely a device to ensure that the selected applicant worked efficiently within the University and was not distracted by any other calling.

The significance of the 1871 visitation lies not in its result but in the exercise of power itself and the fact that Viscount Canterbury was guided principally by the founder's intentions, either express or implied, in both the specific provisions and the general tenor of the foundation instrument.

The pervasive nature of this principle is evident from its application by the Marquis of Normanby in 1884 whilst acting as visitor to the University of Melbourne.[44] The cause of the visitation was again a clash between the Council and the Senate of the University. Various regulations had been duly passed by both bodies altering the prizes to be awarded for scholastic excellence. Amongst other things the new regulations provided that the regulations, 'as hereinbefore in force, shall remain in force until after the annual commencement in the year 1884'. The Council assumed that this provision was not to be read so as to exclude awarding the recently constituted prizes at forthcoming examinations to be held before the annual commencement. Consequently, it advertised that the new prizes would be awarded. The Senate objected to such a construction of the new regulations and sought the intervention of the Visitor. Four months after the petition the Governor, together with his assessor, visited the University and, after hearing lengthy argument by counsel,[45] found that, as a matter of construction, the Council's actions were unauthorized.[46] Accordingly it was ordered that the newly constituted prizes were not to be awarded at the forthcoming examinations, and it should be noted, costs were awarded to the Senate to be paid out of University funds.[47] In so deciding His Excellency seems to have accepted the submission that the visitatorial forum was not, 'a court of law where the judge had to decide between the plaintiff and defendant, but was a domestic tribunal where a decision had to be given according to the very right' and, as such, there was no need for the petitioning body to bear the onus of having to show the respondent to be in error.[48] It should be noted that the 'very right', in this context, is not a decision 'according to feeling' but a decision in strict accordance with what the Visitor perceived as being the intentions of the founder.[49]

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43 Ibid.

44 All relevant documentation of the event is contained in the University of Melbourne Archives in a bound volume entitled *Visitations 1879 & 1884.* See also Scott, *op. cit.* at pp. 91-94.

45 Counsels' submissions are reported in 'The University Visitations' the *Argus,* 11 January 1884, p. 6, cols. 5-6; the *Age,* 11 January 1884 at p. 6, col. 3.

46 The Visitor's judgment is reported in: 'The Governor's Decision' the *Argus,* 24 January 1884, at p. 9, col. 1; the *Age,* 24 January 1884, at p. 5, col. 7.

47 Whether or not the visitor had authority to do this is doubtful. See further text at n. 58 *infra.*

48 See the *Argus* 11 January 1884 *op. cit.* col. 6; the *Age,* 11 January 1884 *loc. cit.*

49 The *Argus* 24 January 1884 *loc. cit.*; the *Age,* 24 January 1884 *loc. cit.*

Together the judgments of Viscount Canterbury in 1871 and the Marquis of Normanby in 1884 indicate that the founder's intentions are the most important consideration which a visitor must take into account in the exercise of his jurisdiction to grant or refuse the relief sought. It should be noted, however, that the founder will be deemed to have intended that in the construction and application of his wishes any detriment to the foundation itself must be considered. This is clearly apparent from Lord Rowallan's visitation at the University of Tasmania in 1962. The details of this event will be discussed below.[50] Here it will suffice to note Lord Rowallan's words: 'We can I believe all agree that the well-being of the University, present and future, is the all-important consideration'.[51]

The Visitor as a Tribunal of Last Resort

A corollary of the principle that the visitor must act in accordance with the foundation Act is that the visitor is a tribunal of last resort. All Australian universities are governed in their day-to-day activities by regulations, rules, by-laws or statutes resulting from the wide powers of control over university affairs vested in the Council and/or Senate of the university. The Council and/or Senate have invariably established, or have delegated authority to establish, a complex organization of internal dispute — settling administrative and disciplinary tribunals. The power to establish this network of both administrative and quasi-judicial bodies results directly from the founding Act. Thus, the visitor must recognise the existence and function of these bodies. He cannot ignore their role or usurp their powers. His role in respect of such bodies is to ensure that they act within their powers and in accordance with the procedures, either express or implied, which are detailed in their governing enactments. Therefore, the visitor will normally deny access to his jurisdiction if recourse has not been had to internal and accessible avenues of relief. In this respect the role of the visitor is very similar to the curial concept of supervisory review.

That failure to invoke the jurisdiction of these internal bodies will operate to deny relief sought from the visitor is clear from the judgment of the Governor of Victoria, Sir Henry Winneke, as visitor to the University of Melbourne, in 1979. In July 1979, four undergraduate students petitioned the Visitor seeking twenty-four declarations to the effect that the Council of the University had acted in breach of the University Act, statutes and regulations of the University and had in some respects acted 'wrongfully', that the Students' Representative Council (hereafter referred to as S.R.C.) had acted in breach of the University statutes and regulations and its own Constitution, and that certain individuals were 'wrongfully' purporting to hold certain S.R.C. offices and consequently 'wrong-

50 See text at n. 68 *ff.*

51 *In the Matter of a Petition Presented to the Visitor of the University of Tasmania* (1962) (unreported, University of Tasmania Archives, Registrar's Office File, UT 88/1 (4)) 6.

fully' receiving remuneration.[52] In a judgment delivered four months after receipt of the petition the Visitor refused to grant any of the declarations sought for reasons which included a lack of jurisdiction and a discretionary refusal to grant relief.[53]

One of the allegations requires particular attention here. Declarations were sought against the S.R.C. that a named individual was no longer President of the S.R.C. and that the S.R.C. were 'wrongfully' paying money to him. It appeared that in May 1979 the President of the S.R.C., who was *ex officio* a member of the Council of the University, had tendered his resignation but that the S.R.C. Executive purported to resolve to allow him time within which he could withdraw his resignation and he did so. The Visitor held that whether or not the alleged President held that office was within his power to decide. At this level the question was whether a person had ceased to hold the requisite qualifications to be a member of the Council and whether there was a vacancy in that body. The Visitor reasoned that his jurisdiction to decide such a question followed from the traditional jurisdiction of a visitor, 'exercisable in respect of corporators, and particularly in respect of disputes as to whether persons are or are not entitled to be recognized as corporators'.[54] There was, however, a complicating factor. The Council had an inherent power to determine whether the credentials of a particular person claiming to be a member of the Council entitled him to recognition as such a member.[55] His Excellency, therefore, held:

> ... where the relevant facts are disputed, and an inquiry as to the facts, and their incidental effects is desirable, I think it would be appropriate exercise of discretion to refrain from a determination of the matter when no such inquiry has been made by the body which has a right to determine the matter in the first instance.[56]

His Excellency felt that he could not grant the declarations sought until the Council had made this inquiry.[57] It appears, then, that a visitor will refrain from granting the relief sought when another body has a right to determine the matter and has not yet done so. It is not necessary that there be a dispute as to the facts for a visitor to exercise his discretion in this manner. This is clear from the reasons given by the Visitor in answer to the allegation that certain individuals were wrongfully purporting to act as editors of a student newspaper when they were not properly qualified to hold that office. The S.R.C. Constitution provided that the S.R.C. itself was to determine whether a person held the requisite qualifications for such an office. The facts in this respect were not disputed.

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52 See generally G. Maslen, 'Students seek Winneke's aid', the *Age* 10 August 1979, 5; G. Maslen, 'Students' plea to Governor could set a Precedent', the *Age* 11 August 1979, 10.

53 *In the Matter of the University of Melbourne and a Petition to the Visitor — Judgment of the Visitor* (Unreported, 1979). (Hereafter referred to as Visitor's Judgment (Melb.) 1979). A copy of the judgment is held by Melbourne University S.R.C.

54 Id at p. 29.

55 Id at p. 30.

56 Ibid.

57 Ibid.

The petitioners had contended that there was no need to exhaust internal remedies before petitioning the visitor as visitatorial jurisdiction extends to hearing all grievances of a domestic nature. His Excellency, however, held that:

> the jurisdiction of the Visitor is not available to those who wish to by-pass internal procedures which are available of access and convenient and ... it is within the discretion of the Visitor in the exercise of his discretion to refrain from making a determination where recourse has not been had to avenues of relief available.[58]

The Visitor will not Interfere with an Honestly Exercised Discretion

It follows from what has been outlined above that the visitor will not readily overturn the decision of an internal body which is assigned a discretion by or pursuant to the foundation instrument if that discretion is exercised honestly.[59] It is not material to argue that different persons exercising the discretion with equal honesty might have reached a different conclusion.[60]

This principle has been adopted and applied by Australian visitors, most recently by the Governor of Western Australia, Sir Wallace Kyle, as visitor to Murdoch University, in 1980. Recourse to the Visitor arose out of a decision by the Vice-Chancellor of Murdoch University approving only half of the normal twelve months study-leave sought by Dr Bloom, a Lecturer in Mathematics. The Vice-Chancellor's decision was based upon three considerations: a recent recommendation of the Tertiary Education Commission that study leave be reduced from twelve to six months unless special circumstances were shown, activity within the Senate of the University in readiness to adopt that recommendation, and the financial strains which may be placed upon the University if he did not implement the Tertiary Education Committee's recommendations. Dr Bloom petitioned the Visitor in late October 1979 alleging, *inter alia*, that the Vice-Chancellor's decision was 'harsh and unjust' and requesting a declaration to the effect that he should have been granted twelve months' study leave.

After hearing oral submissions from counsel on the preliminary point of jurisdiction, the Visitor, in a judgment delivered in early May 1980, refused to grant the relief sought on the ground that he was not prepared to, 'interfere with the exercise of a discretionary power, unless that power has been exercised "from motives wrong, illegal or corrupt".'[61] The Visitor stated that the expression 'from motives wrong, illegal or corrupt' was not a code on the subject but well expressed the rule that '... before

58 Id at p. 51.

59 Cf. *R.* v. *Hertford College* (1878) 3 Q.B.D. 693, 701; *Murdoch University* v. *Bloom* [1980] W.A.R. 193, 198-199 per Burt C.J.

60 Cf. *Ex Parte Forster; re University of Sydney* (1963) 63 S.R. (N.S.W.) 723 at p. 728.

61 *In the Matter of the Murdoch University Act, 1973-1978*; *Bloom* v. *Vice Chancellor of Murdoch University — Judgment of the Visitor* (1980). Unreported, Secretary's Office, Murdoch University and Government House, Perth, 15.

I could interfere with the Vice-Chancellor's discretion I would need to find something much more weighty than that I myself would have reached a different decision'.[62] His Excellency held that Dr Bloom's allegations suggested nothing more than that the Vice-Chancellor had been 'mistaken' in his view of the Tertiary Education Commission's Report and the actions of the Senate and that a mere mistake was 'wholly insufficient as a basis to warrant any interference by me'.[63] The Visitor's view, then, can be briefly stated: If a body in whom a discretion is vested comes to an opinion, that opinion will only be upset if it is based on improper *motives.*

This view is slightly narrower than, and should be contrasted with, the principle applied eight months earlier by Sir Henry Winneke as visitor to the University of Melbourne. It was alleged, *inter alia,* that the Council of Melbourne University had wrongfully made financial grants to the S.R.C. to be used for purposes which did not satisfy the criteria required of such grants. The Visitor refused to grant the declarations sought since the question of whether or not the criteria had been satisfied was a matter of opinion for the Council. His Excellency stated that, as visitor, he would not:

> encroach upon the functions of a body within the University to whose discretion that aspect of internal management has been entrusted by or under the foundation instrument, if that body has exercised the discretion honestly[64] ... and that involves forming the opinion genuinely and not dishonestly or irrationally.[65]

His Excellency defined 'irrationally' as meaning, '... something more than not being reasonable; there has to be an absence of reason to the point where there is no real opinion'.[66] In summary, His Excellency would interfere if the decision-maker's motives were suspect or where there was in truth no real opinion formed.

It is instructive to contrast the views of Sir Wallace Kyle and Sir Henry Winneke as they differ in substance more than can be explained by the assumption that Sir Wallace Kyle did not have Sir Henry Winneke's judgment before him. Both of the learned Visitors admitted that they would intervene if the decision-maker had acted in bad faith, that is, not honestly or genuinely. Both agreed that it is irrelevant that a third person may have come to a different decision. Both also agreed that a mere error in the exercise of discretion, that is a 'mistake' according to Sir Wallace Kyle, would not be sufficient to invoke visitatorial jurisdiction. Sir Henry Winneke, however, would go one step further.

62 Ibid.
63 Ibid.
64 Visitor's Judgment (Melb.) 1979, 20.
65 Id at p. 21.
66 Id at p. 41.

He would intervene if, in truth, the decision-maker had not really formed an opinion but had failed to exercise his discretion.[67]

It is evident from the language of the learned Visitors that the standards they are willing to apply are far less stringent than that which are applied by the courts. For instance, if a decision-maker takes into account irrelevant considerations, fails to consider relevant considerations or acts for an improper purpose (but not in bad faith) a visitor may refuse to intervene whilst, in these same circumstances, it is well settled that a court exercising supervisory jurisdiction will quash the decision or order that it be made according to law. It should be noted, however, that certain grounds of ultra vires for abuse of discretionary authority, such as, acting under dictation, adopting a rule or policy, or improperly delegating a discretion may be construed as coming within the ambit of Sir Henry Winneke's concept of 'irrationality', that is, as being no true exercise of discretion by the decision-maker.

The reason for the relatively narrow grounds of intervention adopted by the Visitors is best explained by reference to the fact that the visitatorial role in this context is perceived as purely supervisory, and this only to the extent that the visitor will ensure that the decision-maker exercises his discretion in good faith and not irrationally. The Visitors have shown an implicit reluctance to impose standards upon a body which is given a discretion by or pursuant to the foundation instrument. In other words, the Visitors have perceived their supervisory jurisdiction in a light different from that of present-day superior courts. The visitatorial role in this respect has been generally regarded as a device to ensure that a discretion is exercised, not that it has been exercised properly.

Visitatorial decisions must ultimately be based on policy, on goals consciously chosen from outside the system itself. The jurisprudence suitable for the regulation of society is sometimes unsuitable for the regulation of microcosms of society. The answers for any microcosm, therefore, are not necessarily found in rules applied by courts supposedly across the board to society generally. Thus, individual microcosms must be catered for and regulated by someone cognizant of their unique problems. Hence, the role of the university visitor. In this light one can properly understand the Visitors' deviation from strict legal precedent. The visitor, therefore, is a norm-creator. This is a very demanding role and calls for an intimate knowledge of the 'community' to be regulated since he must balance, *inter alia*, the need for internal stability, individual expectations, the benefits of intergrating new values into the 'community', the dangers of extrapolating a norm developed by the courts into the field of visitatorial decision-making, the need for optimum power dis-

67 *Cf.* the Dixonian view of 'unreasonableness', that is, that an exercise of discretion will be invalid not merely because it is inexpedient or misguided but because it, 'could not reasonably have been adopted as a means of attaining the ends of the power... it is not a real exercise of power': *Williams* v. *Melbourne Corporation* (1933) 49 C.L.R. 142, 154 *per* Dixon J.; *cf. Weigall Construction Pty. Ltd.* v. *Melbourne and Metropolitan Board of Works* [1972] V.R. 781 at p. 800. See also *Secretary of State for Education and Science* v. *Metropolitan Borough of Tameside* [1976] 3 All E.R. 665.

tribution within the university hierarchy and the many other often unarticulated attitudes, perceptions and ideologies inherent in both human conduct and the proper functioning of university 'communities'.

Substantial Delay

The visitor may decline jurisdiction if there has been 'substantial delay' in bringing the petition. What constitutes 'substantial delay' will depend upon the ramifactions of a visitor's decision at the date of the petition. If such a decision would adversely affect the well-being and beneficial administration of the university or would inhibit the spirit of intellectual inquiry and co-operation within the university the visitor may well decline jurisdiction.

This principle is best expressed by the Governor of Tasmania, Lord Rowallan, as visitor to the University of Tasmania, in 1962.[68] Recourse to the Visitor arose out of the much disputed dismissal of Professor S. S. Orr from the Chair of Philosophy.[69] The epic began in 1954 when Professor Orr requested a government inquiry into alleged maladministration within the University Council. Thereafter, Orr has been described as a 'marked man'.[70] Evidence was supposedly collected against him and it was alleged that he had seduced one of his female students. In 1956, upon a recommendation of a committee of the University Council, Orr was summarily dismissed. Subsequent challenges to this dismissal in both the Supreme Court of Tasmania[71] and the High Court of Australia[72] were unsuccessful, and a later action in defamation and assault against his accuser, the girl's father, was struck out as an abuse of the process of the court.[73]

Many people, including religious leaders and academics, remain convinced that there had been a miscarriage of justice. Both the Supreme Court of Tasmania and the High Court of Australia were reluctant to even consider the matter. Indeed, both Burt C.J.[74] and Sir Charles Lowe[75] have expressed the opinion that if the visitor's jurisdiction had been brought to the court's attention Orr's action would have been dismissed *in limine*. It is noteworthy that toward the end of proceedings in the High Court, Dixon C.J. stated: 'There is one thing I observe; nobody seems to have referred at all to the Visitor and his jurisdiction in a

68 *In the Matter of a Petition Presented to the Visitor of the University of Tasmania* (1962) Unreported; University of Tasmania Archives, Registrar's Office File: U.T. 88/1 (4). (Hereafter referred to as Visitor's Judgment (Tas.) 1962).

69 A bibliography of publications relating to Orr's dismissal appears in 'A Bibliography for Australian Universities' (1964) 7 *Vestes* at pp. 51-52 of the Bibliography.

70 E.g. R. H. Thouless, 'A Dreyfus of Our Times' the *Cambridge Review*, 26 May 1962 at p. 472.

71 *Orr* v. *University of Tasmania* [1956] Tas. S.R. 155.

72 *Orr* v. *University of Tasmania* (1957) 100 C.L.R. 526.

73 *Orr* v. *Kemp* [1962] Tas. S.R. 155.

74 *Murdoch University* v. *Bloom* [1980] W.A.R. 193, 198.

75 For this information I am indebted to the personal recollection of His Excellency, the Governor of Tasmania, Sir Stanley Burbury.

matter like this. Was that ever referred to at all?'[76] The matter was dismissed without discussion by the High Court.

As a consequence of this disquiet, in 1962 a group of protagonists in the 'Orr affair' petitioned Lord Rowallan, as Visitor, praying that he hold a visitation, make findings and give directions as to the procedures adopted by the University in dealing with Orr's dismissal. The Visitor's judgment, delivered approximately four months after receipt of the petition, is both instructive and, in some respects, puzzling. His Excellency stated:

> Some respects of these complaints relate to matters which have been dealt with... in Her Majesty's Courts of Justice... It was elected by those directly concerned that such matters, in respect of which the power and authority of the Visitor *in lieu of* the jurisdiction of the Courts could have been invoked, should in fact be referred to the Courts...[77]

His Excellency, therefore, was plainly of the view that the *jurisdiction* of the visitor can co-exist with that of the courts in cases where the complaint is not one of jurisdictional error. This should be contrasted with the orthodox view outlined by Sir Henry Winneke (who was, in fact, Lord Rowallan's assessor) seventeen years later as Visitor to the University of Melbourne:

> The jurisdiction of the Visitor within a particular area has come to be recognized by the exclusion of the jurisdiction of the Courts from that area... The [Visitor's] jurisdiction cannot co-exist with the jurisdiction of the Courts.[78]

Admittedly, Lord Rowallan was faced with an unusual situation where the courts had come to a decision on a matter which may well have been within the exclusive jurisdiction of the visitor, solely, it seems, because the existence of the jurisdiction had not been argued. Lord Rowallan, however, was prepared to accept jurisdiction although, as a matter of discretion, he refused to grant the relief sought. It is suggested that this result is in conflict with authority,[79] and ignores the principle that a decision of a superior court stands until set aside on appeal. Thus, it is suggested, the fact that the Tasmanian Supreme Court and the High Court of Australia had taken the matter to judgment *a priori* removed the jurisdiction of the Visitor.

In any event, Lord Rowallan dismissed the petition partly because there no longer appeared to be any foundation for some of the directions sought[80] and partly because of the long delay before presentation of the petition.[81] His Excellency said:

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76 *Orr* v. *University of Tasmania*, 22 May 1957, High Court Transcript, 139.
77 Visitor's Judgment (Tas.) 1962 at p. 2 (Emphasis Added).
78 Visitor's Judgment (Melb.) 1979 at p. 18. But see text at n. 28 ff.
79 E.g. *Patel* v. *University of Bradford Senate* [1978] 1 W.L.R. 1488, 1493 (Ch.D.) aff'd [1979] 2 All E.R. 582 (CA.); *cf. Dr Walker's Case* (1773) Cas t. Hard 212, 218.
80 *E.g.* that the University's status had diminished as a result of the 'Orr affair'.
81 *I.e.* Six years since Orr's dismissal, and five years since the High Court action.

> The substantial delay that has elapsed between the occurrences and the presentation of the Petition... makes it right and proper for me in the exercise of my discretion to refuse the relief claimed... Resort to the authority of the Visitor... must be had promptly while events are still fresh in the minds of those concerned in them.[82]

But the visitatorial forum is not a court of law versed in the adversarial tradition. It does not have continuous calls on its time. Why, then should substantial delay of itself prevent the visitor from granting relief? Lord Rowallan mentioned one reason: the longer the period of time after the dispute arises the more difficult the questions of proof. However, visitors are not often required to hear evidence. More often than not their task is merely that of construing various instruments. To this end it is sufficient to rely on available documents.

It is suggested that the principle underlying Lord Rowallan's decision was that at some stage the factual status quo should be recognized. This touches on the question of what is a sufficiently substantial delay for a visitor to decline jurisdiction. Obviously, this will vary according to the circumstances of the case. Here, a delay of at least five years weighed heavily particularly as the whole 'Orr affair' had taken a heavy toll on the University and, by that stage, all but a few 'die-hards' had accepted that the matter had ended.

What, then, constitutes a sufficiently substantial delay for these purposes? The Tasmanian visitation, it is suggested, represents the outer limits of such delay. The line drawn by Lord Rowallan was that substantial delay exists when to decide on the merits would adversely affect the well-being of the University and inhibit the internal spirit of intellectual inquiry and co-operation. Inside this limit, for reasons such as those put in support of the notion that people should not sleep on their rights, a visitor may nevertheless find a substantial delay in bringing the petition and thus decline jurisdiction. In this context it is noteworthy that a standard clause in the employment contracts of Professors and Lecturers at the University of Western Australia provides that upon dismissal any attempt to invoke visitatorial jurisdiction must be initiated within one month.[83] This clause will not of itself necessarily result in a petition outside the one month limit being rejected by the visitor. The clause does not control the visitor's discretion as to what constitutes substantial delay. If a stated period of time is to operate conclusively as delay to prevent access to the visitor's jurisdiction that period must appear in the foundation instrument since it is only that instrument which can fetter visitatorial discretion and the availability of jurisdiction.

Implications From Australian Visitations

The various visitatorial statements discussed above are not merely about the exercise of discretions. They are equally about the nature and

82 Visitor's Judgment (Tas.) 1962 at p. 3.
83 For a discussion of the clause, including its history, see Alexander, *op. cit.* n. 36 at pp. 278, 231.

scope of jurisdiction. What they suggest is that Australian visitors have been attempting to balance the welfare of the university with the rights of individuals within that university. However, this attempt has been constrained by rigorous definitional parameters such that the development and application of principles are restricted by what is perceived as the intentions of the founder. Little injustice is done by so constraining the visitor's decision-making authority when he is concerned with questions of construction of documents. But when exercising his supervisory role such constraints inhibit the imposition of standards upon internal discretions which should properly be imposed. Few would disagree that internal discretions should be exercised, for instance, on the basis of relevant considerations and for proper purposes rather than merely in good faith and not irrationally. Yet, Australian visitors have not seen their jurisdiction as properly extending to the imposition of such standards.

A recounting of the cases before Australian visitors also suggests that they consider that their jurisdiction is not appellate but is more akin to that of a court exercising supervisory jurisdiction. This view of the visitatorial role is both unsatisfactory and unprecedented. It cannot be doubted that Australian visitors, like their English forefathers, have authority to rehear and redecide matters on the merits. But, as suggested above, even in the performance of their supervisory jurisdiction Australian visitors have not applied principles which are seen as properly applicable in like circumstances by the courts. This has the immediate result that internal authorities exercise relatively unfettered discretions which itself leads paradoxically to the long-term result of detriment to university welfare. This, however, is not to say that the visitatorial forum is not needed or that the visitors themselves are in error. Indeed, to some extent the effectiveness of visitatorial decision-making is outside its own control. Without leaving themselves open to censure for not performing their common law role the visitors can do nothing but exercise a jurisdiction, and adopt discretionary criteria, tainted by the archaic definitional parameters of their office. The only realistic avenue for reform lies with the legislature and a detailed statutory delimitation of visitatorial jurisdiction together with the guidance of statutory criteria which visitors must take into account in exercising their jurisdiction.

VISITATORIAL PROCEDURE: SOME UNANSWERED PROBLEMS

It seems well settled that in the course of exercising jurisdiction to hear and determine complaints the visitor may proceed in any manner he deems appropriate[84] subject only to the procedures, if any, stipulated in the foundation instrument.[85] He is not subject to procedures laid down by internal university legislation unless that internal legislature is

84 *R.* v. *Bishop of Ely* [No. 1] (1788) 2 T.R. 290 at p. 338.
85 7 *Com. Dig.* (1826) Visitor, 565, A. 15; *Philips* v. *Bury* (1692) 2 T.R. 346 at p. 356.

expressly empowered by the foundation instrument to prescribe such procedures.[86] Originally English visitors were all great ecclesiastics and naturally adopted the canonical procedures of the ecclesiastical courts. Subsequently, lay visitors, impressed by the simplicity of the procedures which their forefathers had used, required that visitatorial proceedings be conducted in accordance with the rules of civil law.[87]

However, it is unlikely that modern courts, in the exercise of their supervisory jurisdiction, will permit visitors to adopt whatever procedure they please. In substance all Australian universities are government corporations and therefore analogous to municipal corporations. Thus, the very reason why visitors were previously permitted to construct their own procedures — namely because they were exercising a privately conferred control over a private foundation[88] — no longer applies. On the other hand, the procedures designed for courts of law should not be imposed upon the visitor:

> If resort to [visitatorial] jurisdiction is confined to the remedying of real miscarriages in the system of [university] government ... and the procedures adopted for its exercise are not too closely modelled on the technical requirements of court procedures but are directed to the exposure of the essential features of the matters in issue, the system can provide real advantages.[89]

Therefore, whilst the visitor will probably not be allowed an unfettered discretion as to the manner in which he is to proceed, equally the courts should not burden him with a duty to proceed according to the rules designed for courts of law. In this light it is useful to consider a number of fundamental matters of procedure, outline any common visitatorial practices and attempt to ascertain how contemporary Australian visitors should proceed in the course of resolving disputes which are within their jurisdiction.

Initiation of Complaints

Visitatorial proceedings may be initiated either by a complainant's petition to the visitor praying that he intervene and setting out the grounds of relief sought[90] or, alternatively, the visitor may intervene on his own initiative.[91] Complaints are almost invariably initiated by way

86 Ibid; *cf.* 5 Halsb. (4th ed.) para 884.

87 E.g. *Hopkins* v. *Jones* (1750) unreported; cited in G. D. Squibb, *Founders Kin: Privilege and Pedigree* (1972) at pp. 55-56. See also Mitcheson, *Opinion on the Visitation of Charities* (1887) 13-14, discussed in H. Picarda, *The Law and Practice Relating to Charities* (1977) at p. 429.

88 *Philips* v. *Bury* (1692) 2 T.R. 345 at p. 358. But this never justified the exclusion of the principles of natural justice: *R.* v. *Bishop of Ely* [No. 1] (1788) 2 T.R. 290. Natural justice requirements have often been imposed upon domestic tribunals which arise out of contracts, deeds etc., e.g. *Graham* v. *Sinclair* (1918) 25 C.L.R. 102; *Byrne* v. *Kinematograph Renters Society Ltd.* [1958] 1 W.L.R. 762; *Trivett* v. *Nivison* [1976] 1 N.S.W.L.R. 312.

89 Sir Henry Winneke, *op. cit.*, n. 4.

90 These petitions are similar to a plaintiff's statement of claim. An example of a visitatorial petition is set out in Squibb, *op. cit.* Appendix VI, 201-202.

91 The manner in which an application to an Australian visitor should be initiated has been argued before, but not answered by, the Supreme Court of Queensland: *In the Trusts of Brisbane Grammar School* (1942) Q.W.N. 21.

of petition. There is no recent evidence of intervention on the visitor's own initiative in either England, Canada or New Zealand. In Australia, however, as recently as 1974, Sir Mark Oliphant, who was then Governor of South Australia and *ex officio* visitor of the Flinders University of South Australia, attended a student meeting on his own initiative in an attempt to resolve a student revolt.[92] Although His Excellency's interposal was totally unsuccessful it is significant as illustrating that this mode of visitatorial intervention is not obsolete as some commentators seem to suggest.[93]

Delegation of Visitatorial Powers

The statutory appointment of visitors is effectively a delegation of the founder's power to hear and determine grievances and, at least in theory, to visit the university and inspect its general organization and financial accounts.[94] The question arises: Must that delegate act personally or can he sub-delegate his power?

In practice the repository of visitatorial power has invariably acted personally. To the extent that the power is largely judicial and in some respects akin to that of disciplinary tribunals it may well be that it cannot be sub-delegated.[95] However, in *In re S. (A Barrister)*[96] five judges of the High Court of Justice,[97] in their capacity as visitors to Gray's Inn, condoned the exercise of one of their powers by the Inns of Court. It appeared that since the time of Edward I, in 1292, the power to provide, ordain and discipline attorneys and lawyers had been entrusted by the Crown to the Lord Chancellor and all His Majesty's puisne judges as visitors to the various schools of law, that is to say, the Inns of Court. Since the seventeenth century the visitors had concurred in the Inns of Court exercising these powers on their behalf but this, the Visitors pointed out, was in no sense a delegation of their powers so as to attract the maxim *delegatus non potest delegare*:

> The exercise of these duties has been at all times, and remains, subject to the visitorial jurisdiction of the judges ... [T]he judges ... have never divested themselves of those duties, nor could they ever do so.[98]

It was also submitted that even if the Inns were not the recipients of an improperly delegated power, the Inns themselves could not grant such powers to the Senate of the Four Inns of Court since that would infringe

92 See generally C. Milne, 'Flinders Chancellor to meet Sit-in Students' *Adelaide Advertiser* 6 August 1974, 1; 'Student sit-in continues: Patience wears thin over university "occupation".' *Canberra Times* 14 August 1972, 2.

93 *E.g.* J. W. Bridge, (1970) *op. cit.* 536. Picarda, *op. cit.* 429, at p. 431. Cf. *Ex Parte King; re University of Sydney* (1944) 44 S.R. (N.S.W.) 19 at pp. 42-43.

94 *Vanek* v. *Governors of University of Alberta* [1975] 5 W.W.R. 429, at p. 443.

95 Ibid; *Barnard* v. *National Dock Labour Board* [1953] 2 Q.B. 18; *Vine* v. *National Dock Labour Board* [1957] A.C. 488; *R.* v. *Race Relations Board; ex parte Selvarajan* [1975] 1 W.L.R. 1686.

96 [1970] 1 Q.B. 160.

97 Paull, Lloyd-Jones, Stamp, James and Blain JJ.

98 *In Re S. (A barrister)* [1970] 1 Q.B. 160 at p. 170.

the rule against sub-delegation. Again the Visitors rejected this submission by holding that by passing to the Senate some of the benchers' duties the Inns were merely altering 'a practice which had long existed as to *the machinery* by which matters of discipline... should be dealt with to the satisfaction of the Visitors'.[99] The somewhat illogical result of this reasoning was that the Visitors could concur with an alteration in the machinery for dealing with the discipline of barristers yet still hear and determine appeals from that body which now exercised the power. Applying this result to the University Visitor it seems that concurrence with a mere alteration in the machinery for hearing and determining complaints would not infringe the rule against sub-delegation nor would it preclude an appeal from that body now exercising the power back to the visitor. However, this may not be condoned by an Australian court. The line of demarcation adopted by the Visitors in *In Re S. (A barrister)* between a 'delegation' of power which amounts to a mere alteration in the machinery of dispute resolution and a delegation which is invalid is at best tenuous. The decision can probably be explained on the basis that the Visitors were not prepared to strike-down a practice which had been established by their forefathers and which had operated for at least 300 years.

However, it may be that visitors are able to delegate their investigatory and hearing functions although not the power to decide itself. In *Jeffs* v. *New Zealand Dairy Production and Marketing Board*[100] the Privy Council held that the defendant Board, as master over its own procedures, could, whilst in the course of making zoning orders, appoint a person or persons to hear and receive evidence from interested parties. It is suggested that this procedure could properly be followed by visitors but only in those circumstances where the credibility of witnesses is not involved.[101] As this is likely to be the case on only rare occasions the power to delegate investigatory and hearing functions is unlikely to be of much practical significance.

Australian visitors, whilst purporting to act personally, have invariably employed lawyers of great distinction to act as there assessors.[102] Visitatorial assessors remain one of the few, if not the only, use of assessors in Australia which do not have a legislative basis. Their role in assisting visitors is the reverse of the normal assessorial function. Visitatorial assessors are used to advise the visitor on questions of law whereas, normally, assessors aid the court when technical questions of fact are in

99 Ibid at p. 175, emphasis added.

100 [1967] 1 A.C. 551.

101 *Cf.* Ibid at p. 568.

102 Robert Molesworth, then a judge of the Victorian Supreme Court, was assessor to both the Marquis of Normanby and Viscount Canterbury at the Melbourne University visitations in 1871 and 1884. Sir Henry Winneke, then the Victorian Solicitor-General, was employed by Lord Rowallan at the 1962 visitation at the University of Tasmania. Sir Gregory Gowans was assessor to Sir Henry Winneke at Melbourne University in 1979. And Mr Justice Hale and Mr D. K. Malcolm were employed by Sir Wallace Kyle whilst acting as visitor to Murdoch University in 1980.

issue such as in admiralty[103] or medical[104] cases, or in criminal appeals where it is necessary or expedient in the interests of justice.[105] All the rules normally applicable to assessorial assistance, which usually concern the inadmissability of expert evidence on matters within the assessor's sphere,[106] cannot properly apply to visitatorial assessors. What, then, are those constraints within which visitatorial assessors must act? To the extent that the relationship between assessor and visitor approximates that between a justices' clerk and justices' one may well be able to draw analogies from the law which governs the latter relationship. In this light it seems that a visitor can seek the assessor's advice on any question regarding the practice and procedure of the forum.[107] He can also seek advice on any question of construction of a statute or regulation as that may well involve mixed law and fact. In terms of consultation between visitor and assessor any reasonable practice is justifiable provided an objective bystander would regard justice as being done.[108]

Natural Justice

By the late eighteenth century it was well settled that visitatorial powers were of a judicial nature and must be exercised in accordance with the rules of natural justice.[109] The significance of this is twofold: when circumstances require it, the visitor must grant a fair hearing, and he cannot be judge in his own cause.

(a) *Audi Alteram Partem*

In *R.* v. *Bishop of Ely (No. 1)*[110] Ashhurst J., in words which have become the classical statement of a visitor's duty to accord natural justice, said:

> The exercise of a visitor's power ... is a judicial act, and a Judge cannot determine without hearing the parties concerned ... [The visitor] should at least have convened the parties interested to give them an opportunity to make a defence.[111]

However, the procedures which must exist in order to satisfy the requirement of 'an opportunity to make a defence' is a matter of doubt. Ashhurst J. seems to suggest that an oral hearing is required. Yet, only six years later in *R.* v. *Bishop of Ely (No. 2)*[112] the Court of King's Bench unanimously stated that it had no power to control the procedure which a visitor adopts provided it is 'fair'. It was enough that the visitor

103 *E.g. Admiralty Rules* 1952 (N.S.W.) r. 100.
104 E.g. *Lewis* v. *Port of London Authority* (1914) 111 L.T. 776 (C.A.).
105 E.g. *Crimes Act* 1958 (Vic.) s. 574 (e). See generally R.S.C. (Vic.) 0.36, r. 36 and *Supreme Court Act* s. 110.
106 *E.g. The Assyrian* (1890) 63 L.T. 91 (C.A.).
107 See *Practice Note (Justices' Clerks)* [1953] 1 W.L.R. 1416.
108 Ibid at p. 1418..
109 *R.* v. *Bishop of Ely* [No. 1] (1788) 2 T.R. 290; *R.* v. *Bishop of Ely* [No. 2] (1794) 5 T.R. 475. But cf. *Leary* v. *National Union of Vehicle Builders* [1971] Ch. 34 at p. 52.
110 (1788) 2 T.R. 290.
111 Ibid at p. 336.
112 (1794) 5 T.R. 475.

had the merits of the case before him. Any implied requirement of a 'fair hearing' was satisfied by an opportunity to make written submissions. Indeed Ashhurst J. himself was satisfied that, '[h]ere the bishop has heard'.[113]

Together the *Bishop of Ely* cases presage the relatively modern proposition[114] that an oral hearing will not always be required to satisfy the *audi alteram partem* rule and that the seriousness and consequences of the decision[115], and the circumstances in which it is reached,[116] will dictate what kind of 'hearing' is required.[117]

Even if a respondent is granted the opportunity to make oral submissions it is doubtful if he can demand a right to legal representation. Historically, the normal practice before the visitor was for each party to be represented by one civil and one common lawyer.[118] On those occasions in Australia where the visitor has allowed oral submissions the parties have each been represented by at least two counsel. Nonetheless, there is no absolute requirement at common law that legal representation must be allowed.[119] It is probably a question for the visitor in the exercise of his discretion.[120] In exercising this discretion it is both relevant and proper that the visitor take into account the domestic nature of his forum and the particular rights or obligations in dispute since legal representation may well result in a legalistic analysis of the matter in dispute and a diversion from underlying policy considerations.[121]

(b) *Nemo Iudex In Re Sua*

In *R.* v. *Bishop of Ely (No. 1)*[122] the Bishop of Ely, as visitor to Peterhouse College, Cambridge, had, amongst other things, attempted to validate a previous decision he had made in his capacity as warden of the College. Buller J. stated:

> A visitor cannot be judge in his own cause, unless that power is expressly given to him. A founder indeed may make him so, but such an authority is not to be implied; he cannot visit himself.[123]

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113 Ibid at p. 477.
114 *Russell* v. *Duke of Norfolk* [1949] 1 All E.R. 109 at p. 118; *Wiseman* v. *Boreman* [1971] A.C. 297; *Mobil Oil Australia Pty. Ltd.* v. *Commissioner of Taxation* (1963) 113 C.L.R. 475.
115 *Cf. Pett* v. *Greyhound Racing Association Ltd.* [1969] 1 Q.B. 125; *R.* v. *Aston University Senate; ex parte Roffey* [1969] 2 Q.B. 538.
116 *E.g. New Zealand United Licenced Victuallers Association* v. *Prices Tribunal* [1957] N.Z.L.R. 167.
117 *Cf.* H. Whitmore & M. Aronson, *Review of Administrative Action* (1978) at pp. 106-107.
118 *E.g. Bennett* v. *All Souls College* (1749) unreported; cited in Squibb, *op. cit.*, where leave for more than two counsel each was refused.
119 Cf. *Enderby Town Football Club Ltd.* v. *Football Association Ltd.* [1971] Ch. 591. But cf. *Pett* v. *Greyhound Racing Association Ltd.* (No. 2) [1970] 1 Q.B. 46.
120 Cf. *McNab* v. *Auburn Soccer Sports Club Ltd.* [1975] 1 N.S.W.L.R. 54; G. Flick, *Natural Justice* (1979) at pp. 144-148.
121 See generally J. E. Alder, 'Representation Before Tribunals' [1972] *Public Law* 278.
122 (1788) 2 T.R. 290.
123 Ibid at pp. 338-339. *Cf. R.* v. *Bishop of Chester* (1727) 2 Str. 797.

Upon the basis of these words, subsequent commentators have agreed that a visitor would be disqualified from adjudicating for any form of bias recognised by the law, whether arising from financial interest or favour.[124]

Despite this unanimous agreement amongst the commentators it is suggested that not all forms of bias will disqualify the visitor and, indeed, it may well be that he cannot in any circumstance be disqualified. For instance, it is unlikely that the visitor is subject to the rule which disqualifies adjudicators who are actively associated with an organization from sitting in any case where the interests of that organization are in question.[125] By the very nature of his office the visitor is concerned to advance the purposes for which the university is founded. He is not only, at least potentially, a regular participant in university affairs but is necessarily an innate part of the university's existence. Similarly, the fact that the Governor-in-Council is expressly empowered to approve internal university legislation is no obstacle to the Governor, as visitor, hearing an appeal which challenges the validity of that legislation.[126] In such a case, the University Act itself admits that the visitor may visit himself.[127]

In those universities where the Governor alone is visitor it is doubtful if he can be disqualified for any form of bias. As matters within his jurisdiction are often necessarily outside the cognizance of the courts, the visitor may well be required to act *ex necessitate*. If he does not act no-one else can. Justice will be denied.[128] There is, however, one exception to this proposition. Absent any authorization from the foundation instrument, if the visitor literally visits himself, that is to say, where he purports to determine the validity of a decision he has previously made in another capacity, then jurisdiction lies in the Supreme Court[129] since if the visitor were permitted to adjudicate in such cases he would be exercising a power to determine the limits of his own jurisdiction.[130]

Evidence and Witnesses

As the visitor is not bound to proceed according to the rules of common law, equally he is not bound to apply the technical common

124 *E.g.* P. Jackson, *Natural Justice* (2nd ed., 1979) 158; Bridge, (1970) *op. cit.* at p. 546; Tudor, *op. cit.* at pp. 324-325; Ricquier, *op. cit.* at pp. 680-681.

125 For examples of the rule, see *R.* v. *Altrincham Justices; ex parte Pennington* [1975] Q.B. 545; *Ex Parte Qantas Airways Ltd.; Re Horsington* [1969] 1 N.S.W.R. 788.

126 *R.* v. *Hertford College* (1878) 3 Q.B.D. 71; *Ex Parte Jacob* (1861) N.B.R. 153. (N.B.S.C.).

127 *Ex Parte Jacob* (1861) N.B.R. 153, 157 (N.B.S.C.).

128 For the operation of the doctrine of necessity as an exception to the rule against bias, see generally *The Parishes of Great Charte and Kennington* (1742) 2 Stra. 1173; *London and North Western Railway Co.* v. *Lindsay* (1858) 3 Macq. 114 (H.L.); *Re The Constitutional Questions Act* (1936) 4 D.L.R. 134 (Sask. C.A.), (1937) 2 D.L.R. 209 (P.C.).

129 In its capacity as exercising the jurisdiction of the Court of King's Bench: *e.g.* 4 Geo. IV. C. 96, s. 2.

130 See *R.* v. *Bishop of Ely* [No. 1] (1788) 2 T.R. 290; *R.* v. *Bishop of Chester* (1727) 2 Str. 797. Cf. *Earl of Derby's Case* (1613) 12 Co. Rep. 114.

law rules of evidence. There is, for example, no reason why hearsay evidence should not be admitted if it can fairly be regarded as relevant and logically probative.[131]

However, whether or not visitors have power to compel testimony, coerce the production of documents and administer oaths and affirmations cannot be answered with the same degree of confidence. It is clear that in the past visitors have assumed these originally canonical powers,[132] but long uncontested usage cannot be taken to establish that the power existed and still exists. As English visitors were originally ecclesiastics one can understand why they resorted to the canonical procedures. But absent any statutory authorization it is doubtful if there is any legal basis for the assumption of these powers.

History suggests that visitors have no legal mandate to compel witnesses to attend or require that evidence be given under oath. At least until the fifteenth century the trial of common law actions did not involve the taking of testimony from witnesses. When it became the standard practice to accept testimony and to try according to evidence on oath it was thought necessary to pass legislation to make it obligatory for witnesses to attend and to make perjury an offence.[133] The Chancery, possibly inspired by canonical practice, simply assumed this power, but that was before the seventeenth century controversies over the growth of conciliar jurisdictions outside the common law and the statutes of 1641[134] disestablishing the Star Chamber, the Court of High Commission and other such, often ecclesiastically oriented, courts.[135] Then, from the late seventeenth century, the courts began to reinforce the so-called privilege against self-incrimination — which itself arose directly out of the canonical practice of coercing testimony under oath — thereby bolstering the notion that a person is not compellable as a witness unless there is some clear legal mandate for making him compellable.[136] Nowadays it is well settled that a person is under no obligation to attend before a tribunal to give evidence or to give evidence under oath or affirmation unless that obligation is imposed by statute. Clearly the Crown cannot give a Royal Commission such coercive powers.[137]

Even if a visitor does not have power to demand the attendance of a person within his jurisdiction to give evidence in the sense that disobedience to his commands is contempt, historically it may well have been that he had this power indirectly through his authority to suspend

131 Cf. *Case of Queen's College, Cambridge* (1821) Jac. 1 at p. 19.

132 See generally *Wigmore on Evidence,* Vol. 8, (McNaughten Revision, 1961) at pp. 267-295.

133 See 5 Eliz. 1, c. 9. (1562).

134 16 Car. 1, c. 11 (1641).

135 See Wigmore, *loc. cit.*

136 *N.B.* Even though the British Houses of Parliament were long accepted as having power to inquire into and direct attendance of witnesses, it was thought necessary to pass a special Act in 1871 to authorize the administration of the oath: *Parliamentary Witnesses Oaths Act* 1871 (U.K.).

137 *Case of Commissions of Inquiry* (1608) 12 Co. Rep. 31; *McGuiness* v. *Attorney-General (Victoria)* (1940) 63 C.L.R. 73 at pp. 98-99.

or dismiss a person from the foundation for contumacy.[138] However, it is unlikely that this authority would be sustained today. Nowadays, in the case of staff members, membership is controlled partly by contract and partly by university legislation, and the causes for which students may be suspended or expelled tend to be defined by university legislation.

Thus, it remains unclear whether or not visitors have the power to coerce the attendance of witnesses or demand evidence under oath or affirmation. Whilst they have generally assumed these powers in the past there is no obvious legal mandate upon which this assumption can be sustained. In light of the fact that in many cases the visitatorial forum may be the only dispute settling mechanism available to a complainant, if the visitor cannot compel the attendance of witnesses and the giving of evidence on pains of punishable contempt the forum itself is of little practical significance, and a mere sham denying university members a right to have their complaints fully considered and justice accorded. On this basis it is suggested that if the visitor is to remain the University Acts should be amended to incorporate provisions such as those in the Victorian *Evidence Act* 1958[139] which relate to the powers of Royal Commissions and Boards of Inquiry to compel witnesses to give testimony and administer oaths and affirmations. Adoption of such provisions is by no means novel and is the basis of the evidential powers of many judicial and quasi-judicial bodies.[140]

Is there a Duty to Give Reasons?

Until the mid-nineteenth century visitors rarely articulated the reasons for their decisions. This was a direct result of the fact that English visitors had traditionally been great ecclesiastics and ecclesiastical courts did not give reasoned judgments as they did not regard themselves bound by precedent until the end of the eighteenth century.[141] The practice of Australian visitors, however, has been to give full and lengthy reasons for their decisions. Whilst they have not often been required to find facts it is nevertheless common to find that those facts upon which the visitor relies are fully set out in his judgment.

It is a matter of doubt whether or not a visitor is required to articulate the reasons for his decision. Absent any statutory right of appeal[142] or mandatory provision requiring the giving of reasons on request[143] ad-

138 E.g. *Philips* v. *Bury* (1692) 2 T.R. 345 (K.B. *per* Holt C.J.), (1694) Show P.C. 35 (H.L.); *Re Wilson* (1885) 18 N.S.R. 180 at p. 200 (Nova Scotia S.C.).

139 Especially ss. 14, 15, 16, 20 and 20A.

140 E.g. *Pharmacists Act* 1974 (Vic.) s. 17.

141 See G. D. Squibb, *The High Court of Chivalry* (1959) at p. 163.

142 *Donges* v. *Ratcliffe* [1975] 1 N.S.W.L.R. 502.

143 E.g. *Administrative Law Act* 1978 (Vic.) s. 8; *Administrative Decisions (Judicial Review) Act,* 1977 (Cth.) s. 13.

ministrative tribunals are under no duty to give reasons.[144] The visitor may well be a like case. But this rule itself cannot be regarded as well settled since in recent years the courts have shown a tendency to require reasoned decisions if in all the circumstances it is fair to do so.[145] Indeed, a refusal to state reasons may justify a reviewing court in drawing the adverse inference that the decision-maker acted for an improper purpose, failed to take into account relevant considerations or took into account irrelevant considerations.[146] On the other hand, whilst courts themselves are usually under no common law duty to give reasoned decisions, if a judge is exercising a judicial discretion[147] he may well be required to articulate the reasons for exercising, or refusing to exercise, that discretion in a particular manner.[148] To the extent that the visitor exercises a quasi-judicial discretion he may therefore be required to state the reasons for his decision.[149]

Finality: Appeals, Re-Hearings and Re-Openings

It is well settled that a visitor's decision is without appeal to any other domestic court or court of law.[150] Davidson J. in *Ex Parte McFadyen*[151] stated the principle and its rationale as follows:

> The holder of the visitor's office constitutes a form of tribunal of the order of a domestic court created by the founder. Its decisions are not subject to appeal, as it is considered that the parties deriving benefit from the endowment must, in that respect, abide by the conditions which the founder has annexed.

Indeed, the House of Lords have indicated that a visitor cannot relieve against his own sentence.[152] This view has not gone undisputed. Dr Mackay, a university officer who was dissatisfied with the visitor's decision at the University of Melbourne in 1884, argued that the visitor

144 See generally, M. Akehurst, 'Statement of Reasons for Judicial and Administrative Decisions' (1970) 33 *M.L.R.* 154; G. A. Flick, 'Administrative Adjudications and the Duty to Give Reasons — A Search for Criteria' [1978] *Public Law* 16; 'Reasons for Decision: The Australian Experience' [1979] *N.Z.L.J.* 24.

145 *Breen* v. *Amalgamated Engineering Union* [1971] 2 Q.B. 175 *per* Lord Denning M.R. (dissenting); cf. *Pepys* v. *London Transport Executive* [1975] 1 W.L.R. 234; *Trivett* v. *Nivison* [1976] 1 N.S.W.L.R. 312 at p. 321.

146 *Padfield* v. *Minister of Agriculture, Fisheries & Food* [1968] A.C. 997 at pp. 1032-1033 (Lord Reid), 1049 (Lord Hodson), at pp. 1053-1054 (Lord Pearce) at pp. 1061-1062 (Lord Upjohn).

147 As opposed to an administrative discretion.

148 *Ex parte Merchant Banking Company of London, re Durham* (1881) 16 Ch.D. 623 at p. 625; *Pure Spring Co. Ltd.* v. *Minister of National Revenue* (1947) 1 D.L.R. 501 at pp. 533, 545. See further Akehurst, *op. cit.* 154n.

149 Cf. *Election Importing Co. Pty. Ltd.* v. *Courtice* (1949) 80 C.L.R. 657 at p. 663. N.B. In Victoria, by virtue of *Administrative Law Act* 1978 (Vic.) s. 8, visitors will be required, upon request, to state their reasons for decision.

150 E.g. *Attorney-General* v. *Talbot* (1748) 3 Atk. 662, 674 at p. 676; *Ex Parte Wrangham* (1795) 2 Ves. Jun. 609 at p. 619; *Thomson* v. *University of London* (1864) 33 L.J.Ch. 625 at p. 635; *Ex Parte McFadyen* (1945) 45 S.R. (N.S.W.) 200, 201; *R.* v. *Dunsheath; ex parte Meredith* [1951] 1 K.B. 127, at p. 132; *Patel* v. *University of Bradford Senate* [1978] 1 W.L.R. 1488 at p. 1499 (Ch.D.) aff'd [1979] 2 All E.R. 582 (C.A.).

151 (1945) 45 S.R. (N.S.W.) 200 at p. 201.

152 *Philips* v. *Bury* (1694) Show P.C. 35, 52 (1 E.R. 24, 36).

had power to *re-hear* his previous decision.[153] Mackay's reasoning can be briefly stated. The visitatorial office is roughly coeval with that of the Lord Chancellor: in early times both were ecclesiastics and have a common origin in the civil law. The Lord Chancellor — it should be added in his equitable rather than his Latin jurisdiction — could rehear any of his own decisions if convinced that he was in error. Therefore, so Mackay's argument runs, the visitor can rehear and alter his own decision. The fallacy in Mackay's reasoning is that he unjustifiably draws inferences from historical vagaries and assumes that since the minor premise is correct then the conclusion follows. Mackay's argument is not only logically unsound but is also unsupported by visitatorial practice and unattractive as a matter of policy. The Lord Chancellor's power to rehear his own decisions arose where a party could point to an error, however slight, on the face of the decree or could adduce some new evidence. The practice was eventually obviated as it produced long delays and prevented any kind of finality of decision.[154]

Thus, absent intervention by the legislature, there remains no right in the parties to demand a rehearing by or appeal from the visitor. If his decision is erroneous or unjust it may be rectified via general principles akin to those governing internal review of administrative action and by the assumption of limited powers similar to those of the courts to re-open their decisions.[155]

Conclusions

In toto the procedures adopted by Australian visitors do not differ in any significant respect from that which may be required of them by a supervising court. They have consistently given notice of a petition and ample opportunity for written or oral submissions by the parties, depending upon the circumstances of the case. If they have coercive power over witnesses such powers have not yet been disputed. It is apparent that they have tended to adopt less rigorous standards for admission of evidence than that required of the courts. They have consistently given reasoned decisions despite any clear requirement to do so. In accord with ancient practice their decisions are not subject to appeal or rehearing. In short, their procedures remain sufficiently akin to that of the courts to accord a fair result but nevertheless shy from stringent judicial procedures, resultant from adversarial tradition, which may tend to a denial of all the true facts. Some may argue that the procedures which have been adopted are too similar to those of the courts for an optimal use of the jurisdiction. There remains, nevertheless, an inherent flexibi-

153 Letter from Dr G. Mackay to the Vice-Chancellor of the University of Melbourne, 31 January 1884, 13-14 (held in University of Melbourne Archives amongst the miscellaneous documents entitled *Visitations 1879 & 1884*).

154 Holdsworth, IX *A History of English Law* at pp. 366-369. See generally J. S. Smith, *The Practice of the Court of Chancery* (6th ed., 1857) at pp. 478-483.

155 On this latter point see 26 Halsb. (4th ed.) paras 555-572.

lity born in the ecclesiastical origins of the jurisdiction which provides for a procedure to meet any demands asked of the visitor.

WHITHER THE VISITOR'S JURISDICTION?

Should the rarely invoked visitatorial jurisdiction be retained? Should it be demolished? Or should it be strengthened; its ancient and unclear ecclesiastical origins, and dubious scope, be embodied in a detailed statutory scheme clarifying university review and appellate machinery? In strict legal theory the sole justification for visitatorial authority is the founder's right to oversee the government of, and conduct within, his corporation: *cujus est dare, ejus est disponere.* As Lord Hardwicke observed:

> ... since a contest might arise about the government of [the corporation], the law allows the founder or his heirs, or the person specially appointed by him to be the visitor to determine according to his own creature ... [The] jurisdiction is *forum domesticum,* the private jurisdiction of the founder.[156]

Nowadays this view lacks appeal. Australian universities are created by public statutes in order to provide a public service of education and research, and are financed almostly exclusively from funds appropriated by Parliament. The public, therefore, have an interest in the activities within, and government of, universities. For these reasons alone it can be argued that university affairs should be open to public scrutiny through the courts.

The question is whether the visitor's jurisdiction should be retained and, if so, whether the jurisdiction should continue to be exclusive of that of the courts? Megarry V.-C. in *Patel's* case[157] observed that:

> ... there is much to be said in favour of the visitor as against the courts as an appropriate tribunal of disputes of a type which fall within the visitatorial jurisdiction. In place of the formality, publicity and expense of proceedings in court, with pleadings affidavits and all the apparatus of litigation (including possible appeals ...), there is an appropriate domestic tribunal which can determine the matter informally, privately, cheaply and speedily, and give a decision which, apart from any impropriety and excess of jurisdiction is final and will not be disturbed by the courts.

However, it seems that the issue is not as simple as this. Megarry V.-C. appears to proceed on the false premise that the scope of review undertaken by the visitor is the same as that undertaken by the Courts. Although Australian visitors may have attempted to confine their role to a supervisory one, in theory their jurisdiction enables them to review complaints on their merits. Curial review, on the other hand, is a purely supervisory review which does not include review on the merits and, at its widest, extends only to errors of law.

Thus, the advantages noted by Megarry V.-C., even if true, only go to

156 *Green* v. *Rutherforth* (1750) 1 Ves. Sen. 462 at p. 472.
157 *Patel* v. *University of Bradford Senate* [1978] 1 W.L.R. 1488 at p. 1499.

justify visitatorial review at a supervisory level. But even these advantages do not justify an *exclusive* supervisory jurisdiction for review of ultra vires acts and errors of law, since what is in issue in these complaints is compliance with legislation or subordinate legislation drafted and enacted in most, if not all cases, on the assumption that their validity and/or construction, if in issue, would be subject to consideration by the courts. If the visitor's supposed jurisdiction to decide complaints of ultra vires and errors of law is regarded as exclusive, persons whose complaints fall within that exclusive domain may be denied legal protections afforded to other people in other legal contexts who encounter similar problems. Moreover, the Governor, as visitor, is not necessarily qualified to determine questions of errors of law. There is no requirement that the persons appointed as Governor must be learned in the law.

However, even the advantages suggested by Megarry V.-C. can be doubted. For instance, it is probably not true to say that visitatorial review is substantially less expensive than curial review. The practice in Australia has been that parties seeking visitatorial review have placed their affairs in the hands of solicitors and, if a hearing is granted, both senior and junior counsel have been briefed. In fact, even if a hearing is not granted, counsel's opinion has been obtained. Thus, even before the costs of the visitor and his assessor (which are usually borne equally between the parties) are taken into account, the expense incurred is not substantially less than that incurred in going to court. Indeed, there may be an added disincentive in seeking visitatorial review since it is far from clear whether the visitor has power to award even party and party costs to a successful petitioner. Historically, it appears that the visitor could award costs out of university funds but could not award costs against the petitioner.[158] It must be queried whether this rule can apply in Australia where there are invariably internal laws about who can commit funds and where the use of funds is limited, 'solely for the purpose of the University'.[159]

Megarry V.-C. also noted that a decision of the visitor, apart from the possibility of judicial review, is final. If finality is to operate as a benefit of visitatorial review it must be based upon two assumptions. First, that universities are not merely microcosms of society at large but have special purposes and problems unfamiliar to, and inappropriate for consideration by, the courts. It is in this sense that visitatorial jurisdiction can be rightly linked to the notion of university self-government and autonomy. Second, that persons who have an intimate relationship with the university are better able than strangers to the university to resolve intra-mural disputes. Such persons assumedly are aware how the institu-

158 *Case of Queen's College* (1821) Jac. 1 at p. 47; *Ex Parte Dann* (1804) 9 Ves. 547; *Attorney-General* v. *Master of Catherine Hall, Cambridge* (1820) Jac. 379 at p. 401-402.

159 E.g. *Deakin University Act* 1974 (Vic.) s. 30 (1); *Monash University Act* 1958 (Vic.) s. 32 (1).

tion is best administered and cognizant of its special problems. Historically, this was one of the often mentioned reasons for accepting a private visitatorial jurisdiction. However, nowadays, at least in Australia, this argument proceeds on a false premise. There is no reason to assume that the Governor has any particular and specialized knowledge of a university's ethos.

Nevertheless, the remaining advantages of visitatorial review noted by Megarry V.-C. are weighty and, it is suggested, justify the continuance of visitatorial review in cases where non-jurisdictional errors of fact are in issue or where the decision reached, though within power and not legally incorrect, is not the preferable decision. The future success of this jurisdiction, however, will depend upon both legislative reforms delineating those matters properly within the exclusive province of the visitor and whether the visitor himself takes a positive attitude toward the exercise of his jurisdiction.

The independent appeals-type system available by way of visitatorial decision-making can lead to a decision based on the consuetude of the university community. If properly constituted and qualified the visitatorial forum offers all the advantages inherent in suitably constituted specialist tribunals. But a decision on the merits cannot result in the 'correct' or 'preferable' decision unless the visitor is suitably armed with powers which go beyond those enjoyed by decision-makers whose decisions are appealed from. The visitor, in this context, must have access to all the relevant information. He must, for example, be empowered to require evidence to be taken on oath or affirmation, enforce the attendance of witnesses and the answering of questions. If the visitor is to step into the shoes of the original decision-maker and make the decision he ought to have made, (though on the material before the visitor) the visitor cannot be expected to slavishly adhere to the rules of evidence. Some may argue that, given that university governing bodies include outside as well as internal members, there is no reason why they should not be regarded as the ultimate domestic forum. They may legislate to provide for certain kinds of tribunals. They may, within certain limits, appoint committees and engage persons to investigate and report. However, this argument breaks down when one considers grievances similar to those of Professor Orr at the University of Tasmania in the early 1950's when it was the procedures of the governing body of the University itself which were in question. It is in circumstances such as these that the greatest benefits of the visitatorial forum emerge, most notably by the provision of an objective independent appellate body which, although not in a position of membership, is part of the university.

It is not suggested that the statutory elucidation of the visitor's jurisdiction, powers and procedures is the cure for the peculiar problems facing universities nowadays. But it is suggested that if the jurisdiction is properly limited to disputes concerning real miscarriages in the system of university government it may still have a propitious role to play.