he was sentenced to death, but whose sentence was commuted to life imprisonment, cannot maintain an action in NSW for a civil wrong. In his dissenting judgment in *Dugan*, having surveyed European and American law Justice Murphy had this to say about the evolution of the common law:

> The common law is made by judges in the area left to them by constitutions and legislation; for this reason, it is often more accurately described as judge-made law or decisional law. Australian courts (especially this Court) should, while taking into account the advantages of predictability, evolve the common law so that it will be as rational, humane and just as judges can make it. The present conditions of the common law is the responsibility of the present judges. If this were not so, we would still be deciding cases by following the decisions of medieval judges.

the criminal accused. The longest section of the book contains extracts from a number of judgments in which Justice Murphy expressed concern about procedures applicable in criminal trials. The selected judgments address such issues as the dangers of relying on circumstantial evidence, the problems inherent in the use of disputed confessions and the rights of accused persons to legal representation. Underlying these judgments is the fundamental principle that a person is presumed innocent until convicted by law. This presumption of innocence was crucial to his conclusion in *R v Darby* that a conviction for conspiracy cannot stand if the alleged co-conspirator has been acquitted. He said:

> A criminal trial . . . begins with the presumption that the accused is innocent. The presumption is of course rebuttable, but only by proof of guilt beyond reasonable doubt. If the prosecution fails to adduce such proof and the accused is acquitted, the presumption is said to become irrebutable or conclusive. In truth the presumption is replaced by a judgment of innocence.

Similarly, the presumption of innocence was crucial to his decisions that special leave to appeal against their convictions should be granted to the Chamberlains.

conclusions. There is no doubt that a collection of judgments such as this serves a very useful purpose. The reader is struck particularly by the clarity of Justice Murphy's prose. Further, it clearly demonstrates the range of sources of law tapped by Justice Murphy in his decision making. Although there are problems inherent in the system of classification adopted by the editors, and little in the way of contextual analysis, the book provides a highly accessible means of acquaintance with the legal philosophy of a great Australian judge.

lionel murphy on the powers of the executive

In administrative law decisions, Justice Murphy often took a considerably more restricted view of the role of the courts and their capacity to review both decisions made by the executive branch of government and decisions made in the exercise of a statutory discretion than did his fellow justices. In two important administrative law cases, *Re Toohey: ex parte Northern Land Council* 38 ALR439 and *FAI Insurances Limited v Winneke & Ors* 41 ALR1, Mr Justice Murphy was in a minority of one against the remainder of the full court of the High Court. The former case concerned the making of a regulation by the Administrator of the Northern Territory on the advice of his Executive Council which was designed to thwart an otherwise legitimate claim under the Aboriginal Lands Rights (Northern Territory) Act 1976 (Cth). Land rights claims could only be made under that section for, inter alia, 'unalienated Crown land' which was defined not to include land in a 'town'. Following the making of a claim by the Northern Land Council for rights to certain undeveloped and sparsely populated land about six kilometres from Darwin by sea but remote from it by land, the Commissioner determining the claim decided that the land claimed was land in a town. Two days later a regulation was made by the Administrator prescribing that the same land was subject to the Town Plan-

ning Act 1964 (NT) as if it were part of Darwin. This, on its face, excluded the land from that available to be claimed pursuant to the Aboriginal Land Rights (Northern Territory) Act.

In the High Court The Northern Lands Council challenged the validity of the regulation on the basis that it was made for the ulterior purpose of thwarting the land rights claim and not for any proper purpose connected with the Town Planning Act and the delegated powers under it. On this issue, all of the members of the High Court hearing the case with the exception of Justice Murphy held that it was within the power of the judiciary to enquire into the propriety of the exercise of delegated statutory power. They held that a power conferred by a statute, regardless of whether it be classified as an executive or a legislative power, can only be exercised for the purposes for which it is conferred. Further, it would be anomalous to limit this principle or to limit the power of the courts to enquire whether there had been a proper exercise of the power given, by giving the Crown or its representative a special immunity from review by the courts.

Justice Murphy took a radically different view, holding that

> Under the separation of powers the judicial branch may inquire into and determine whether a challenged law is within the scope of the legislative or delegated legislative power, but not whether the power has been misused.

That is, the good faith or other motive or purpose relevant to the particular exercise of power could not be challenged. In his view, 'this is true of all exercises of legislative power by delegation, unless the legislature makes good faith (or propriety of purpose or due regard for those affected) a condition of validity' (at 487). He envisaged a floodgate situation should review be possible for the manner of exercise of what he referred to as a delegated legislative power, rather than simply whether or not the delegated legislation was within the power conferred. His view was that misuse of legislative power or delegated legislative power could be dealt with by Parliament or by the electorate if Parliament failed to so deal with it, but not by the judicature unless authorised to do so by Parliament. He did not state whether or not this view rested upon the doctrine of ministerial responsibility, although Justice Mason stated (at 481). that the doctrine was generally accepted not to be an adequate safeguard for the citizen whose rights are affected.

Justice Murphy used the term 'delegated *legislative* power' rather than 'statutory power' used by the majority judges, and thus did not address the complex issue of the manner of classification of such a power in accordance with the separation of powers doctrine. Although apparently resting his judgment upon that doctrine and upon the notion of parliamentary accountability to the electorate for the exercise of its legislative powers, he did not address the problems raised by the discretionary or 'executive' character of the exercise of a statutory power for a purpose based upon the opinion of the subordinate law-making body. The judgments of Justices Mason and Stephen and the authorities they analyse show the difficulty, and often futility, of classifying powers. They, like the remaining majority judges, preferred to look at the substance of what the subordinate body could and should do under its enabling statute. These complexities are not referred to by Justice Murphy.

The majority reasoning was epitomised by the judgment of Chief Justice Gibbs who stated that 'The courts have the power and duty to ensure that statutory powers are exercised only in accordance with the law. They can, in my opinion, enquire whether the Crown has exercised a power granted to it by statute for a purpose which the statute does not authorise' (at 458). He, together with the rest of the majority judges, granted mandamus to the appellant on the ground that the regulation was made for a purpose which was not a planning, or a town planning, purpose

and was therefore outside the scope of the statutory power.

FAI Insurances v Winneke is another example of the somewhat restrictive approach which Justice Murphy took to the question of judicial review of executive decisions and of those based on a statutory power. FAI was a worker's compensation insurer in Victoria whose licence renewal was not approved by the Governor in Council acting upon the recommendation of the Minister of Labour and Industry. Even though the decision made by the Governor in Council was formal in character, the actual decision having been made by the government, the entire High Court with the exception of Justice Murphy held that the rules of natural justice applied to the decision making process and to the decision handed down by the Governor in Council. Chief Justice Gibbs regarded it as

> clear that, in circumstances such as the present, the exercise of the power to grant or refuse a renewal of an approval will be subject to the common law rule whose effect is that a company that would be affected by a refusal to grant a renewal should be given an opportunity to be heard before a decision is made, unless that rule is either excluded by the Act on its proper construction, or is rendered inapplicable by the fact that the power is vested in the Governor in Council.

The majority concurred and held that FAI had a legitimate expectation that approval be renewed unless good reason existed for not renewing it. Otherwise, 'non-renewal may seriously upset his plans, cause an economic loss and perhaps cast a slur on his reputation. It may therefore be right to imply a duty to hear before a decision not to renew when there is a legitimate expectation of renewal, even though no such duty is implied in the making of the original decision to grant or refuse a license' (see Mason J at 13).

Since the Act did not indicate that the requirements of natural justice should be excluded from its operation, and since it was conceded that the rules of natural justice had not been complied with if they were applicable, the Chief Justice, together with the rest of the majority judges, granted a declaration that the decision of the Governor in Council was void for failing to comply with those rules. Further, the fact that the decision was made by the Governor in Council provided no ground for excluding the rules of natural justice since the Governor in Council was not above the law and was, in any event, acting upon the advice of his Ministers. On this point, Justice Mason reasoned that the decision to renew approval to act as an insurer or not to do so was one which would unquestionably attract a duty to comply with the rules of natural justice had it been made by a statutory officer, and that the difference, in his view, in the nature and character of the Governor in Council from that of a statutory officer was not sufficient to deny the existence of *some* duty to accord natural justice. Rather, the difference would only justify a variation in the content of the duty and what was expected by way of discharge of it. Thus the Governor in Council may only have been expected to give the applicant an adequate opportunity to present its case, and not conduct a judicial-style hearing. These conclusions were arrived at by his Honour by a process of statutory construction and reasoning from an analysis of the position and role of the Executive Council.

On the other hand, Justice Murphy responded to the suggestion that decisions made in the exercise of a statutory power affecting the rights of individuals might be open to review by the court, not by looking at the legitimate expectations of the applicant or the nature of the statutory power, but by considering the functions of the three different branches of government. He briefly outlined the possible dissensions and conflicts which might occur in the process of decision making by the Cabinet and reached the conclusion that the state of mind of either the Minister making the recommendation to the Governor in Council or of the Governor was not relevant to the validity of 'an act, legislative or executive'. He went on to say, somewhat confusingly, that the standards of good

faith, fair dealing, natural justice and propriety were nonetheless applicable but that 'they are political standards enforceable by the political process' (at 24). He did not expand this notion which does not sit easily with his conclusion that Parliament's authorisation of the Governor in Council to approve the renewal of insurance companies' licences was intended to be an executive matter not subject to judicial review. He based this conclusion on the argument that no Victorian Act authorised judicial review of the Council's decision and stated, without giving reasons, that common law judicial review should not be available in such an area of executive government. He appeared to see a floodgate situation emerging from the availability of review of a Minister's recommendation to the Council. This, he said, had 'startling implications. Are recommendations by the Minister to Cabinet, and Cabinet decisions to recommend to the Council, also subject to declaratory orders? (at 24)

Justice Murphy did not refer to the doctrine which formed the basis of the majority's application of the principles of natural justice to the decision, namely, that of the 'legitimate expectation' of the grantee that approval would continue to be granted.

Justice Murphy has been perceived as a great reforming judge in relation to the rights of the little man in some arenas of the battle between the citizen and the state. However, in these cases he seemed to concede that the state may properly ignore the interests of individuals where it is exercising a statutory discretion. Yet the individual often needs the assistance of the law when dealing with the State's administrators.

insider trading

After such knowledge, what forgiveness?

TS Eliot, *Gerontion*

Imagine it in $1 bills, or better yet, in a pile of silver dollars. I wonder how tall that would be . . . it would be like Jacob's ladder, wouldn't it? A Jacob's ladder of silver dollars. Imagine – wouldn't that be an aphrodisiac experience, climbing to the top of such a ladder?

Ivan Boesky

Throughout 1986, the practice of insider trading was a major item of news in the financial world in the United States of America, the United Kingdom and Australia. Insider trading is the practice of dealing in shares or other securities of a company while in the possession of confidential information which will affect the value of those securities once it becomes known. The person who engages in insider trading thus has a greater opportunity to make a profit or avoid a loss than other participants in the market. Although some free market economists argue that the practice of insider trading incorporates available information into the price of a share more quickly than would otherwise be the case, there is a general consensus that the practice is undesirable, since it undermines public confidence in the equity of the share market and thus weakens the market.

wall street woes. 1986 saw a spectacular continuation of the crackdown on insider trading which has been under way in the United States of America for the past two years. At a news conference in May 1986, the United States Securities and Exchange Commission revealed that in the past two years, 50 individuals have been charged with criminal offences arising from insider trading schemes compared with only 11 charged in the whole of the previous history of the SEC (*Weekend Australian*, 31 May – 1 June 1986).

The year began 'quietly' enough with the SEC laying a charge against Joseph G Cremonese, a former Vice-President of a unit of Allied Corporation for insider trading in connection with Allied's acquisition of Instrumentation Laboratory in May, 1983. (*Australian Financial Review*, 20 January 1986). The SEC sought a permanent injunction from the court barring Cremonese from