THE RISE AND RISE OF JUDICIAL REVIEW

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The principal agents of change in Australian administrative law in the past three decades have been statutory and procedural. Central principles as enunciated by the High Court remain substantially unaltered. Constitutional access to the High Court to review Commonwealth executive action stands against privative clauses and has been repeatedly affirmed. Attempted limitations on access to judicial review by privative clauses have been met with constructional devices and the distinction between jurisdictional and non-jurisdictional error. Standing necessary to access is unchanged in principle but more flexible in practice. Judicial review now extends to the highest levels of executive decision-making and subject to clear statutory exclusions procedural fairness is a general mandate.

A long view of the last 30 years in administrative law in Australia might see it in geological terms as an age of legislative mountain building and mild and fitful judicial vulcanism. The statutory upthrust of the legislature and the gassy exhalations of the judges, however, are not so much signals of continuing upheaval as a reflection of the shifting into place of a balance of forces between the users and the subjects of executive power. No global changes of principle are indicated. The underlying approaches to those aspects of judicial review which have been the subject of decision by the High Court do not reflect any radical shifts of judicial consciousness.

The sources of administrative law in Australia are fragmented with differing constitutional, statutory and prerogative regimes in Commonwealth and State spheres. The most significant changes in the law in recent times have been statutory generated by the administrative law package of the Commonwealth.[1] Statutory review procedures have also been enacted for

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1. Administrative Decisions (Judicial Review) Act 1977 (Cth); Administrative Appeals Tribunal Act 1975 (Cth); Freedom of Information Act 1982 (Cth); Ombudsman Act 1976 (Cth).

Victoria and Queensland.[2] The purposes of administrative law which were in their origins remedial extend to the improvement of primary decision-making.[3] Nevertheless, the practical applications of the law whether in judicial review or administrative review on the merits are remedial.

The broad standards supported by judicial review are of long standing. Discretion is to be exercised

> [A]ccording to the rules of reason and justice not according to private opinion... according to law, and not humour. It is to be not arbitrary, vague, and fanciful, but legal and regular. And it must be exercised within the limit to which an honest man competent to the discharge of his office ought to confine himself....[4]

Criteria of lawfulness, rationality and fairness pervade contemporary administrative law whether based upon remedial statutes or the older prerogative writs. The limits within which these criteria should be applied form the subject of much of the contemporary debate about the proper limits of judicial review.

The period since 1960 has not seen any dramatic change in this area emanating from the High Court. There has, however, been a significant extension of the reach of judicial review to ministerial and gubernatorial decision-making. The exercise of prerogative powers may now be called into question and the possibility is open that even decisions of the Cabinet could, in certain circumstances, be justiciable. While the principles that govern standing remain unchanged, their practical application in the last three decades suggests that the category of interests which will support access to the Court is open. This is not unconnected with the movement to broaden the range of interests on the part of those claiming to be affected by administrative decisions which will attract the requirements of procedural fairness or natural justice.

Despite the relative stability of the central principles of administrative law in Australia over the last 30 years there has been an explosion of judicial pronouncements in part inspired by the significant statutory reforms enacted by the Commonwealth. That genie having escaped from the bottle, it will not easily be recaptured. Questions for the future include the development of the concept of justiciability, the extent to which the policy of relevant decision-

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2. Administrative Law Act 1978 (Vic); Administrative Appeals Tribunal Act 1984 (Vic); Judicial Review Act 1991 (Qld).
3. Report of Administrative Review Committee ("The Kerr Committee") Parliamentary Paper No 144 of 1971; D C Pearce *Commonwealth Administrative Law* (Sydney: Butterworths, 1986) para 113.
4. *Sharp v Wakefield* [1891] AC 173, Halsbury LC, 179.

making agencies may be taken into account in construing legislation and the question whether the beginnings of an implied rights theory in constitutional law may foreshadow a like development in the judicial supervision of administrative discretions. Before turning to some of these matters in more detail, however, it is proper to begin by a consideration of the place established for judicial review in the Commonwealth Constitution.

THE IRREDUCIBLE CORE — CONSTITUTIONAL JURISDICTION OF THE HIGH COURT

As Australia's ultimate court of appeal, the High Court, in the exercise of its appellate jurisdiction, has stated the law in relation to the extent and limits of judicial review both under the common law and the statutory scheme of Commonwealth administrative law. Its supervisory role in relation to executive action under Commonwealth law, however, derives directly from the Constitution as an important element of the original jurisdiction of the Court. Section 75(v) of the Constitution provides that:

> In all matters ... In which a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth: the High Court shall have original jurisdiction.

It is a curious fact that the source of the High Court's original jurisdiction to review the exercise of Commonwealth executive power was inserted into the Constitution to overcome the effect of a judgment that asserted the power of the Supreme Court of the United States to pass upon the exercise of legislative power.[5] In that case the jurisdiction had been invoked to invalidate section 33 of the Judiciary Act 1789 (US) in so far as it purported to authorise the Supreme Court to issue writs of mandamus to non-judicial officers of the United States. This involved the exercise of an original jurisdiction for which the Constitution of the United States had made no provision. In moving the inclusion of what became section 75(v) in the draft Constitution in March 1898, Edmund Barton observed that the words of the provision could do no harm and might "protect us from a great evil".[6] Because it comes directly from the Constitution and not from legislation made under it, the jurisdiction conferred by section 75(v) is proof against legislative attempts to restrict judicial review.[7]

5. *Marbury v Madison* 5 US 1 (Cranch) 137 (1803).
6. *Official Record of the Australasian Federal Convention Debates* Vol 2 (Melbourne: Government Printers, 1898) 1876.
7. *R v The Commonwealth Court of Conciliation & Arbitration; Ex parte The Brisbane Tramways Co Ltd (No 1)* (1914) 18 CLR 54, 83. That proposition was reinforced in *The*

No privative clause has yet been devised which can defeat the constitutional jurisdiction in head-on conflict. Such provisions have, nevertheless, been effective when characterised not as restricting judicial review but as defining the true reach of the decision-maker's power: see *R v Hickman; Ex parte Fox and Clinton*[8] ("*Hickman*"). Referring, in that case, to Regulation 17 of the National Security (Coalmining Industry) Employment Regulations 1941 (Cth), which protected decisions of local reference boards from being challenged on any ground whatsoever, Dixon J said:[9]

> Such a clause is interpreted as meaning that no decision which is in fact given by the body concerned shall be invalidated on the ground that it has not conformed to the requirements governing its proceedings or the exercise of its authority or has not confined its acts within the limits laid down by the instrument giving it authority, provided always that its decision is a bona fide attempt to exercise its power, that it relates to the subject matter of the legislation and that it is reasonably capable of reference to the power given to the body.[10]

The invulnerability of the section 75(v) jurisdiction and the basis upon which privative clauses will be given effect by the High Court, notwithstanding the section, remained substantially unaltered in the period under review. In *R v Coldham; Ex parte The Australian Workers' Union*[11] ("*Coldham*"), the Court considered the operation of section 60 of the Conciliation and Arbitration Act 1904 (Cth) which protected awards from appeal or review or from being "subject to prohibition, mandamus or injunction in any Court on any account". Mason ACJ and Brennan J reaffirmed that "the jurisdiction of the Court conferred by section 75(v) of the Constitution to grant mandamus and prohibition directed to an officer of the Commonwealth cannot be ousted by a privative clause."[12] They accepted nevertheless that a privative clause in the form of section 60 would validate an award or order of the Commission within constitutional bounds provided that the three conditions laid down in *Hickman* were fulfilled:

- The purported exercise of the power is bona fide;
- The exercise of the power relates to the subject matter of the legislation;

Waterside Workers' Federation of Aust v Gilchrist Watt & Sanderson Ltd (1924) 34 CLR 482, 526, 551.

8. (1945) 70 CLR 598.
9. Id, 615.
10. See also *R v Commonwealth Rent Controller; Ex parte National Mutual Life Assoc of Australasia Ltd* (1947) 75 CLR 361, 369 and *R v Central Reference Board; Ex parte Thiess (Repairs) Pty Ltd* (1948) 77 CLR 123, 130, 137, 140.
11. (1983) 153 CLR 415.
12. Id, 418.

- The award or order is reasonably capable of being referred to the power.

But a privative clause could not, it was said, affect the operation of a provision of the empowering legislation which imposed "inviolable limitations or restraints upon the jurisdiction or powers of the Tribunal."[13] And if, as in that case, the Tribunal had travelled beyond those inviolable limits then prohibition and mandamus would lie under section 75(v) notwithstanding the privative clause. In *Re Cram; Ex parte Colliery Proprietors' Association Ltd*[14] ("*Re Cram*"), all seven judges held that the members of a local coal authority and coal industry tribunal set up under Commonwealth law remained officers of the Commonwealth although exercising power conferred upon them in those capacities by a State law. As such, they were subject to the jurisdiction conferred by section 75(v). That position was not and could not be altered in relation to the exercise of powers conferred by the State Act by privative provisions in the Commonwealth and State legislation: "It is beyond argument that such a provision cannot operate to preclude this Court from exercising the powers directly conferred upon it by section 75(v) of the Constitution."[15] The Judges cited *Hickman*[16] in this regard but accepted the observations of Mason ACJ and Brennan J in *Coldham*.[17]

The proposition which emerges from *Coldham* and *Re Cram* is that when a Commonwealth statute confers substantive decision-making power, a privative clause which has the effect of authorising the decision-maker to travel beyond that power will not authorise transgression of "inviolable limitations or restraints" upon its exercise. The question whether a limit or restraint upon a power conferred by statute which also contains a widely drawn privative clause is "inviolable" is one of evaluation and characterisation. Indeed, the answering of the question may come close to a process of selection from one of Professor Stone's categories of meaningless reference.[18] There is another limit on the operation of privative clauses in this context which is a corollary of their characterisation as extensions of the decision-maker's power. That is that they cannot preclude review under section 75(v) in respect of a wrongful refusal of jurisdiction.[19]

13. Id, 419.
14. (1987) 163 CLR 117.
15. Id, 131.
16. Supra n 8.
17. Supra n 11.
18. J Stone *Precedent and Law: Dynamics of Common Law Growth* (Sydney: Butterworths, 1985) 68–70.
19. See *Re Coldham; Ex parte The Australian Building Construction Employees' & Builders Labourers' Federation* (1985) 159 CLR 522, Gibbs CJ, Wilson and Dawson JJ, 530.

In *O'Toole v Charles David Pty Ltd*,[20] the High Court considered section 60 of the Conciliation and Arbitration Act 1904 (Cth) in the context of a case stated from the Full Federal Court. The condition that the purported exercise of the substantive power be bona fide in order to attract the power-enhancing operation of the privative clause was explained. The good faith requirement could not refer to the subjective intention or motivation of those purporting to exercise the substantive power. It should be understood as referring to what is apparent on the face of the record. The Court said:

> So understood, the condition will, as a practical matter, be satisfied unless the purported exercise of power can be seen, on the face of the record, to be not bona fide. That being so, the cases in which that first condition is not satisfied in respect of an award purportedly made by the Commission will be rare and extreme. The second and third conditions are related. Both involve objective tests.[21]

The operation of section 75(v) was summarised in a joint majority judgment in the Full Court of the Federal Court in *David Jones Finance & Investments Pty Ltd v Commissioner of Taxation*:

> In summary therefore, section 75(v) of the Constitution confers a jurisdiction upon the High Court which cannot be limited or qualified by any statute. That jurisdiction authorises the court to control excesses of power or failure of duty by officers of the Commonwealth. It is ambulatory to the extent that its exercise will depend upon the constitutional and statutory boundaries of the powers or duties in question. To determine those boundaries in a given case may involve questions of the construction of the relevant legislation. And that process may require that account be taken of any privative provisions able to be construed as extending the powers or contracting the duties.[22]

That case considered the like jurisdiction conferred on the Federal Court by section 39B of the Judiciary Act 1903 (Cth) and found that as a matter of construction the section was intended to operate against a pre-existing privative provision in the same way as section 75(v).

The importance of the constitutional jurisdiction is not to be underestimated. There have been some indications of a reaction by elements of executive government, at ministerial and departmental level, against the scope of judicial review. This may be associated with a perception of the courts as inexpert interveners in areas of decision-making which are best left to ministers and their advisors.[23] Whether or not this reaction will lead to any statutory contraction of judicial review, the constitutional jurisdiction re-

20. (1990) 171 CLR 232.
21. Id, 287.
22. (1991) 28 FCR 484, 495.
23. D C Pearce "Executive Versus Judiciary" (1991) 2 PLR 179.

mains. It has its limitations. The absence of express reference to certiorari makes the basis for the grant of that relief doubtful although it has been granted in what the Court has regarded as appropriate cases.[24] But whatever the full ambit of the relief properly available in proceedings brought under section 75(v) the importance of that jurisdiction has not diminished in the last 25 years or so. It was recognised by the Constitutional Commission's Advisory Committee on Executive Government which reported to the Commission in the following terms:

> Judicial review is an important feature of the operation of Australia's Constitution. It is another of the "fetters" which are placed on Government as part of the separation of powers strategy that is an essential part of Australia's federal system. No part of the apparatus of Government is above judicial review.[25]

PRIVATIVE CLAUSES AND JURISDICTIONAL ERROR

The pronouncements of the High Court on privative clauses in the period under review have not been limited to their interaction with its constitutional jurisdiction. The Court has tended to maintain a distinction between the operation of privative clauses on judicial review of "jurisdictional error" and other species of error within jurisdiction. Some English decisions have been seen as eliding that distinction. *Anisminic Ltd v Foreign Compensation Commission*[26] ("*Anisminic*") concerned section 4(4) of the Foreign Compensation Act 1950 (UK) which provided that:

> The determination by the commission of any application made to them under this Act shall not be called in question in any court of law.

The House of Lords held that the provision did not apply to protect from review a purported determination which was a "nullity". On this basis the class of error exempted from the operation of the privative clause included bad faith, excess of power, failing to comply with the requirements of natural justice, failure to take into account relevant considerations and taking into account irrelevant considerations.[27] The discussion of jurisdiction was, on one view, not necessary to the decision which in substance construed the relevant section as extending only to determinations not affected by vitiating errors of law: "A more reasonable and logical construction is that by

24. *Pitfield v Franki* (1970) 123 CLR 448; *R v Cook; Ex parte Twigg* (1980) 147 CLR 15; *Re Coldham; Ex parte Brideson* (1989) 166 CLR 338.
25. *Executive Government, Report of the Advisory Committee to the Constitutional Commission* (Canberra: AGPS, 1987) 47.
26. [1969] 2 AC 147.
27. Id, Lord Reid, 171.

"determination" Parliament meant a real determination not a purported determination."[28]

In *In re Racal Communications Ltd*,[29] Lord Diplock held that, for practical purposes, *Anisminic* abolished "the old distinction between errors of law that went to jurisdiction and errors of law that did not".[30] The High Court, however, did not accept that view of the effect of the decision. In *Public Service Association of South Australia v Federated Clerks' Union of Australia*[31] Brennan J pointed to earlier decisions of the Court in which the distinction had been maintained and said:

> Making the distinction between jurisdictional and non-jurisdictional errors, this court construes general privative clauses as impliedly exempting certiorari for jurisdictional error from the ouster of supervisory jurisdiction.[32]

The privative clause under consideration was section 95 of the Industrial Conciliation and Arbitration Act 1972 (SA). This provided that no award, order or proceeding of any kind of the Commission or a Committee could be challenged, appealed against, reviewed, quashed or called in question except on the ground of excess or want of jurisdiction. On that basis, an order in the nature of certiorari founded on excess or want of jurisdiction was validly made. Mandamus, based upon a constructive failure to exercise jurisdiction, was strictly within the scope of the privative clause.[33] As a matter of construction, the word "jurisdiction" was used in the section in its ordinary sense to refer to the authority of a tribunal to entertain the proceedings. This reflected the narrow sense adopted by Lord Reid in *Anisminic*.[34]

The distinction between jurisdictional and non-jurisdictional error had been drawn in *Houssein v Department of Industrial Relations & Technology (NSW)*.[35] Section 84(1) of the Industrial Arbitration Act 1940 (NSW) protected orders of the Commission from being liable "to be challenged, appealed against, reviewed, quashed or called in question by any court of judicature on any account whatsoever". This was held to oust the jurisdiction of the Supreme Court to grant certiorari in respect of errors of law not going to the jurisdiction of the Industrial Commission. The Privy Council had come to a like conclusion on a similarly worded provision of the Industrial

28. Id, Lord Pearce, 199.
29. [1981] AC 374.
30. Id, 383.
31. (1991) 102 ALR 161.
32. Id, 167.
33. Id, 170.
34. Id, Deane J, 173; Dawson and Gaudron JJ, 181.
35. (1982) 148 CLR 88.

Relations Act 1966 (Malaysia) in *South East Asia Fire Bricks Sdn Bhd v Non-Metallic Mineral Products Manufacturing Employees Union*.[36] In *Hockey v Yelland*,[37] the privative clause in issue was section 14c(11) of the Workers' Compensation Act 1916 (Qld) which made determinations of medical boards set up under the Act "final and conclusive". That clause was held not to oust the jurisdiction of the Supreme Court to grant certiorari for excess of jurisdiction or error of law on the face of the record. The question was again one of construction, applying the general principle that the subject's right of recourse to the courts is not to be taken away except by clear words.[38] The distinction between excess of jurisdiction and error of law on the face of the record was maintained but nothing turned on it.

There were some observations about the effect of *Anisminic* in *R v Gray; Ex parte Marsh*.[39] *Anisminic* was seen as making clear that an error of law may amount to jurisdictional error even though the Tribunal which made the error had jurisdiction to embark on its inquiry.[40] Put another way, it was said to have decided that where a Tribunal misconstrues the statute which gives it jurisdiction it may address itself to the wrong issue and thereby exceed its jurisdiction.[41]

Whatever the proper interpretation of *Anisminic* it is clear that the High Court has maintained the distinction between jurisdictional error and error within jurisdiction. The distinction seems to have little work to do in the cases relating to the operation of privative clauses. These have turned largely on questions of their construction aided by the presumption in favour of access to the courts. That being so, some may ask why there is still discussion about the distinction. In Sykes Lanham and Tracey's *General Principles of Administrative Law*,[42] the tendency to eliminate the distinction between error as to jurisdiction and error of law within jurisdiction altogether is viewed "with strong disapproval". The authors say:

> It is thought that many decisions, including some Australian ones, should be viewed with suspicion to the extent to which they extend the concept of jurisdictional error to unreal lengths. Such decisions at best evince the character of strongly subjective interpretations and at worst a tendency to use the concept of lack of jurisdiction as a manipulative device to justify an exploration of the decision on the merits as the limitation to questions of law is an obstacle which can readily be surmounted. Such

36. [1981] AC 363.
37. (1984) 157 CLR 124.
38. Id, Gibbs CJ, 130.
39. (1985) 157 CLR 351.
40. Id, Gibbs CJ, 371.
41. Id, Mason J, 377.
42. 2nd edn (Sydney: Butterworths, 1984) 17.

> tendencies lead not only to uncertainty in the law but also breed an attitude of cynicism as to the truth of the judicial process.[43]

It is difficult to detect within the already overburdened ranks of the federal judiciary any enthusiasm to extend its charter into de facto merits review. There will no doubt always be debatable cases at the boundaries of fact and law. It is difficult to see how the distinction between jurisdictional and non-jurisdictional error of law will have much impact on that debate in light of the extensive grounds of review which include error of law simpliciter under the Administrative Decisions (Judicial Review) Act 1977 (Cth).

Given that the distinction has, at best, only marginal relevance to the questions of construction which arise in relation to privative clauses, it may be preferable to focus on the nature and extent of the power conferred on the administrative decision-makers whose decisions are called into question. Jurisdiction in the narrow sense can be treated as an aspect of the power of the decision-maker to embark upon any relevant inquiry and to make the decision in question. The requirements of conformity to the substantive law, to natural justice, good faith, the avoidance of the irrelevant and the requirement to take into account certain relevant considerations are all matters which go to the definition and limitation of the decision-making power. If there be a privative clause that can be characterised, in accordance with the discussion in the preceding section, as an enhancement of the substantive power conferred on the decision-maker. The extent of that enhancement depends upon the proper construction of the clause which will depend upon its language aided by the presumption that Parliament would not intend to bar access to the courts in the absence of clear language.

A QUESTION OF ACCESS — STANDING

While the legislative intention to retain access to the Courts may be presumed it is not always available to those who seek judicial review of decisions to which they object. The degree of access to review is defined by reference to the concept of standing which has been considered in a number of cases in the High Court during the period under review.

The criteria for standing to challenge legislative or administrative action in Australia may be doubtful but they do not raise much current controversy in principle. In part that may be because it is not often that persons without a real interest to protect or advance resort to the expensive and uncertain option of litigation. There has been little substantial change in this area at the

43. Id, 18.

hands of the High Court although the criteria are flexible and, it may be said, capable of liberalisation in their application.

The standing necessary to support a challenge to the validity of legislation was considered by the High Court in *Robinson v The Western Australian Museum*[44] ("*Robinson*"). For the most part the Judges required the demonstration of a special interest. That is to say, the applicant for relief had to be able to show an interest greater than his interest as a member of the general public.[45] In this respect the decision did not change the existing law.[46] The nature of the interests sufficient to support standing was not the subject of expansive definition. The broad range of interests was reflected in the judgment of Mason J:

> Reflection on the considerations which underlie the rule do not provide much assistance in defining the nature of the interest which a plaintiff must possess in order to have locus standi. However, it does indicate that the plaintiff must be able to show that he will derive some benefit or advantage over and above that to be derived by the ordinary citizen if the litigation ends in his favour. The cases are infinitely various and so much depends in the given case on the nature of the relief which is sought, for what is a sufficient interest in one case may be less than sufficient in another.[47]

In a practical sense, the decision in *Robinson* showed that it is possible in some cases to side-step the issue of standing completely. Gibbs J said that the question whether a plaintiff has a sufficient interest to challenge the validity of legislation may depend upon the resolution of difficult questions of law and fact. In such a case the Court has a discretion as a matter of convenience to proceed immediately to determine the validity of the challenged statute, rather than endeavour to resolve the question of standing at the threshold.[48]

The special interest requirement restated in *Robinson* was applied in *Australian Conservation Foundation Inc v The Commonwealth*[49] ("*ACF*"). It reflected a formulation previously enunciated by Buckley LJ in *Boyce v Paddington Borough Council*[50] and by the House of Lords in *Gouriet v Union of Post Office Workers*.[51] The Australian Conservation Foundation sought declaratory and injunctive relief in the original jurisdiction of the High Court

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44. (1977) 138 CLR 283.
45. Id, Barwick CJ, 292; Gibbs J, 302; Stephen J, 323; Mason J, 327.
46. As applied in the earlier decisions of *Anderson v The Commonwealth* (1932) 47 CLR 50; *Toowoomba Foundry Pty Ltd v The Commonwealth* (1945) 71 CLR 545, 570; *Crouch v The Commonwealth* (1948) 77 CLR 339.
47. Supra n 44, 327.
48. Id, 302.
49. (1980) 146 CLR 493.
50. (1903) 1 Ch 109, 114.
51. [1978] AC 435.

to challenge an approval by the Minister for the Environment of the development of a resort and tourist area at Farnborough in central Queensland. Existing principle was firmly applied to prevent the Foundation from pursuing its action. Gibbs J said:

> The general principle stated in *Gouriet v Union of Post Office Workers*, that a private person, who is in the same situation as any other member of the public, has no standing to claim either an injunction or a declaration to enforce a public right or duty, has been consistently applied in this Court.[52]

The response of the majority in that case to a submission that the Court should depart from the existing law as to standing was clear and expressed in terms of limitations on the proper role of the judiciary. Mason J said:

> There are limits to what the courts can and should do by way of altering the law. The Court is not a legislature and has no general charter to reform or change the existing law. The Court can and does elaborate the common law by judicial decision. This is an evolutionary and continuing process. It is a process which allows little scope for radical reform of a rule of law, which, except in some aspects which are not of present importance, has long been settled, when it has not been demonstrated that the foundation on which the rule is based has fundamentally changed.[53]

A mere intellectual or emotional concern or belief about the subject matter of the action, however strongly held, would not confer standing.[54] Mason J referred to the constitutional concerns underlying some United States decisions which turned on the Article III limitation of the judicial power in that country to "cases" and "controversies". Although deriving some assistance from those cases he was not to be taken as suggesting that a similar limitation would apply under Chapter III of the Commonwealth Constitution to bar legislative enlargement of locus standi in federal jurisdiction.[55]

It does not follow from *ACF* that the presence of intellectual or emotional concerns will defeat a claim of locus standi where a special interest is otherwise demonstrated. Nor does it follow that the special interest must be a pecuniary or property interest of some kind. While some grounds for claiming standing were excluded by the decision in that case, the categories

52. Supra n 49, 527; see also Stephen J, 538; Mason J, 547. Murphy J dissented.

53. Id, 552. Gibbs J, 529 favoured a sharp divide between the proper role of judges and legislators:

> [I]f the law is settled, it is our duty to apply it, not to abrogate it. It is for the Parliament, whose members are the elected representatives of the people, to change an established rule if they consider it to be undesirable, and not for judges, unelected and unrepresentative, to determine not what is, but what ought to be, the law.

54. Id, Gibbs J, 530; Stephen J, 539; Mason J, 548.

55. Id, 551.

of eligible interest were not closed. This was demonstrated in *Onus v Alcoa of Australia Ltd*[56] ("*Onus*"). The interest of traditional custodians in certain Aboriginal relics was sufficient to confer standing to support their claim for an injunction to restrain interference with those relics contrary to the provisions of the Archaeological and Aboriginal Relics Preservation Act 1972 (Vic). The Act did not of itself confer rights of action upon any class of person.[57] The case does not involve any departure from the principles governing locus standi in public law. As Stephen J said, the contentions of the parties called for no reconsideration of the existing law. The appellants needed to invoke no new principle in order to establish their right to sue.[58] The decision does indicate however that, within the apparently restrictive guidelines restated in *Robinson* and *ACF*, there is a potentially wide range of qualifying interests. The absence of mere material interest in the subject matter of the action in the sense of property or pecuniary rights is not fatal.[59] Wilson J spoke of the qualifying interest in *Onus* as "a cultural and historical interest... more than the kind of emotional or intellectual interest to which Gibbs J referred in the Conservation Foundation case".[60]

Most recently, the Court has held that the range of special interests capable of supporting standing includes an interest asserted by a sub-group or individual which is dependent upon a communal native title to land.[61] A possible further extension of the range of qualifying interests was indicated by the judgment of Gibbs CJ sitting as a single judge on a strike out application in *Davis v The Commonwealth*.[62] Aboriginal plaintiffs sought a declaration of invalidity of certain sections of the Australian Bicentennial Authority Act 1980 (Cth). Among the grounds upon which they asserted locus standi was their contention that Aboriginals had a special interest, for historical reasons, to challenge the celebration of the two hundredth anniversary of a colonial settlement in Australia. Gibbs CJ said he had difficulty in accepting that the interest was other than emotional or intellectual. But having regard to the rules governing strike out applications he would not dismiss the claim as frivolous or hopeless.[63] The plaintiffs also relied upon

56. (1981) 149 CLR 27.
57. Id, Gibbs CJ, 33; Wilson J, 59; Brennan J, 68.
58. Id, 41.
59. Id, Stephen J, 42.
60. Id, 62.
61. *Mabo v The State of Queensland (No 2)* (1992) 175 CLR 1, Brennan J, 62; Mason CJ and McHugh J agreeing.
62. (1986) 68 ALR 18.
63. Id, 23–24.

their capacities as taxpayers. The question whether a taxpayer might have standing by reason of that status to challenge legislation providing for the disbursement of public moneys had been left open in *Attorney-General (Vic) (Ex rel Black) v The Commonwealth*.[64] Gibbs CJ accepted that there had been in recent years a marked relaxation of the rules relating to standing in England and Canada. In *Minister of Justice (Canada) v Borowski*,[65] the Supreme Court of Canada had taken the view that a person not directly affected by legislation might have standing to challenge it on the basis of a genuine interest as a citizen in its validity and if there was no other reasonable and effective manner in which the issue could be brought before the Court. On the other hand, he noted a more restrictive tendency in the United States decision in *Valley Forge College v Americans United*.[66] He decided that the question whether the plaintiffs had standing as taxpayers was arguable and not to be determined on a strike out application.[67]

It may be concluded from the preceding that the High Court is unlikely to depart from the requirement that a person wishing to challenge legislative or administrative action must show a special interest which is not common to members of the public at large and which is not merely an emotional or intellectual concern. The range of matters which may be considered as special interests, however, is not limited to pecuniary or property interests but extends to cultural or historical interests and can no doubt be extended to spiritual concerns. The High Court's retention of the special interest requirement leaves it with a control mechanism but a mechanism that is plainly manipulable from case to case with a more or less restrictive or liberal approach.

THE REACH OF JUDICIAL REVIEW

The development of administrative law in the High Court in the last three decades has perhaps been most dramatic in its extension of the reach of judicial review into the highest levels of governmental decision-making. The reviewability of the exercise of ministerial discretions for improper purposes asserted in United Kingdom case law[68] was first clearly established for

64. (1981) 146 CLR 559, Gibbs CJ, 588–590.
65. (1982) 130 DLR (3d) 588.
66. (1982) 454 US 464.
67. Supra n 62, 25.
68. *Padfield v Minister of Agriculture Fisheries & Food* [1968] AC 997; *Congreve v Home Office* [1976] 1 QB 629; *Laker Airways v Department of Trade* [1977] 1 QB 643; *Secretary of State for Education v Tameside Metropolitan Borough Council* [1977] AC

Australia in *Murphyores Incorporated Pty Ltd v The Commonwealth*.[69] It had been foreshadowed in *Television Corporation Ltd v The Commonwealth*.[70] When the High Court came to decide *R v Toohey; Ex parte Northern Land Council*[71] ("*Toohey*"), it was then "well established that both the exercise and non-exercise by Ministers of the Crown of discretionary powers vested in them are subject to judicial review, which extends to the examination of the reasons which led to the Minister's exercise or non-exercise of his power".[72] In that case it was held that a decision of the Administrator of the Northern Territory making regulations under a statutory power was examinable for improper purpose. On the basis that the Crown was represented by the Administrator[73] and was exercising statutory powers, Gibbs CJ concluded:

> If a statutory power is granted to the Crown for one purpose, it is clear that it is not lawfully exercised if it is used for another. The courts have the power and duty to ensure that statutory powers are exercised only in accordance with law. They can in my opinion inquire whether the Crown has exercised a power granted to it by statute for a purpose which the statute does not authorise.[74]

No mystique attached to the representative of the Crown in such cases which would justify drawing a distinction in principle between the acts of the representative and ministers of the Crown, it being recognised that in the exercise of statutory power the former acts on the advice of the latter.[75] The judgment of Mason J foreshadowed the applicability of judicial review to the exercise of the prerogative powers of the Crown in areas appropriate to such review.[76]

Just under five months after delivery of its judgment in *Toohey*, the Court handed down its decision in *FAI Insurances Ltd v Winneke*[77] ("*FAI*"). There it held that the Governor in Council for the State of Victoria, exercising the statutory function of deciding whether or not to renew an approval of an insurance company under the Workers' Compensation Act 1958 (Vic), was subject to the requirements of natural justice. The company was entitled to be heard before a decision not to renew the approval was given. No question

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69. (1976) 136 CLR 1, Barwick CJ, 6; McTiernan J, 8; Gibbs J, 9; Murphy J, 26.
70. (1963) 109 CLR 59.
71. (1981) 151 CLR 170.
72. Id, Stephen J, 202; see also Aickin J, 264.
73. Id, 186 — a view he himself did not hold but accepted for the purpose of his judgment having regard to the opinions of certain of the other judges.
74. Id, 193.
75. Id, Stephen J, 215. See also Wilson J, 283.
76. Id, Mason J 220.
77. (1982) 151 CLR 342.

of the exercise of prerogative power was involved. Indeed, there was support for the view that the Governor in Council, when considering an application for approval of an insurance company, was a tribunal for the purposes of the Administrative Law Act 1978 (Vic). No question of justiciability arose and in most such cases would not arise because as Stephen J observed: "In Victorian legislation it is the merest commonplace to assign to the Governor in Council the making of a host of routine administrative decisions, involving neither matters of high government policy nor any nice exercises of policy-oriented discretion".[78]

The Governor or Governor in Council, when placed in the role of commonplace statutory decision-maker, attracts generally the same ambit of judicial review as any minister or other officer of the Crown exercising similar functions.

The extension of judicial review to the exercise of prerogative powers was accepted in England for certain classes of decision in *Council of Civil Service Unions v Minister for the Civil Service*[79] ("*CCSU*"). That case related to the exercise of a delegated power conferred upon the minister by an Order in Council made pursuant to the prerogative power. It concerned the variation by the minister of the conditions of employment of staff in a defence establishment. It was contended that the minister was required, as a matter of natural justice, to hear from affected parties before making the decision. The challenge was rejected on the basis that consultation might have affected national security. But the House of Lords accepted that the prerogative origins of the power would not exclude judicial review. Lord Scarman said:

> [T]he law relating to judicial review has now reached the stage where it can be said with confidence that, if the subject matter in respect of which prerogative power is exercised is justiciable, that is to say if it is a matter upon which the Court can adjudicate, the exercise of the power is subject to review in accordance with the principles developed in respect of review of the exercise of statutory power.[80]

In *Minister for Arts Heritage & the Environment v Peko Wallsend Ltd*[81] ("*Peko Wallsend*"), the Full Court of the Federal Court held that the Court had jurisdiction under section 39B of the Judiciary Act 1903 (Cth) to entertain an application for the review of the exercise of prerogative power by the Federal Cabinet. The proceedings were based upon an alleged failure by Cabinet to accord natural justice to certain mining companies which held mining

78. Id, 353.
79. [1985] 1 AC 374.
80. Id, 407.
81. (1987) 75 ALR 218.

interests in the Northern Territory allegedly affected by a Cabinet decision to nominate Stage 2 of the Kakadu National Park for inclusion in a World Heritage List established under the World Heritage Convention and to submit to Parliament a plan of management which would affect exploration and mining activities pursuant to those interests. The judge at first instance declared that the decision to nominate Stage 2 for inclusion on the list was void. The appeal was allowed in substance on the basis that the decision under review was not justiciable. Two of the judges of the Full Court also took the view that the applicants had been given an adequate opportunity of putting their case and had not been denied natural justice. The case is important however for establishing, as a matter of principle, that executive action is not immune from judicial review merely because it is carried out pursuant to a power derived from the prerogative rather than a statutory source. Nor is it necessarily immune from review because exercised by or pursuant to a decision of the Cabinet although serious issues of justiciability will usually impede any attempt to seek review of such decisions. Bowen CJ, persuaded by the decision of the House of Lords in *CCSU*, said:

> In my opinion, subject to the exclusion of non-justiciable matters, the Courts of this country should now accept responsibility for reviewing the decisions of Ministers or the Governor-General in Council notwithstanding the decision is carried out in pursuance of a power derived not from statute but from the common law or the prerogative.[82]

On the question of Cabinet involvement however, Bowen CJ referred to the elements of high policy attending such decisions and the often intense conflicts of interests or of opinions in the community which have to be resolved by the Cabinet. Without going so far as to say that a Cabinet decision made pursuant to the prerogative could never be reviewed, he thought it inappropriate for the Court to intervene to set aside a Cabinet decision involving the complex policy considerations attending the decision under review even if the private interest of the applicants was thought to have been inadequately considered. That matter lay in the political arena. Wilcox J thought it would be a rare case in which a Cabinet decision would be reviewable. However, it was not possible in his Honour's view to exclude the judicial review of a decision "merely because it was one made by the Cabinet, merely because it was a decision taken in the exercise of the prerogative powers of the Crown or merely because the decision combined both these characteristics."[83] The critical matter would be the nature and effect of the

82. Id, 224.
83. Id, 249.

relevant decision. That would involve considerations of justiciability and whether some other feature such as national security or international relations would make judicial review inappropriate in a particular case. Sheppard J agreed generally with Bowen CJ and Wilcox J. He referred to the practical difficulties of embarking upon a review of the exercise by Cabinet of prerogative power and seemed to be more inclined than the other judges to exclude any possibility of a review of Cabinet decisions:

> I should emphasise that the question is not whether the Cabinet is bound to act according to law; it is whether its decisions are amenable to the supervisory jurisdiction of the Court. In other words, are its decisions justiciable? In my opinion, the Cabinet being essentially a political organisation not specifically referred to in the Constitution and not usually referred to in any statute, there is much to be said for the view that the sanctions which bind it to act in accordance with the law and in a rational manner are political ones with the consequence that it would be inappropriate for the Court to interfere with what it does.[84]

His Honour inclined to the view that the application should fail at the outset because the decision in question was one made by Cabinet, but he decided it was not necessary for him to express that view finally. In that case the High Court refused special leave to appeal from the Federal Court's decision. In the absence of any concluded view about the reviewability of Cabinet decisions as such, that is perhaps not surprising.

In summary, it has been established by the decisions of the High Court to which reference has been made that Ministers of the Crown and the Governor or Governor in Council may be subject to judicial review in relation to the exercise of statutory discretions and that review may extend to excess of power, improper purposes and breach of the rules of natural justice. The Court has left it open to conclude that the exercise of prerogative power by the Executive may, according to the nature of the particular power under consideration, be subject to judicial review. The question of the review of statutory powers exercised by a Cabinet has not arisen, no doubt because Cabinets are generally not the repositories of statutory powers. And on the present state of the law it would seem highly unlikely that an attempt to review the exercise of prerogative power by a Cabinet would survive the test of justiciability. It may be, nevertheless, that a case could arise in which a decision affecting the interests of a particular individual and lacking any of the complex policy considerations often attendant upon Cabinet decisions, would be amenable to review.

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84. Id, 227.

PROCEDURAL FAIRNESS — LEGITIMATE EXPECTATION

The rules of natural justice embody a broad concept of procedural fairness variously described as "fair play in action"[85] and "fairness writ large and juridically".[86] It has been repeatedly asserted in the High Court that their application to the exercise of a statutory power is a matter of construction.[87] There is support for the proposition that a wide statutory discretion may indicate the absence of a duty to observe natural justice. However, in De Smith's *Judicial Review of Administrative Action*[88] it is said to be far from obvious that the width of a power should be sufficient to exempt its repository from the obligation to listen to representations before it acts.[89] Professor Wade contends that, whether widely or narrowly drawn, discretions ought to be exercised fairly just as they must also be exercised reasonably.[90] In *FAI*,[91] Mason J accepted that an unfettered discretion has frequently been regarded as an indication that the rules of natural justice have no application. However, he found in the judgment of Kitto J in *Testro Bros Pty Ltd v Tait*[92] support for the view that:

> [E]ven in the case of a wide discretion the repository may be under a duty to receive representations before arriving at a decision and that this is more likely to be the situation where the decision turns on "findings of adjudicative facts or the interpretation or application of decisional criteria of greater specificity than those contained in the statute".[93]

In *FAI*, the nature of the decision to be taken by the Governor, involving the question whether the applicant for approval was a fit and proper person to act as a workers' compensation insurer, turned on the view taken of the applicant's commitments and financial position. In those circumstances, there was a legitimate expectation that the approval would be renewed or at the very least that it would not be refused without the applicant having an

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85. *Ridge v Baldwin* [1963] 1 QB 539, Harman LJ, 578.
86. *Furnell v Whangarei High Schools Board* [1973] AC 660, Lord Morris, 679.
87. *Salemi v Mackellar (No 2)* (1977) 137 CLR 396, 401, 419, 460; *R v Mackellar; Ex parte Ratu* (1977) 137 CLR 461, 463, 470, 475; *Heatley v Tasmanian Racing & Gaming Commission* (1977) 137 CLR 487, 491, 498.
88. 4th edn (London: Stevens & Sons, 1980).
89. Id, 186.
90. H W R Wade *Administrative Law* 6th edn (Oxford, Clarendon Press, 1977) 555.
91. (1982) 151 CLR 342.
92. (1963) 109 CLR 353.
93. Supra n 91, 363.

opportunity to meet objections raised against it.[94]

The notion of legitimate expectation enunciated initially by Lord Denning in *Schmidt v Secretary of State for Home Affairs*[95] came to bear two aspects. The first suggested that it was a legitimate expectation of some privilege or benefit which should not be disappointed without a hearing. The second suggested that the legitimate expectation related to the right to be heard before being deprived of a privilege or benefit.[96] It has been said that while there is some ambiguity about the notion of legitimate expectation which may convey either the expectation of a fair hearing or the expectation of the privilege or other benefit sought, the result is the same in either case, namely, absence of legitimate expectation will absolve the public authority from affording a hearing.[97] It is, however, not correct to characterise legitimate expectation as a necessary condition of the application of the rules of natural justice.[98]

In *Heatley v Tasmanian Racing & Gaming Commission*,[99] Aickin J (with whom Stephen and Mason JJ agreed) spoke of a "reasonable expectation" of some entitlement as "an expectation that some form of right or liberty will be available, or will not be taken away without an opportunity for the subject to put his case to the relevant governmental authority armed with the compulsory power in question".[100] In *Kioa v West*,[101] Mason J accepted that legitimate expectations extended to expectations going beyond enforceable legal rights provided they are reasonably based. In this he departed from the rather sceptical view of Barwick CJ in *Salemi v Mackellar (No 2)* that the expression added little, if anything, to the concept of a right.[102] Mason J said:

> [L]ater decisions demonstrate that the concept of "legitimate expectation" extends to expectations which go beyond enforceable legal rights provided that they are reasonably based.... The expectation may be based on some statement or undertaking on the part of the authority that makes the relevant decision. In the view of some members of the Court in *Salemi (No 2)* the "amnesty" constituted an example of such an undertaking. Alternatively, the expectation may arise from the very nature of the application, as it did in the case of the application for a renewal of a licence in *FAI* ... or from the existence of a regular practice which the person affected can reasonably

94. Id, 369.
95. (1969) 2 Ch 149.
96. *Cinnamond v British Airports Authority* [1980] 2 All ER 368, Denning MR, 374.
97. Supra n 90, 552.
98. *Haoucher v Minister of Immigration & Ethnic Affairs* (1990) 169 CLR 648: see infra p 140.
99. (1977) 137 CLR 487.
100. Id, 508.
101. (1985) 159 CLR 550, 583.
102. (1977) 137 CLR 396, 404.

> expect to continue... The expectation may be that a right interest or privilege will be granted or renewed or that it will not be denied without an opportunity being given to the person affected to put his case.[103]

The latter part of that passage might seem to support the notion that the legitimate expectation relates to the opportunity to be heard as distinct from the privilege or benefit. The difficulty with that approach is that a legitimate expectation may be said to exist on that basis whenever the Court considers that natural justice requires that a person be heard before being refused or deprived of a privilege or benefit.

A rather modest view of the role of the legitimate expectation in procedural fairness was indicated by Deane J in *Haoucher v Minister for Immigration & Ethnic Affairs*[104] ("*Haoucher*"). His Honour characterised the law as moving towards a conceptually more satisfying position where common law requirements of procedural fairness will, in the absence of a clear contrary legislative intent, be recognised as applying generally to governmental decision-making. In that context the question whether the particular decision affects the rights, interests, status or legitimate expectations of a person in his or her individual capacity is relevant to the ascertainment of the practical content, if any, of those requirements in the circumstances of a particular case and of the standing of a particular individual to attack the validity of the particular decision in those circumstances.[105] That observation was made in the context of a reaffirmation of the well established flexibility of rules of procedural fairness in respect of which his Honour said:

> [I]t is important to bear in mind that the recognition of an obligation to observe procedural fairness does not call into play a body of rigid procedural rules which must be observed regardless of circumstances. Where the obligation exists, its precise content varies to reflect the common law's perception of what is necessary for procedural fairness in the circumstances of the particular case.[106]

That the requirements of procedural fairness extend beyond the protection of rights and legitimate expectations was also affirmed by Dawson J.[107] Gaudron J described a legitimate expectation as "a circumstance which attends the case", adding that:

> In some situations that expectation, if it exists, may dominate the other circumstances of the case, particularly if it results in the failure to put a case on some aspect of the

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103. Supra n 101, 583.
104. (1990) 169 CLR 648.
105. Id, 653.
106. Id, 652.
107. Id, 659.

matter thought not to be in issue.[108]

It is important to note, as Toohey J observed,[109] that the notion of legitimate expectation does not depend upon any principle of estoppel. It does not depend upon the knowledge and state of mind of the individual concerned although such an expectation may arise from the conduct of a public authority towards an individual. It may turn on a question of statutory construction. As Brennan J said in *Kioa v West*: "It is not the state of mind of an individual but the interest which an exercise of power is apt to affect that is relevant to the construction of the statute."[110]

More recently, in *Annetts v McCann*,[111] the majority of the Court, Mason CJ, Deane and McHugh JJ, said it could now be taken as settled that when a statute confers power upon a public official to destroy, defeat or prejudice a person's rights, interests or legitimate expectations, the rules of natural justice regulate the exercise of that power unless they are excluded by plain words of necessary intendment. They adopted the statement of Mason J in *Kioa v West*[112] that the law in relation to administrative decisions has now developed to a point where it may be accepted that there is a common law duty to act fairly in the sense of according procedural fairness in the making of administrative decisions which affect rights, interests and legitimate expectations subject only to the clear manifestation of a contrary statutory intention. And the statement of Deane J from *Haoucher* that the law seemed to be moving towards a conceptually more satisfying position in which requirements of procedural fairness would be recognised as applying generally to governmental executive decision-making was also adopted.

In summary, the role of legitimate expectation as it has been developed by the High Court is that of a conceptual tool to aid in the perception of circumstances in which and the way in which general rules of procedural fairness apply to particular case. It is not the only such tool but can be treated as a circumstance among others to be regarded.

CONCLUSION

This short review of the activity of the High Court in the area of administrative law does not pretend to be comprehensive. It has not ad-

108. Id, 672.
109. Id, 669–670.
110. Supra n 101, 618.
111. (1990) 170 CLR 596.
112. Supra n 101, 584.

dressed the Court's limiting interpretation of the classes of decision which are reviewable under the Administrative Decisions (Judicial Review) Act 1977 (Cth)[113] nor the absence of a general obligation on decision-makers to provide reasons for their decisions at common law.[114] The general limitations on judicial review expounded in the judgment of Mason J in *Minister for Aboriginal Affairs v Peko Wallsend Ltd*[115] are also now part of the daily working tools of the public law practitioner, particularly in relation to the review of discretion for failure to take into account relevant considerations. Despite some ebb and flow in the areas which have been reviewed, it is to be hoped that the general trend of the law as enunciated by the High Court is in the direction of simplification and unification rather than further complexity.

113. *Australian Broadcasting Tribunal v Bond* (1991) 170 CLR 321.
114. *Public Service Board of NSW v Osmond* (1986) 159 CLR 656.
115. (1986) 162 CLR 24.