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SOUTH AUSTRALIAN ADMINISTRATIVE LAW: A SURVEY OF RECENT DEVELOPMENTS

1. Introduction

Administrative law has not, as it was once put, "come like a thief in the night". For example its significance in the 19th century English legal system, not in potential but in *actual* terms, was recognized in a typically prescient assessment of Maitland in his 1887-1888 Cambridge lectures on constitutional history:

"If you take up a modern volume of the reports of the Queen's Bench Division, you will find that *about half the cases reported have to do with the rules of administrative law* . . . Now these matters you cannot study here; they are not elementary, they are regulated by volumes upon volumes of Statutes. Only do not neglect their existence in your general conception of what English law is. If you do you will frame a false and antiquated notion of our constitution . . . The governmental powers, the subordinate legislative powers of the great officers, the Secretaries of State, the Treasury, the Board of Trade, the Local Government Board, and again of the Justices in Quarter Sessions, the Municipal Corporations, the Guardians of the Poor, School Boards, Boards of Health, and so forth; these have become of the greatest importance and to leave them out of the picture is to make the picture a partial one-sided obsolete sketch."¹

From the point of view of the early development of a coherent and rational body of discrete public law principles apt to deal with the rapid growth of the administrative system, it is regrettable that Maitland's admonition was not heeded. As is well-known, it was Dicey's vigorous denial of the very existence of the subject, reinforced by expressions of judicial scepticism, even distaste, both curial and extra-curial, that had a decisive and retarding effect on the development of English, and by derivation, Australian administrative law, despite a continuing and ever-growing accretion of administrative powers. The period of paranoia in which the very foundations of the common law were perceived as threatened by the detested bureaucracy and its equally detested *succubus*, the *droit administratif*, has long-since gone, and for this we should be grateful. It is far healthier to face the reality of the presence and permanence of an administrative law system and to work for its improvement. Juridically speaking, we do well to accept that for some time, the basic confrontations of the citizen have been, are and will continue to be with the State in the form of some official or "administrative" action. This ought not to disturb us too much, for doubtless we are sufficiently realistic to accept the fact that ours is a modern society and that in common with all modern societies, the State has "seized the initiative, and has put upon itself all kinds of new duties".² In the words of Felix Frankfurter it is vain to feel . . .

" . . . either blind resentment against 'government by commission', or a sterile longing for a golden past that never was. Profound new forces call for new social inventions, or fresh adaptations of old experience."³

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1. Maitland, *The Constitutional History of England* (1908 ed.), 500-501.

2. Wade, *Administrative Law* (2nd ed., 1967), 1.

3. "The Task of Administrative Law", (1927) 75 *Univ. Pa. L. Rev.* 613, 617.

What is called for, therefore, is an awareness that lawyers bear a special responsibility for producing an environment in which State or official power and the rights of the individual can achieve a satisfactory coalescence and balance. In short, lawyers are, or should be, particularly involved with the development, at various points in the system, of institutions, doctrines and methodologies designed to provide a check against these significant accretions of State or official power, while at the same time permitting the chosen administrative instruments adequate scope to serve the public interest.

The present survey of recent developments in administrative law in this State is designed to draw attention to a number of significant developments in "core" areas of the subject which have so far gone unremarked in this journal. It may also serve to reinforce, or in some cases implant, an awareness that in administrative law we confront one of the fastest-growing and more significant areas of our legal system. Finally, the process of identifying and dealing with these recent developments may provide an opportunity to reflect on the adequacy of our administrative law system and may suggest that some fresh initiatives will soon need to be taken. For the proposition that "profound new forces call for new social inventions, or fresh adaptations of old experience"⁴ applies with particular force to the remit of the law reformer in the administrative law field.

2. Review of Administrative Action Outside the Courts

(A) THE OMBUDSMAN

(i) Origins and Growth of the Ombudsman Idea

A great deal has been and continues to be written about this remarkable institution. From its basic Scandinavian,⁵ and more particularly Swedish, origins it has spread throughout the world at an almost exponential rate, transcending ideological differences, and adapting to a wide variety of socio-economic systems.

It is known throughout the Commonwealth and is gaining in popularity in the United States. In Australia, the Federal Parliament has recently enacted legislation to establish the office and the first incumbent has just begun work. All States but Tasmania now have Ombudsmen.

Legislation establishing an Ombudsman in this State was assented to on 23rd November, 1972. One of the most important things about the legislation is that it permits direct access to the Ombudsman by a member of the public rather than requiring the filtration of complaints through a member of Parliament. This makes our Ombudsman truly an Ombudsman, *i.e.*, an independent advocate for the aggrieved citizen, and preserves a close generic link with the original Swedish model. The alternative approach would have been to make the office more obviously ancillary to the existing grievance-resolving role of members of Parliament. It is true that this latter approach, best illustrated by the U.K. legislation's filter system, theoretically better preserves the basic constitutional doctrine of ministerial responsibility; for the Parliamentary Commissioner, as the Ombudsman has now become, is perceived essentially as an adjunct to the existing parliamentary machinery for eliciting information and obtaining remedial action from ministers. The U.K. legislation, however, has not been outstandingly successful. The Parliamentary Commissioner for the Administration has succeeded only in securing for himself a

4. *Ibid.*

5. The office was introduced in Sweden in 1809; Finland in 1919; Denmark in 1954, and Norway in 1962.

rather ambivalent status; when appropriate, largely ignored by members, and when approached directly by members of the public, found to be inappropriate because they should have gone through their member. It is not surprising that these limitations of access, together with other not insignificant jurisdictional constraints, should have largely preserved the traditional avenues of recourse against the administration and have led to a regrettable devaluation of a potentially valuable alternative.

On the other hand in New Zealand there was recognition of the need to ensure a greater degree of administrative responsiveness and accountability than was being provided by existing mechanisms. Thus responsible government, a theory which had, at least partially, been found wanting, was subordinated to the pragmatic demands of the problem. The creation of a "true" Ombudsman, with powers of investigation either upon his own motion, or upon complaint whether from a member of the public or a member of Parliament, was recognized as beneficial and quite capable of being accommodated and sustained within a system to which it was not indigenous. It was this New Zealand model that was substantially adopted in the 1972 South Australian legislation.

(ii) *The South Australian Ombudsman Act*

The basic jurisdiction of the Ombudsman is the power to investigate, either on complaint or on his own initiative, in conditions of strict privacy, and make recommendations⁶ with respect to, the "administrative acts" of government departments, statutory authorities and proclaimed councils. Specifically excluded from the ambit of his investigatory powers are (a) acts, decisions or recommendations of persons discharging "any responsibilities of a judicial nature"⁷ or duties which they may have "in connection with the execution of judicial process",⁸ and (b) acts, decisions and recommendations of persons acting "as counsel or legal adviser to the Crown" in that specific capacity.⁹ The Act further provides that it shall "not apply to or in relation to any member of the police force in his capacity as such a member."¹⁰ It incorporates a restriction that the Ombudsman shall not investigate a complaint where the complainant already has an appeal or some other right to review the merits or legality of the relevant administrative act unless the Ombudsman is of the opinion that "in all the circumstances it is not reasonable that the complainant should resort or should have resorted" to the alternative remedy.¹¹ Moreover the Act provides that the Ombudsman's powers of investigation are not to be ousted by any privative clause.¹² The Ombudsman may refuse to entertain a complaint "if he is of opinion . . . that the complainant . . . has not a sufficient personal interest in the matter raised in the complaint",¹³ that the matter raised in the complaint is trivial,¹⁴ that the complaint is frivolous or vexatious or not made in good faith,¹⁵ or that

6. The grounds upon which recommendations may be based are set out in the Ombudsman Act, 1972-1974, s.25(1), and the "sanctions" for their implementation in ss.25(2)-(6), 26. There is no power of direct enforcement.

7. *Id.*, s.3(1)(a); see further *infra*, text at n.36.

8. *Ibid.*

9. *Id.*, s.3(1)(b).

10. *Id.*, s.5(2).

11. *Id.*, s.13(3).

12. *Id.*, s.13(4).

13. *Id.*, s.17(2)(c).

14. *Id.*, s.17(2)(a).

15. *Id.*, s.17(2)(c).

“having regard to all the circumstances of the case, the investigation or its continuance is unnecessary or unjustifiable”.¹⁶ He is not permitted to entertain complaints which in his opinion are, or in substance relate to, the administrative acts of an employer acting *qua* employer,¹⁷ the purpose of this restriction apparently being to pre-empt an otherwise predictable flood of complaints with respect to matters of government and local government employment. Finally, he is prevented from investigating complaints made out of time (*i.e.*, made later than twelve months from the date when the complainant first had notice), unless he considers that “in all the circumstances of the case, it is proper to do so”.¹⁸ It is now appropriate to say something further about a number of these jurisdictional matters.

(a) *Privacy of Communications*

Although not strictly a jurisdictional matter, the scope and meaning of s.15(4) of the Ombudsman Act initially caused difficulties, particularly in relation to correspondence passing between the Ombudsman and persons in prison. S.15(4) provides:

“Notwithstanding the provision of any enactment prohibiting or restricting, or authorizing the imposition of prohibitions or restrictions on the communications of any person, a person having the care and custody of another person shall not refuse or fail to take all steps necessary to facilitate any communication by that other person necessary for or incidental to the purpose of a complaint under this Act, and to ensure the privacy of that communication.”

Prison Regulation 86 provides *inter alia*:

“. . . each letter written to or by a prisoner shall be perused by the gaoler or officer detailed for the purpose. Any letter either to or from a prisoner may be withheld by the gaoler and referred to the Comptroller, whose decision shall be final.”

The question arose in August 1973¹⁹ whether, in the light of Regulation 86, prison officials retained the power to peruse letters passing between prisoners and the Ombudsman in order to determine whether their contents related to complaints arising out of an administrative act. The Ombudsman considered this power to have been excluded by s.15(4), and the Comptroller agreed that in future “letters from prisoners to the Ombudsman should not be perused by prison officials but be forwarded unopened direct to my prison office.”²⁰

As a matter of construction, s.15(4) presents certain difficulties. First, the section nowhere directly prohibits perusal. All it does is to impose a duty to facilitate the communication of prisoners’ complaints to the Ombudsman.²¹ This duty to facilitate applies only to “communications . . . necessary for or incidental to the purpose of a complaint under this Act . . .”,

16. *Id.*, s.17(2)(d).

17. *Id.*, s.17(1).

18. *Id.*, s.16(1).

19. South Australia, *Report of the Ombudsman, 1973-1974*, 10-11. An Annual Report of the Ombudsman shall hereinafter be cited as O.R.

20. *Id.*, 10.

21. Logically, of course, perusal and facilitation may be quite compatible, and in practice perusal might exist for promoting that very purpose: *e.g.*, a policy that all prisoners’ complaints should go by priority post could be facilitated by a policy of perusal.

which arguably can only be found out by the act of perusal. Certainly there is no explicit requirement that this should be taken on trust. The duty "to ensure the privacy of *that communication*" on this view is a posterior one, arising only when the process of identifying the true nature of the correspondence has been completed. This, of course, is but one legal view of a provision which has a somewhat opaque quality. As a matter of policy it appears quite desirable that prisoners should be able to rely on their letters being written for the eyes of the Ombudsman only.

As to letters from the Ombudsman to prisoners, s.15(4), speaks initially of "the communication of any person", which arguably, if it stood alone, ought be wide enough to cover letters *from* as well as to the Ombudsman. The latter part of the section, however, is clearly confined to "any communication *by* that . . . person." On its face, therefore, s.15(4) does not appear to provide adequate *legal* underpinning for the practice which the Comptroller has willingly adopted, *viz.*, "arrang(ing) administratively for letters in envelopes bearing the name of my office and addressed to a prisoner to be delivered to him unopened".²² Such privacy of communication may well be "in conformity with the spirit of the legislation and investigations thereunder." A more specific source of protection, however, is probably to be found in the Ombudsman's duty to maintain the confidentiality of matters being investigated.²³ It would surely be incidental to the performance of that duty that correspondence passing between the Ombudsman and a complainant should be immune from perusal by, for example, prison officials.

(b) "Administrative Act"²⁴

The concept of an administrative act, of course, lies at the heart of the Ombudsman's power and functions. It is not an expression entirely free from difficulty, particularly when its juridical characteristics have to be identified for the purpose of determining whether it relates "to a matter of administration"²⁵ or was performed in the course of discharging "any responsibilities of a judicial nature."²⁶ Nevertheless, for the most part, the concept has proved an appropriate basis for the expansion and development of the Ombudsman's powers. There are, however, certain acts apart from "judicial" acts which do not attract the denotation "administrative".

(I) Ministerial Acts and Decisions

An administrative act includes "a recommendation made to a Minister of the Crown relating to a matter of administration",²⁷ but presumably inferentially excludes ministerial acts and decisions. This exclusion is not so drastic a curtailment as may at first appear since a high proportion of the acts of Ministers are based on recommendations from one source or another, *e.g.*, departmental officers, advisory committees, etc. By impugning such a recommendation the Ombudsman may be in a position indirectly to impugn the ministerial decision itself.

(II) Cabinet Decisions on Matters of Policy

The Ombudsman has had this to say on the matter: "Ministerial and Cabinet decisions are outside the scope of my jurisdiction and, in my view most properly so . . ." ²⁸ Proper the exclusion may be. However the great

22. O.R., 1973-1974, 10.

23. Ombudsman Act, 1972-1974, s.22; see further s.18(2).

24. *Id.*, s.3(1).

25. *Ibid.*

26. *Id.*, s.3(1)(b).

27. *Id.*, s.3(1).

28. O.R., 1973-1974, Appendix F, 39.

difficulty, as the Ombudsman's own attitude in the particular controversy in which he made these remarks indicates,²⁹ is to distinguish between matters of implementation and administration on the one hand, and matters of policy on the other. As the Ombudsman there remarked:

“. . . my investigation has been directed at the departmental action taken in this case and I remain of the opinion that the Department was at fault in ignoring considerations of hardship to the substantial financial detriment of my complainant”.³⁰

The problem of differentiation at the conceptual level is, no doubt, an acute one which is unlikely to yield in all respects to any one test, however carefully formulated.³¹ Indeed it could be argued that the problem is wholly intractable since on one view all departmental decisions are taken in pursuance of policy so that the suggested dichotomy between policy and administration is inherently false.

Such a view ought to be resisted on three grounds in particular. First it ignores the fact that in the case of a great many departmental decisions and recommendations the policy which underlies them was substantially animated by the department and not by the Cabinet or the responsible minister. In the second place it would so confine the concept of “administrative act” as to render the Ombudsman's jurisdiction virtually nugatory. Indeed in the two most notable instances so far where a department and its officers have, in effect, pleaded government policy as the basis for refusing to yield to the Ombudsman's recommendations,³² no jurisdictional objection was taken to the process of investigation, report and recommendation. Finally, and this seems to be the essence of the Ombudsman's view in the two cases cited above, there are very few formulations of policy so embracing as to include all situations, or so inflexible as to preclude examination of a special case when it arises.

In short, the importance of the distinction is more theoretical than practical. The reality is that if a department (or a statutory authority or a council) is able to secure the support of Cabinet for a position it has adopted there is little that the Ombudsman can do and there the matter must lie. The best that the Ombudsman can do in such cases is to point up any over-rigid, unsympathetic, or even obtuse applications of policy which may further involve the fettering of statutory discretionary powers.³³

(III) Acts Which Are of the Essence of a Body's Functions

Actions taken by an administrative body, otherwise subject to the Ombudsman's powers, that are perceived as paradigms of the sorts of functions it was set up to perform will not be “administrative acts” for the purposes of the

29. A case in which the Ombudsman was of the opinion that a Departmental recommendation to a Minister, *viz.* that on the transfer of a property a water licence for a smaller acreage than had been covered by the previous water licence be issued, had caused the new owner substantial hardship. The Ombudsman recommended that the new owner be issued with a licence covering the same acreage as the previous licence. The recommendation was not implemented and the original decision not to grant an expanded licence upheld by Cabinet as being in accordance with existing policy: *id.*, 35-41.

30. *Id.*, 39.

31. The matter has recently attracted the attention of the Victorian Supreme Court in *Glenister v. Dillon* [1976] V.R. 550, 557-558.

32. The two E. & W.S. Department cases are set out in O.R., 1973-1974, Appendices F. and G.

33. This last point was taken up by the Ombudsman in his conclusion to the second E. & W.S. case, *id.*, Appendix G., 47.

legislation. Thus the question whether the Public Trustee, in exercising a discretion in the performance of his duties as a trustee under the Act, is performing an administrative act produced this response from the Crown Solicitor:

"The ultimate carrying out of the duty of a trustee is one of the very purposes for which the Public Trustee exists. He is not administering any statute . . . in exercising his discretion in relation to a trust . . . He is engaged in the very functions for which he exists."³⁴

On the other hand decisions taken by the Public Service Board with respect to the employment of prospective employees or ex-employees in the public service have not been regarded as outside the Ombudsman's investigatory powers. While it might be argued "that . . . the engagement of employees on behalf of the State is not an administrative act, since it is one of the very functions for which the Board has been set up"³⁵ the argument must be viewed in the context of the Board's other functions. In particular, matters ancillary to employment, and indeed the act of termination of employment itself, are treated in s.17 as potential administrative acts which, but for their being specifically excluded in that section, would come within the Ombudsman's jurisdiction. It would, accordingly, be a very difficult distinction to maintain, even as a matter of logic, in the context of the Board's functions with respect to employment of personnel. Furthermore, to exclude such matters from the Ombudsman's jurisdiction would reduce the effectiveness of his office for the sake of a distinction which in the case of this particular body seems to be of very marginal utility.

(c) "*Acts etc. Performed While Discharging Responsibilities of a Judicial Nature*"³⁶

A first observation is that s.3(1)(a), properly construed, depends upon the *general* nature of the responsibilities being performed rather than the *specific* juridical quality of the particular act or decision complained of. While help may be derived from a consideration of the general nature of the responsibilities of which a body is seised, the more natural, indeed rational, inquiry is to ascertain the nature of a specific decision. The most likely result is that the two questions will tend to fuse. Certainly in the leading example of the operation of this section this seems to have been the case. There the question in form was whether the South-Eastern Drainage Appeal Board was discharging "responsibilities of a judicial nature".³⁷ The specific question, upon which there was arguably greater concentration, was whether a decision on liability to rating³⁸ was a judicial or an administrative decision. The Ombudsman determined that it was, on the basis of the rather stringent requirements of the U.K. Donoughmore Committee's test of "a true judicial decision".³⁹ Without engaging in detailed criticism of the Ombudsman's reasons, there seem to be good grounds for the view that in both the general and specific aspects of the problem the Appeal Board was not discharging "responsibilities of a judicial nature". Rather, as the Ombudsman himself recognises,⁴⁰

34. *Id.*, 12.

35. Crown Solicitor's Opinion, *id.*, Appendix E, 34.

36. Ombudsman Act, 1972-1974, s.3(1)(a).

37. See generally O.R., 1974-1975, 7-8.

38. *I.e.*, whether the land "ha[d] received [any] direct or indirect benefit from the construction of drains or drainage work": South-Eastern Drainage Act, 1931-1974, s.50.

39. United Kingdom, *Committee on Ministers' Powers*, (1932) (Cmd. 4060), 73-74.

40. O.R., 1974-1975, 8.

it was a decision dependent upon the expertise and discretion of the Board, involving primarily matters of fact not of law. On this view criteria 3 and 4 of the *Donoughmore* test⁴¹ were not satisfied and the Ombudsman's jurisdiction was not excluded.⁴² The fact that the Appeal Board on reaching a determination may become *functus officio* and so unable to implement any recommendation the Ombudsman may make does not seem to have very much to do with the question whether that body is performing "responsibilities of a judicial nature". On the other hand it would appear to be rather more relevant to the question whether the Ombudsman should entertain a complaint arising out of a decision of the tribunal of first instance,⁴³ notwithstanding the statutory right of appeal.

This case points up one of the present difficulties of the Ombudsman. To the plurality of meanings already attributed to the word "judicial" has been added its meaning in the context of the Ombudsman's jurisdiction. He is furthermore required to cope with a concept which has always been elusive when applied to actual situations, in this instance without the benefit of any clear guidance from the legislation as to the matters to be taken into account. The best one can say is that the test hitherto chosen by him for identifying a judicial act is one (the South-Eastern Drainage Appeal Board case notwithstanding) which will tend to maximise his jurisdiction and keep the area of exclusion within tolerably confined limits.

(d) "*Any Decision, Act etc. of Any Person Acting as Counsel or Legal Adviser to the Crown*"⁴⁴

This matter has apparently arisen in substantive form on one occasion only.⁴⁵ Given the width of the immunity then claimed by the Crown Solicitor and acquiesced in by the Ombudsman⁴⁶ there seems little prospect of impugning any bureaucratic shortcomings of the Crown's legal advisers. On the other hand a *modus vivendi* has been reached following the Crown Solicitor's wish "to be advised of any matters affecting the Crown Law Department which I consider ought to be brought to his attention. I have made use of this invitation usefully on more than one occasion."⁴⁷

(e) *Acts of the Police*⁴⁸

This is not the place to pursue the debate as to whether the actions of the police in the performance of the "essential" police function should be investigable by the Ombudsman. In South Australia they are not, although bureaucratic shortcomings by the Police Department may be the subject of complaint. Suppose, however, that a person goes to the Ombudsman alleging that there has been some deficiency in the internal complaint-resolving mechanisms of the police department in respect of a complaint concerning an exercise of the police function? There seems to be no reason in principle why the Ombudsman should not investigate this deficiency as an "administra-

41. 3. The submission of argument on any disputed question of law; 4. A decision which disposed of the whole matter by a finding upon disputed facts and "an application of the law of the land to the facts so found, including where required a ruling upon any disputed question of law": *supra*, n.39.

42. Contrary to the view expressed by the Crown Solicitor to the Board: O.R., 1974-1975, 8.

43. *Viz.*, South Eastern Drainage Board. The Ombudsman appears to accept that a decision at first instance is an "administrative act": *ibid.*

44. Ombudsman Act, 1972-1974, s.3(1)(b).

45. O.R., 1973-1974, 9.

46. The complaint arose in relation to what was essentially nothing more than a claim of dilatoriness on the part of the Crown Law Department.

47. O.R., 1973-1974, 9.

48. Ombudsman Act, 1972-1974, s.5(2).

tive act", even though it may incidentally involve him in matters which would otherwise be protected by s.5(2).

(f) *Right of Appeal; Alternative Legal Remedy*⁴⁹

The matters relevant to the Ombudsman's discretion to relax the *prima facie* prohibition have already been touched upon.⁵⁰ A fuller exposition of these matters is given in the Ombudsman's debate with the Valuer-General concerning the viability of the avenues of appeal under the Valuation of Land Act, 1971.⁵¹ Expressed compendiously they include the sufficiency or otherwise of the reasons given for the original or any intermediate decision; the sufficiency or otherwise of any appeal process provided;⁵² the relative expense and general legal *imbroglio* involved in the full exercise of rights of appeal and review. This wholly sound appreciation of the scope and purposes of the discretion makes further comment unnecessary.

(g) *Employer/Employee*⁵³

This provision has previously been examined.⁵⁴

(h) *Complainant Has Not a Sufficient Personal Interest in the Matter Raised in the Complaint*⁵⁵

The definition of the requisite interest (*locus standi*) is laid down in s.15(2). This provides that a complaint shall not be entertained by the Ombudsman unless it is made by a "person . . . directly affected by the administrative act complained of."

(i) *Triviality etc.*⁵⁶

(j) *Time*⁵⁷

(iii) *Conclusion*

A full analysis of the work of the South Australian Ombudsman together with a closer examination of the wealth of statistical data provided in his annual reports over the past three and a half years must await another occasion.

At a more general level the following conclusions seem to be worth recording. First, our Ombudsman appears convinced of the virtue of using his powers persuasively in an atmosphere of mutual trust and respect rather than of confrontation.⁵⁸ There are, for example no cases so far in which the Supreme Court has been invited, pursuant to s.28(1), to fix some parameter or other of his jurisdiction.⁵⁹ Moreover this shows no sign of resulting in an unhealthy symbiosis of Ombudsman and Administrator. Rather it has produced an almost perfect "striking rate" with only two recalcitrants so far refusing to implement his recommendations.⁶⁰

49. *Id.*, s.13(3).

50. *Supra*, text at n.43.

51. O.R., 1973-1974, 12-14.

52. The Ombudsman regards an appeal to the original decision-maker as inadequate: *id.*, 13.

53. Ombudsman Act, 1972-1974, s.17(1).

54. *Supra*, text at n.17.

55. Ombudsman Act, 1972-1974, s.17(2)(e).

56. *Id.*, s.17(2)(a), (b), (d).

57. *Id.*, ss.14, 16.

58. Significantly he cites with obvious approval the definition which describes an Ombudsman as "a formulator of administrative equity by the power of persuasion": O.R., 1975-1976, 11.

59. An interesting contrast can be made here with the Victorian Ombudsman who has either faced or personally initiated a number of Supreme Court actions for that purpose: *Booth v. Dillon (No. 1)* [1976] V.R. 291; *Booth v. Dillon (No. 2)* [1976] V.R. 434; *Glenister v. Dillon* [1976] V.R. 550; *Booth v. Dillon (No. 3)* (judgment of Nelson J. delivered 4/11/76).

60. The E. & W.S. Dept.: O.R., 1973-1974, Appendices F. and G.; O.R., 1974-1975, 5, 11-13. The Port Adelaide City Council: O.R., 1975-1976, 11.

A second significant aspect of his work has been the use of his power to report and recommend "that any law in accordance with which or on the basis of which action was taken should be amended or repealed".⁶¹ Thus he has made important recommendations with respect to the Workmen's Compensation Act,⁶² the Local Government Act⁶³ and most recently the Planning and Development Act,⁶⁴ all of which were either implemented or recognized to have merit.

Third, he has been successful in bringing about variations in unsatisfactory administrative practices and procedures, not, it would appear, so much by invoking the sanction of his power specifically to recommend such changes⁶⁵ as by making a particular administrative body aware of these difficulties in the course of investigating a complaint.⁶⁶

Fourth, and this is presumptive, his work must have enabled him to identify those areas of the administrative system, particularly where discretionary power is involved, most prone to abuse of power or friction in the exercise of power where some reform, whether procedural or substantive, would be beneficial.⁶⁷

Finally there can be little doubt that we have an Ombudsman who has succeeded in maximising the true strengths of the office. That is to say, his powers of investigation and report have more than compensated for his lack of direct revising authority, because they are underpinned by a political independence and objectivity which together provide a persuasive basis for his negotiations and discussions with officials.

3. Judicial Review of Administrative Action

This section incorporates decisions of the Supreme Court during the period 1966-1976 which involved judicial review of a range of administrative acts and decisions, including the making of subordinate legislation. However only those cases which seem to have significance from the point of view of elucidating general administrative law principles have been selected for extended comment. Decisions have been classified not according to descriptive labels of particular sorts of administrative power, for example Local Government; Planning; Licensing; Mining, *etc.*, but according to general conceptual categories of administrative law and in particular the doctrines, grounds and remedies for judicial review. It has been assumed that persons reading this survey are sufficiently familiar with the concepts and doctrines thus employed to make extended introductory material by and large unnecessary.

(A) DOCTRINES OF REVIEW

(i) Ultra Vires: *Subordinate Legislation*

(a) *Procedural Ultra Vires*

Although an area of importance and no little difficulty in the context of subordinate legislation, particularly as regards the mandatory/directory

61. Ombudsman Act, 1972-1974, s.25(2)(d).

62. O.R., 1974-1975, 14.

63. *Id.*, 14-15.

64. O.R., 1975-1976, 13.

65. Ombudsman Act, 1972-1974, s.25(2)(e).

66. See O.R., 1974-1975, 15.

67. For example, a right of appeal under the Interim Development Control Regulations: O.R., 1975-1976, 11-13.

problem, there are relatively few examples of the application of the relevant principles for the period covered in this survey.⁶⁸

(b) *Substantive Ultra Vires*

(1) The task of Delimitation

Expressed most simply, *ultra vires* means in this context no more than that an exercise of subordinate legislative power should have been authorised by the parent statute, whether expressly or by necessary implication. But this, if not a simplistic, is a deceptively simple way of putting the matter because it fails to indicate that the courts are here involved in one of the most difficult and at the same time important areas of administrative law. As the many interesting local cases demonstrate, rarely is the task of delimitation easily disposed of. The basic technique requires sensitive and protean application if it is to cope, for example, with the drafting of both statutes and regulations that may be very far from achieving pellucid clarity of meaning,⁶⁹ or with parent statutes that may have left a very large field of policy to be filled in by regulation without ultimate delimitation, or with the various wide formulae which are employed to maximise the essentially ancillary nature of subordinate legislation.⁷⁰

In relation to the last two points, which are of particular relevance to the question of delimitation, the law appears to be as follows: (a) no matter how generously expressed a power to make regulations may be, regulations may not "go outside the field of operation which the Act marks out for itself."⁷¹ It is therefore of critical significance to ascertain the scope and "character of the statute and the nature of the provisions it contains."⁷² (b) Having done this it will be significant in further defining the scope of the regulation-making power to determine to what extent the parent statute has left the implementation of its general policy to regulation; in short, in what degree of detail has the statute dealt with its own subject of concern? The niceties of determining the appropriate application of these principles are exemplified by the Full Court's decision in *Minister of Education v. Huezenroeder*.⁷³ Regulations made under the Education Act, 1915-1970, purported to empower the Minister to require a sum, not exceeding two months salary, to be paid by any teacher who resigned otherwise than in accordance with the Regulations. The regulation-making power (s.60(1)) permitted regulations "providing for and regulating the . . . resignation . . . of teachers . . ." S.60(2), however, provided that "any regulation may impose a penalty not exceeding ten pounds

68. However as to the publication requirements of the Acts Interpretation Act, 1915-1975 (S.A.), s.38 see *Myer Queenstown Garden Plaza Pty. Ltd. and Anor. v. Corporation of City of Port Adelaide and the Attorney-General (No. 2)* (1975) 11 S.A.S.R. 504, 536-537; see further *id.*, 544-553, 567 (procedural requirements for making of valid regulations pursuant to s.36 of the Planning and Development Act, 1966-1975).

69. See *e.g. R. v. Olsen, ex p. Vahlberg* (1975) 11 S.A.S.R. 156, 157; *City of Marion v. Becker* (1973) 6 S.A.S.R. 13, 29, 42.

70. See *Shanahan v. Scott* (1957) 96 C.L.R. 245, 250; *Morton v. Union Steamship Co. of New Zealand Ltd.* (1951) 83 C.L.R. 402, 410.

71. *Id.*, 410; *Shanahan v. Scott* (1957) 96 C.L.R. 245, 250. This principle was applied by Zelling J. in *Prices Commissioner v. Charles Moore (Aust.) Ltd.: R. v. Credit Tribunal, ex p. Charles Moore (Aust.) Ltd.* (1975) 12 S.A.S.R. 214, 232. In his view the functions of the Credit Tribunal were *subordinately legislative* and could not, therefore, under the rule in *Shanahan v. Scott*, augment the requirements of any statute, in that case the Fair Credit Reports Act, 1974-1975. See also *R. v. Olsen, ex p. Vahlberg* (1975) 11 S.A.S.R. 156.

72. *Morton v. Union Steamship Co. of New Zealand Ltd.* (1957) 96 C.L.R. 402, 410.

73. [1967] S.A.S.R. 357.

for any breach of . . . any . . . regulation." The principal questions raised were first, whether the regulation imposed a penalty inconsistent with the provisions of s.60(2), and second, even if not such a penalty, whether s.60(2) was an exhaustive prescription of the sorts of liabilities, civil or criminal, or at least of penalties in the wider sense, whether enforceable by civil action or criminal prosecution which might be created by regulation. Chamberlain and Mitchell JJ. in separate judgments, but for similar reasons, rejected both these views of the interaction of the Act and the regulation-making power. The present regulations were, in their view, a necessary and convenient way of regulating resignations, and were quite in accord with the specific provisions of the Act, and the full effectuation of its scope and objects. Bray C.J. dissented on the ground either that the forfeiture of salary was a penalty and thus *ex facie* inconsistent with s.60(2), or that s.60(2) by implication excluded any power to create further civil obligations, at least in so far as they had the character of penalties. The latter argument was re-inforced by pointing out that consistently with the view of the majority the rather slight sanction permitted by s.60(2) could, in the case of many other regulations made under s.60(1), be replaced by "civil obligations to an unlimited amount . . ."74

In *Santin and Ors. v. Corporation of Woodville*⁷⁵ Wells J. upheld the validity of regulations prescribing a system of preliminary approvals by the relevant planning body, notwithstanding the absence of any express provision in the Act either allowing for preliminary approvals or conferring power to make regulations to that effect. However, the legislature had left a wide ancillary power in the hands of the Governor. It was held that this power had been exercised in accordance with the scope and purpose of the statute and in conformity with the statute's approach to the subject-matter to which it was addressed. Indeed it was a case where the regulations were necessary if the statute were to work "smoothly and effectively and with less cost to the community".⁷⁶

The principle that a widely-drawn regulation-making power must yield to the detailed provisions of the statute and does not permit the making of regulations which deal with the same subject-matter in a different way is not necessarily applied where the apparent duplicity of approach can be rationally explained or accommodated. Thus in *Coles Foodmarket Pty. Ltd. v. Boucher*⁷⁷ Wells J. was able to find sufficient warrant in the Parliamentary history of the legislation for permitting a more recent and widely-drawn regulation-making power to deal in another way with the same matters which were also regulated by earlier provisions of the statute. Moreover, the above principle is unlikely to be regarded as relevant where its application would stultify or prevent the introduction of mechanisms and procedures by way of subordinate legislation which are characterized by the courts as both desirable in principle and consonant with the legislative scheme as originally formulated.⁷⁸

74. *Id.*, 364 *per* Bray C.J.; *cf.* 369-370 *per* Chamberlain J.

75. (1971) 1 S.A.S.R. 336.

76. *Id.*, 341.

77. (1971) 2 S.A.S.R. 323.

78. See, e.g., *R. v. Credit Tribunal, ex p. Charles Moore (Aust.) Ltd.; Prices Commissioner v. Charles Moore (Aust.) Ltd.* (1975) 12 S.A.S.R. 214, 228-229 *per* Bray C.J.; 241-242 *per* Jacobs J., discussing and sustaining the validity of regulations bestowing on the Credit Tribunal a power of *its own motion* to vary the conditions of an existing authorisation to provide credit, as being "necessary or expedient for the purposes of [the Consumer Credit] Act."

Finally, Benjafield and Whitmore have identified "a particular case of restrictive interpretation . . . where . . . a general formula of delegation is followed (after what the draftsman no doubt hopes is the precautionary phrase 'and in particular, but not so as to limit the generality of the foregoing . . .') by a list of specific topics on which regulations may be made. Here the courts will tend to limit the ambit of the general formula to matters which are ancillary to the enumerated specific powers."⁷⁹ All one can say to this is that there is less evidence of such a restrictive approach in recent South Australian decisions.⁸⁰ Furthermore where a "precautionary phrase" such as "without limiting the generality . . ." is used, there is a recent example of its being taken at face value, so that the anterior general expression is not "cut down by any sort of *eiusdem generis* principle by the subsequent list of specific powers, since that list is expressed to be without limitation of the generality of the words just quoted".⁸¹

So far the task of delimitation has been seen primarily in terms of fixing the parameters of a widely-drawn source of incidental subordinate legislative power by reference to the scope and character of the principal statute. We have in short looked at the relationship between purported source and ultimate source. However, another aspect of the problem is to determine whether the purported *exercise* of subordinate law-making power is consistent with the empowering words of the source from which it is said to derive—a simpler form of statutory interpretation, so it would appear, but not invariably so. For example in *Paull v. Munday*⁸² a regulation made under the Health Act, 1935-1973, sought to prohibit open fires without the written approval of the local board of health. The source of power permitted regulations *inter alia* for ". . . prohibiting the emission of air impurities" from open fires. The Full Court held by a majority (Wells and Jacobs JJ.) that prohibiting open fires themselves was both an effectual and valid means of prohibiting air impurities. Bray C.J. dissented on the ground that all that could be prohibited was the emission of impurities, and not the source of such impurities: "a power to prohibit the emission of X from Y seems to me to contemplate the continued existence of Y. It cannot . . . extend to the prohibition of Y."⁸³ To some this may smack of legal pedantry; to others it may appear to be but the orthodox application of principles of construction to legislative words.⁸⁴ It most certainly demonstrates that one ought to scrutinise every purported exercise of subordinate legislative authority for the required nexus between source and effectuation.⁸⁵

79. *Principles of Australian Administrative Law* (4th ed., 1971), 119.

80. *E.g.*, *Coles Foodmarket Pty. Ltd. v. Boucher* (1971) 2 S.A.S.R. 323, 331.

81. *Prices Commissioner v. Charles Moore (Aust.) Ltd.*; *R. v. Credit Tribunal, ex p. Charles Moore (Aust.) Ltd.* (1975) 12 S.A.S.R. 214, 228 *per* Bray C.J.; see further *City of Marion v. Becker* (1973) 6 S.A.S.R. 13, 42 *per* Bray, C.J.

82. (1975) 11 S.A.S.R. 346.

83. *Id.*, 349.

84. *Id.*, 351 *per* Bray C.J.

85. The High Court by a majority subsequently found the regulation to be beyond power and invalid: *Paull v. Munday* (1976) 9 A.L.R. 245. See further *Kinross Transport Pty. Ltd. v. Hannaford* [1966] S.A.S.R. 100 where it was accepted that a power to prescribe by regulation the means to be adopted in the attainment of some object required a prescription of means, not merely a statement of the ends or objects; held, however, that the regulations were *intra vires*: *Harrison v. The City of Adelaide* (1976) 12 S.A.S.R. 593, where a form of subordinate legislation (a planning directive) was held not to have "defined" uses of land which were approved, restricted or prohibited merely by referring to "the existing use or the approved use": see esp. 598-599 *per* Wells J. (Land and Valuation Court); 603-604 *per* Hogarth and Walters JJ.; 613 *per* Zelling J. (Full Court).

(II) Other Grounds of *Ultra Vires*

The so-called additional grounds of *ultra vires* are, of course, merely further *indicia* used by the court for the purpose of demonstrating that a purported exercise of subordinate law-making power exceeds the lawful bounds laid down by the statute.⁸⁶ They are nevertheless familiar categories, requiring in a survey of this sort no introductory treatment, and will be used simply as a system for deploying or referring to the cases.

(1) Presumptions

In *Tsegos v. Despinoudis*⁸⁷ it was held that the owner of a precious stones claim had an implied or presumed right to provide himself with a place to live on such claim. Accordingly any regulation inconsistent with the exercise and enjoyment of such a right was invalid.

(2) Inconsistency with Parent Statute

Many of the cases earlier dealt with in relation to the task of delimitation are also relevant here. Those cases, however, were generally concerned with a "covering the field"⁸⁸ form of inconsistency and with fairly acute problems of defining the scope and character of both statute and regulations.⁸⁹ At this point we may subsume the "direct clash" examples of inconsistency. *R. v. Olsen, ex parte Vahlberg*⁹⁰ was a case in which the Fisheries Act, 1971-1975, provided for cancellation of a fishing licence or permit by a court following a second or subsequent conviction under the Act. The regulation-making power permitted regulations "prescribing the terms and conditions of . . . permits and certificates and provid[ing] for the . . . cancellation of such permits and certificates . . ." A regulation made under this power *inter alia* gave the Director of Fisheries power to cancel an authority or permit "where the holder thereof has committed or has been convicted of an offence against the Act or these regulations." It was argued that there was neither duplication of approach under the rule in *Morton v. Union Steamship Co. of New Zealand*,⁹¹ nor inconsistency; first, because the regulation was indeed regulation and not the imposition of penalties additional to those prescribed under the Act in that its purpose was to exclude improper persons, and secondly, because the regulations dealt with authorities to use boats, not permits to take fish. The Full Court held that cancellation, at least as regards permits and licences, was a penalty additional to the scheme of penalties provided by the Act itself and so was *ultra vires* according to the rule in *Morton's* case.⁹² It held further that the regulation was clearly inconsistent with the provision of the Act dealing with cancellation of permits and was not confined to authorities, and that even had it been so confined, it might well have been invalid under the first ground.⁹³

86. Indeed, as if to emphasise that they are but elements of this one broad, generic doctrine the High Court has consistently denied the separate existence of such grounds as unreasonableness and uncertainty: see *Williams v. Melbourne Corporation* (1933) 49 C.L.R. 142 (unreasonableness); *King Gee Clothing Co. Pty. Ltd. v. The Commonwealth* (1945) 71 C.L.R. 184, 194 (uncertainty).

87. [1967] S.A.S.R. 104.

88. The constitutional analogy should not, moreover, be pushed too far: *Myer Queenstown v. Port Adelaide (No. 2)* (1975) 11 S.A.S.R. 504, 541-542.

89. See, e.g., *Minister of Education v. Huezenroeder* [1967] S.A.S.R. 357; *Coles Foodmarket v. Boucher* (1971) 2 S.A.S.R. 323; *Prices Commissioner v. Charles Moore (Aust.) Ltd.* (1975) 12 S.A.S.R. 214.

90. (1975) 11 S.A.S.R. 156.

91. (1951) 83 C.L.R. 402, 410.

92. *Supra*, n.91.

93. See further *Macris v. Lucas and Ors.* [1971] S.A.S.R. 329.

(3) Inconsistency with Other Statutes⁹⁴

In *Willing v. Hollobone*⁹⁵ Bray C.J. examined s.682(1) of the Local Government Act, 1934-1975, a provision designed to render the provisions of any statute paramount over the provisions of any inconsistent by-law. He noted, however, that s.682(1) contained "no words restricting the invalidity resulting from the inconsistency to the portion of the by-law actually inconsistent". Thus the question remains whether the whole of a voluminous by-law, some portion only of which is inconsistent with the provisions of a statute, is by virtue of the section rendered inoperative.⁹⁶

In *Myer Queenstown Garden Plaza Pty. Ltd. and Anor. v. Corporation of City of Port Adelaide and A.-G. (No. 2)*⁹⁷ it was held that regulations made under s.36 of the Planning and Development Act, 1966-1975 were not "repugnant to or inconsistent with" the provisions of another statute (the Building Act, 1970-1971) and were not to be impugned on that ground. There is an important and elaborate discussion of the tests of inconsistency and repugnancy to be applied in the context of provisions such as s.36 and presumably in the wider context of inconsistency between regulations and any statute.⁹⁸

(4) Impropriety of purpose

There is ample authority that what *conceptually* involves the exercise of legislative power may be impugned on the ground that the power was animated by improper or extraneous purposes.⁹⁹ What is less clear is the extent to which the proceedings of representative bodies may be scrutinised for this and other purposes,¹⁰⁰ or the extent to which the *bona fides* of a direct participant in the legislative process may be impugned for similar purposes.¹⁰¹ These are novel and complex issues, ably foreshadowed by Wells J.¹⁰² but as yet not finally disposed of.

(5) Unreasonableness

There are no directly relevant cases.¹⁰³

94. The presumption is that all species of subordinate legislation should be construed to harmonise with existing statutory provisions: *Myer Queenstown v. Port Adelaide (No. 2)* (1975) 11 S.A.S.R. 504, 542; on rare occasions, however, the presumption may, it seems, be reversed: *Becker v. Corporation of City of Marion* (1974) 9 S.A.S.R. 543, 549 *per* Hogarth J.; and see now the Privy Council's judgment, (1976) 8 A.L.R. 421, 430.

95. (1974) 11 S.A.S.R. 118 (Full Court).

96. The question was left open because the statute with which the by-law was allegedly inconsistent, the Road Traffic Act, 1961-1975, provided for invalidity only "to the extent of the inconsistency", and as a special rule, prevailed over the general rule contained in s.682(1).

97. (1975) 11 S.A.S.R. 504.

98. *Id.*, 538-544; see further *id.*, 553-564 on the question whether regulations could take immediate effect notwithstanding that an existing proclamation imposing interim development control was still unrevoked.

99. In *Hill v. Port Adelaide Corporation* (1973) 8 S.A.S.R. 196 for example it would presumably have rendered the declaration of a differential rate invalid had there been evidence that the apparent geographical denotation disguised a denotation based on user: 207 *per* Sangster J.; *cf.* 198-199 *per* Bray C.J.

100. *Myer Queenstown v. Port Adelaide (No. 2)* (1975) 11 S.A.S.R. 504, 565.

101. *Id.*, 567, 569.

102. *Ibid.*

103. Reference may, however, be made to the remarks of Bray C.J. in *Minister of Education v. Huezenroeder* [1967] S.A.S.R. 357, 364 which offer little encouragement or scope for an argument on the unreasonableness of regulations (even as an aspect of the generic doctrine of *ultra vires*) which have undergone parliamentary scrutiny: *cf. id.*, 370 *per* Chamberlain J., although the criterion "utterly beyond the bounds of reason" is most stringent.

(6) Uncertainty

In *Hinton Demolitions Pty. Ltd. v. Lower (No. 1)*¹⁰⁴ it was held that the validity of a regulation vesting in the Registrar of Motor Vehicles a power to determine load capacity of vehicles was, having regard to the empowering words, in no sense dependent for its validity upon a precise specification of the factors relevant to the exercise of the Registrar's power.¹⁰⁵ The proposition as expressed is arguably not in accord with the principle that where some form of liability, civil or criminal is dependent upon meeting certain conditions or requirements contained in subordinate legislation it is a condition of validity that those conditions and requirements should be clearly stated, or be capable of relatively certain and precise identification according to the provisions of the subordinate legislation.¹⁰⁶

(III) Failure to Exercise Power

(1) *Sub-delegation*

*Hinton Demolitions Pty. Ltd. v. Lower (No. 2)*¹⁰⁷ is best regarded as an example of a delegate of legislative power being given *express* power by statute to implement that power by vesting wide administrative discretionary power in a sub-delegate. As such it is quite uncontroversial. On the other hand the argument of Bray C.J. that there was in any case no sub-delegation of legislative power because the Registrar was empowered to exercise *administrative* power has disturbing implications in situations where no such express authority can be found. Surely in *Hinton v. Lower (No. 2)* the vice of the regulations, in the absence of express authority to sub-delegate, would have been the abdication of legislative authority by the delegate in favour of the Registrar. On this view it becomes irrelevant to characterize the nature of the power vested in the sub-delegate. There would be as much a sub-delegation in leaving the power to be exercised by means of *ad hoc* administrative discretionary decisions as there would be in a purported transfer of the general rule-making power.¹⁰⁸

(IV) Severance

Problems of severance have been usefully discussed in a number of cases.¹⁰⁹

(ii) *Ultra Vires: Administrative Power*(a) *Procedural Ultra Vires*

(I) The Mandatory/Directory Distinction

The questions whether procedural requirements annexed to the exercise of substantive administrative powers apparently in the language of obligation are to be construed imperatively or not, and occasionally whether words of apparent permission are to be construed permissively or not,¹¹⁰ remain both a significant and relatively intractable part of administrative law. Recent contributions to the subject in South Australia serve only to re-emphasize that

104. [1968] S.A.S.R. 370 (Full Court).

105. See *id.*, 374-375 *per Bray C.J.*, who delivered the judgment of the court.

106. *King Gee Clothing Co. v. The Commonwealth* (1945) 71 C.L.R. 184; *Canns Pty. Ltd. v. The Commonwealth* (1945) 71 C.L.R. 210. See further *Kinross Transport Pty. Ltd. v. Hannaford* [1966] S.A.S.R. 100, 104-105 *per Hogarth J.*; 108 *per Bright J.*

107. (1971) 1 S.A.S.R. 512.

108. This point seems to have been taken by Wells J. in *Harrison v. City of Adelaide* (1976) 12 S.A.S.R. 593, 598 (Land and Valuation Court).

109. *In Re Young* (1971) 1 S.A.S.R. 435; *R. v. Olsen, ex parte Vahlberg* (1974) 11 S.A.S.R. 156, 162-163 *per Bray C.J.*; *Twenty-Seven Properties Ltd. v. The Corporation of Noarlunga and Ors.* (1974) 11 S.A.S.R. 188 (planning conditions).

110. See generally *Ward v. Williams* (1954) 92 C.L.R. 496, 506-507.

this remains an area in which courts are unwilling, save at a level of some generality, to commit themselves to *a priori* rules.¹¹¹ Moreover there may even be a considerable disinclination to attach the same meaning and consequences to like expressions as they have been construed by other courts whether of co-ordinate or superior authority. Thus in *Jolly v. District of Yorketown*¹¹² the Full Court had to consider whether a provision of the Local Government Act was mandatory or directory. The relevant provision required a council *inter alia* to inform a landowner whether any work had previously been contributed to by himself or any predecessor in title; this it had failed to do. The question was whether such failure was fatal to its present attempt to recover the cost of certain work from the appellant. This in turn depended on whether the requirement was mandatory or directory. In the absence of direct authority it could be said to be a nice question. On the one hand the council had a statutory power to recover costs from a landowner; the requirement as to notice could therefore be seen as an important procedural safeguard of that person's rights and therefore as being mandatory. On the other hand it could be said that the council was under a public duty, and that the consequence of construing the provision as mandatory would be to shift the burden of meeting the cost of the work from the appellant to those for whom the duty was exercisable. The provision, on this view, was merely directory. The decision of the High Court in *Mayor etc. of the City of Sandringham v. Rayment*¹¹³ had, however, held a somewhat similar provision to be mandatory. This decision the Full Court attempted to distinguish, albeit rather unconvincingly,¹¹⁴ holding the provision to be directory.

One remaining matter for comment is the proof required to show compliance with certain sorts of mandatory provisions. Will the courts apply a *prima facie* presumption that the statutory requirements have been met, or will they require strict and independent proof of compliance with such requirements? Once again it is probably not possible to formulate a universally valid approach. Equally, two recent South Australian cases suggest that a hierarchical approach will be a relevant factor in predicting whether strict or presumed proof will suffice. Thus if a health inspector is required to obtain the consent of a local board before laying a complaint, strict proof of consent will be required.¹¹⁵ On the other hand the courts will assume the truth until the contrary is proved of a Minister's assertion that he has complied with what were apparently *objective* procedural requirements attached to an exercise of otherwise subjective discretionary power.¹¹⁶

(b) *Substantive Ultra Vires*

The major problem associated with administrative powers derives from the need to control and structure the exercise of extensive and significant discretionary powers.¹¹⁷ The techniques developed for this task by the courts can best be summed up by saying that there is always a statutory perspective

111. See, e.g., the discussion of Wells J. in *Christie's Sands Pty. Ltd. v. City of Tea Tree Gully* (1975) 11 S.A.S.R. 255, 261-264; see further *Myer Queenstown v. Port Adelaide (No. 2)* (1975) 11 S.A.S.R. 504, 525-534 (requirements as to notice for council meeting).

112. [1967] S.A.S.R. 89.

113. (1928) 40 C.L.R. 510.

114. Subsequently the High Court upheld an appeal, holding its previous decision to be indistinguishable in principle: (1969) 119 C.L.R. 347.

115. *Shulz v. Virgin* [1966] S.A.S.R. 94, 97-100.

116. *Ralphs v. Luongo* (1971) S.A.S.R. 325.

117. See, e.g., *Shire of Swan Hill v. Bradbury* (1937) 56 C.L.R. 746, 757-758 *per* Dixon J.

within which all powers, even the widest and most subjective, must be placed, and which accordingly governs their lawful exercise. A number of discrete aspects of this basic rule may now be examined.

(I) Do the Words Impose a Duty or Confer a Discretion?

The principles relevant to this well-known problem were discussed at length by Wells J. in *Pacminex (Operations) Pty. Ltd. v. Australian (Nephrite) Jade Mines Pty. Ltd.*¹¹⁸ It was held that once a mining warden was satisfied, as a matter of subjective discretionary evaluation, as to the matters which would provide the basis for forfeiture of a claim pursuant to s.69(1) of the Mining Act, 1971-1975, he was under a duty to exercise that power, even though it was given in *prima facie* permissive language. It was a jurisdiction existing primarily "to provide the means whereby private interests may fairly and properly be advanced if the conditions upon which mineral claims were initially granted have not been duly observed".¹¹⁹

(II) Discretionary Power — General Principles

In *Michell v. Minister of Works*¹²⁰ the Full Court considered the grounds relevant to the exercise of the discretionary power of the Minister to grant or refuse permits to drill or to construct wells pursuant to the Underground Waters Preservation Act, 1969-1975. The judgment of Bray C.J. makes the following important points. First, discretionary power vested in a Minister of the Crown is neither unfettered nor immune from judicial scrutiny and control;¹²¹ second, following an appeal to the Underground Waters Appeal Board resulting in a quashing of his original decision, the Minister, although empowered to make a fresh determination, was estopped from relying on any ground which the Appeal Board had found against him. If he did so, he would not be exercising his discretion according to law and *mandamus* would lie. Zelling J. was inclined to confine *Padfield's* case¹²² as far as possible to its own statutory context and origins. He clearly regarded the principles there enunciated as difficult to reconcile with his view of the *persona designata* principle,¹²³ and in any case expressed a preference for Lord Morris's dissenting speech in that case.

In *Storey v. Director of Planning*¹²⁴ Wells J. had to consider in particular¹²⁵ the discretion of the Director of Planning to withhold approval of a plan of re-subdivision if "in the opinion of the Director the development of the land depicted thereon would not form a compact continuous and economic extension of a township or a developed urban area".¹²⁶ The principles underlying *Padfield's* case¹²⁷ are discussed fully and with approval.¹²⁸ Nevertheless, although presumably capable of an *a fortiori* application in a case where

118. (1974) 7 S.A.S.R. 401, 409ff.

119. *Id.*, 411.

120. (1974) 8 S.A.S.R. 7; see further *Storey v. Director of Planning* (1975) 11 S.A.S.R. 227, *infra*, text at n.124; *Pacminex (Operations) Pty. Ltd. v. Australian (Nephrite) Jade Mines Pty. Ltd.*, *supra* n.119, 409; *Twenty-Seven Properties Ltd. v. Corporation of Noarlunga and Ors.* (1975) 11 S.A.S.R. 188, *infra*, text at n.132.

121. *Id.*, 15, 17, citing in particular *Padfield v. Minister of Agriculture, Fisheries and Food* [1968] A.C. 997.

122. *Supra* n.121.

123. *Infra*, text at n.227.

124. (1975) 11 S.A.S.R. 227 (Land and Valuation Court).

125. There is an elaborate and presumably indispensable general discussion of the principles relevant to the operation of the Planning and Development Act and of the matters which ought to guide the Planning Appeal Board in the disposition of its work: *id.*, 232-247.

126. Planning and Development Act, 1966-1975, s.51(1)(ea).

127. *Supra*, n.121.

128. (1975) 11 S.A.S.R. 227, 247ff.

challenge is by way of appeal as contrasted with review by way of prerogative writ, e.g., *mandamus*, Wells J. was not prepared "having regard to the state of the record" to commit himself to a definitive opinion as to the validity, whether in point of law or fact, of the Director's opinion.¹²⁹

(III) Further Applications of *Ultra Vires* in Relation to Administrative Powers

(1) Inconsistency with Statute

In *Lehmann v. Forsyth*¹³⁰ the Full Court held that the Licensing Court was not empowered in the exercise of its discretionary powers under the Licensing Act, 1967-1975, to impose a condition fixing the minimum price at which beer could be sold under a distiller's storekeeper's licence. These licences were specifically exempt from the operation of orders fixing the minimum retail price of any liquor, made by the Minister under the Prices Act, 1948-1975. In short, "where Parliament ha[d] declared immunity the Court ha[d] imposed liability".¹³¹

(2) Application of Extraneous or Irrelevant Criteria

An exercise of discretionary power ought not to be animated by considerations which are in point of law extraneous to it. In *Twenty-Seven Properties Ltd. v. Corporation of Noarlunga and Ors.*¹³² the Planning Appeal Board had allowed an appeal against a council's refusal of consent to a development proposal, but had imposed a condition that the shops should not open until certain work had been done to the highway, at the applicant's expense, which would minimize traffic hazards. This was a purported exercise of a discretionary power in s.26(2) of the Planning and Development Act, 1966-1975, to give "such directions as [it] thinks fit". It was held by Wells J. that this was not an unfettered discretion, and was subject to the controlling context of the Act. The condition here imposed could not be related to any matter relevant or reasonably capable of being regarded as relevant to the grant or refusal of planning consent to the proposed development.¹³³

(IV) Failure to Exercise Power

(1) Sub-delegation

In *Hinton Demolitions Pty. Ltd. v. Lower (No. 1)*¹³⁴ a valid regulation empowered the Registrar of Motor Vehicles to determine load capacity. The presumption of regularity could not be used in view of the undisputed fact that the relevant determination had been made by a clerk. This, it was further argued, was an invalid subdelegation. The strongest argument in favour of sub-delegation was administrative necessity. Bray C.J. approached the case in the following way. First, there is no necessary presumption against sub-delegation: it is the words of the statute that will be ultimately decisive. So in the present case the statute disclosed some powers which might be exercised through the departmental infrastructure without the Registrar's

129. *Id.*, 251.

130. (1974) 9 S.A.S.R. 359.

131. *Id.*, 362 *per* Bray C.J.

132. (1975) 11 S.A.S.R. 188; see further *Corporation of City of Tea Tree Gully v. Wilkey* [1970] S.A.S.R. 129: held, budgeting for a surplus is not *prima facie* improper or violative of the spirit of local government rating, provided it is *bona fide*: *id.*, 133, 135 *per* Bright J.

133. (1975) 11 S.A.S.R. 188, esp. the discussion of authorities, 194-196, 197-200. In the result it was held that the offensive condition could be severed as a matter of law and further because there was no basis *in fact* for the view that the proposed development would create a traffic hazard.

134. [1968] S.A.S.R. 370; see also *O'Hair v. Killian* (1971) 1 S.A.S.R. 2, (specific power of subdelegation; as to the meaning of "delegation" see *id.*, 21 *per* Sangster J.); *City of Marion v. Becker* (1973) 6 S.A.S.R. 13, 18-19 *per* Wells J.

personal advertence and others which assumed some specific state of mind on his part, like the determination of load capacity. The latter class might not be capable of sub-delegation. Second, the principle in *Carltona Ltd. v. Commissioner of Works*¹³⁵ is applicable only to Ministers, who are ultimately responsible to Parliament for the conduct of their departments. It has no application to non-political permanent heads of departments. On the other hand the "administrative inconvenience" argument would certainly permit sub-delegation of the Registrar's purely ministerial functions, *i.e.*, those not involving personal advertence. Finally, it was noted that the present statute contemplated sub-delegation of some powers, including fixing load-capacity, to a deputy registrar. This at once overcame the administrative inconvenience argument while at the same time indicating the permissible limits of sub-delegation in relation to those powers "requiring some mental state to be achieved or some intellectual decision made."¹³⁶ No concluded view was expressed on the sub-delegation of such powers in the absence of the limited, express power, but the tendency of the judgment is against its validity.

(2) Fettering Discretion by Application of *a priori* Policy Determinants

This well-known ground of invalidity has attracted some relatively important applications during the relevant period. So in *In Re John Martin & Co. Ltd.*¹³⁷ it was held that it was legitimate to apply a consistent approach to a number of contemporaneous and cognate applications for revolving credit authorizations by large retail stores provided it was not so rigidly applied as to preclude consideration of individual cases and identification of differences where they existed.¹³⁸

(iii) *Jurisdictional Error*

While the connotations of the terms "jurisdiction" and *ultra vires* may not differ significantly, the former is employed here to denote the "basic device developed by the courts to control the activities of bodies which are held to be exercising judicial or quasi-judicial power".¹³⁹ The concept of "jurisdiction" is in essence the means or technique whereby one delimits the legal scope of the decision-making powers vested in such bodies. Of course every such body must make the initial decision whether it does or does not have jurisdiction (power to decide).¹⁴⁰ Equally, however, there are certain matters which define in an objective sense the limits of power. These jurisdictional matters (sometimes called preliminary or collateral matters) which may consist of matters of fact or of law¹⁴¹ are, with rare exceptions, never conclusively determinable by the body itself¹⁴² and errors with respect to such

135. [1943] 2 All E.R. 560.

136. [1968] S.A.S.R., 378.

137. (1974) 8 S.A.S.R. 237. See also *Arkaba Hotels Pty. Ltd. v. Superintendent of Licensed Premises* [1968] S.A.S.R. 122; *Perre Bros. v. Citrus Organization Committee* (1975) 10 S.A.S.R. 555, 560, 567-568; *Myer Queenstown v. Port Adelaide* (No. 2) (1975) 11 S.A.S.R. 505, 520-521.

138. (1974) 8 S.A.S.R., 237, 243 *per* Bray C.J.; 260-261 *per* Sangster J.; 267 *per* Jacobs J.

139. *Benjafield and Whitmore, op. cit.*, 176. That there is a close conceptual correlation between the two doctrines is well-accepted, and needs no further elaboration here: *id.*, 180-181.

140. See, *e.g.*, *Harrison v. City of Adelaide* (1976) 12 S.A.S.R. 593, 599-600 *per* Wells J.; *R. v. Bleby and Ors., ex p. S.A. Public Service Board* (1974) 9 S.A.S.R. 320, 325 *per* Bray C.J.

141. See *R. v. Bleby and Ors., ex p. Royal Australian Nursing Federation* (1973) 4 S.A.S.R. 445, 457 *per* Mitchell J.

142. But see *id.*, 462-463 *per* Wells J.

matters may be impugned in both direct, and it is thought, collateral proceedings, for such errors produce nullity in a purported decision.¹⁴³

(a) *The Concept of Jurisdiction*

There are many cases during the relevant period which show the application of the distinction between jurisdictional and non-jurisdictional matters. Most of these may be footnoted.¹⁴⁴ Others, however, are eloquent testimony to some words of Bray C.J.:

"I am at a loss to discover the criterion by which one selects one element out of a legislative prescription to a court contained in one sentence comprising many elements and declares that that element is jurisdictional . . . while the other elements are not . . ." ¹⁴⁵

In *R. v. Bleby and Ors; ex parte Royal Australian Nursing Federation*,¹⁴⁶ *certiorari* was sought before the Full Court to quash a determination of the Industrial Commission. S.156(1)(a) of the Industrial Code, 1967-1972, (now amended by the Industrial Conciliation and Arbitration Act, 1972-1975) required the Full Commission to cancel the registration of an association "if it appears [to it] that an association has been registered under this part of this Act erroneously or by mistake". It was the fact that the applicant for *certiorari* was not registered under the Industrial Code, but was registered under earlier legislation. The Full Commission had nevertheless purported to cancel the association's registration. The short point was whether the status of being registered under the Industrial Code was a matter preliminary or collateral to the exercise of the power of cancellation, or a matter to be decided in the course of the inquiry. It was held by a majority¹⁴⁷ that though the section may have committed certain matters¹⁴⁸ to be decided by the commission within jurisdiction, the requirement as to registration was an essential precondition to the valid assumption of jurisdiction—an objective criterion of validity. The Commission's error was, therefore, not protected by the privative clause in s.53(1).¹⁴⁹ On the contrary it fell squarely within s.53(2) which preserves the power of the Supreme Court to correct errors demonstrating "excess or want of jurisdiction". The difficulties inherent in the manipulation of the relevant concepts is exemplified by the cogent dissenting

143. See generally de Smith, *Judicial Review of Administrative Action* (3rd ed., 1973), 65, 92-94. The latter form of attack is far from being uncontroversial: see *Hinton Demolitions Pty. Ltd. v. Lower* (No. 2) (1971) 1 S.A.S.R. 512, 520, 521 *per* Bray C.J.; *per* Wells J. *passim*, esp. 549, proposition 2. See further *R. v. Chislett, ex p. P.S.A. of S.A. Inc.* (1973) 4 S.A.S.R. 427, discussed *infra*, text at n.284.

144. *E.g.*, *R. v. Smith, ex p. James* [1966] S.A.S.R. 47, 51ff. (Full Court: *certiorari* against magistrate); *R. v. Smith, ex p. James* [1966] S.A.S.R. 47, 51-52; *R. v. Johns, ex p. P.S.A. of S.A. Inc.* [1971] S.A.S.R. 206, esp. 207 *per* Bray C.J., 217-218 *per* Chamberlain J. (Full Court: *certiorari* granted against Industrial Commissioner); *R. v. Olsson, ex p. Amalgamated Wireless (Australia) Ltd.* (1971) 1 S.A.S.R. 453 (Full Court: prohibition directed to the Deputy President of the Industrial Court prohibiting further proceedings involving the "unjust dismissal" provision of the Industrial Code on the ground that it was available only in the context of an "industrial matter" as defined by that legislation); *R. v. Bleby and Ors., ex p. S.A. Public Service Board (No. 2) (Public Servants' Case)* (1974) 9 S.A.S.R. 330 (Full Court: prohibition sought against both Industrial Commission and Industrial Court, but refused); *Adelaide Assemblers Ltd. v. Kutos and Anor.* (1974) 9 S.A.S.R. 102 (Full Court: case stated by Full Industrial Court).

145. *R. v. Olsson, ex p. E. Smith & Co. Pty. Ltd.* (1973) 5 S.A.S.R. 248, 252.

146. (1973) 4 S.A.S.R. 445.

147. See esp. *id.*, 455-459 *per* Mitchell J.; 462-463 *per* Wells J.; and the dissent of Bray C.J.

148. Matters which might otherwise have been characterised as preliminary or collateral: *id.*, 462-463 *per* Wells J.

149. *Infra*, n.283.

analysis of Bray C.J. who regarded the question of registration as one of a number of matters to be determined by the Commission in the course of exercising its power of cancellation.¹⁵⁰

In *R. v. Bleby and Ors; ex parte S.A. Public Service Board (No. 1) (Teachers' Case)*¹⁵¹ prohibition had been sought against both the Industrial Commission¹⁵² and the Full Industrial Court. The latter application sought to restrain further action on an advisory opinion as to the jurisdiction of the Commission which resulted from a reference to it by the Commission pursuant to s.102 of the Industrial Conciliation and Arbitration Act, 1972-1975. S.92(3) of the Act provides:

"no order or decision . . . of the Full [Industrial] Court shall be challenged, appealed against, reviewed, quashed or called in question save on the grounds of excess or want of jurisdiction. . . ."

The argument was that the Industrial Court had done no more than exercise a jurisdiction vested in it under s.102. In so far as any jurisdictional question was concerned it related to an excess or want of jurisdiction on the part of the Commission not the Industrial Court itself. The determination of the Industrial Court was accordingly protected by s.92(3). The argument was rejected by Bray C.J.:

"Next, I do not think that s.92(3) should be construed in the narrow way contended for. It would be a very odd result, surely, if the Court could interfere when the Full Industrial Court exceeded its jurisdiction as part of the internal mechanics of the Industrial Court system by entertaining a proceeding validly instituted under the Act before the Commission, but not properly brought before the Full Industrial Court, but could not interfere if the whole proceeding was from the beginning outside the jurisdiction of any industrial tribunal. It would be more rational to think that Parliament intended to preserve the power of this Court in respect of industrial law, rather than that it intended to confine the power to what I may term domestic errors. I think that the words "on the ground of excess or want of jurisdiction" in s.92(3) should be construed as extending to any case where excess or want of jurisdiction on the part of any industrial court, commission, committee or other tribunal is in question before the Full Industrial Court and not as confined to cases where the excess or want of jurisdiction alleged relates to the power of the Full Industrial Court within the framework of the Industrial Conciliation and Arbitration Act.

Finally, it would be anomalous and confusing if the decision or opinion of the Full Industrial Court on any question of the jurisdiction of the Industrial Commission were to be final and conclusive if it were given in the course of a reference under s.102, but not a decision

150. (1973) 4 S.A.S.R. 445, esp. 449-451; and *cf. R. v. Olsson, ex p. E. Smith & Co. Pty. Ltd.* (1973) 5 S.A.S.R. 248 in which a differently constituted Full Court, consisting this time of Bray C.J., Hogarth and Zelling JJ., held that the question whether money claimed was due pursuant to an "award" was a matter to be determined by the Industrial Court within jurisdiction. Prohibition was accordingly refused. There are some interesting reflections on the jurisdictional/non-jurisdictional distinction, part of which is quoted earlier; *supra* n.145; *id.*, 252-253.

151. (1974) 9 S.A.S.R. 320.

152. *Infra*, text at n.287.

or opinion on the Industrial Commission or the Industrial Court given in some other form. It might lead to irresolvable conflicts of authority and to undesirable tactical manoeuvring."¹⁵³

Finally, the decision of the Full Court in *R. v. Stanley, ex parte Redapple Restaurants Pty. Ltd.*¹⁵⁴ makes the following points on the jurisdictional question. First, "excess or want of jurisdiction" on the part of the Full Industrial Court may arise in relation to its erroneous determination of *any* matter going to jurisdiction, whether its own or that of another body whose decisions are subject to review on appeal or reference under the internal machinery of the legislation.¹⁵⁵ Secondly, a provision giving jurisdiction but requiring its *exercise* to conform to certain conditions, for example as here a requirement as to the time for instituting an appeal, ought not to be construed as jurisdictional if its exercise does not so conform. "If a court does purport to exercise it, it has made an error of law within its jurisdiction, but has not exceeded it"¹⁵⁶ The contrary argument was thus lampooned: ". . . Parliament has said that the court is not to have jurisdiction to exercise its jurisdiction. That . . . sounds perilously like nonsense."¹⁵⁷

(b) Subjective Discretionary Language

Clearly an expansion of the jurisdictional/non-jurisdictional dichotomy is required if such powers are to be adequately controlled. It has been noted that "there are many cases in which it has been assumed that decisions which are based on irrelevant considerations, or which seek to achieve an improper purpose are decisions involving jurisdictional error."¹⁵⁸ The same principle has been frequently recognized in recent South Australian decisions.¹⁵⁹ In *R. v. Credit Tribunal, ex parte Charles Moore (Aust.) Ltd. and Ors.*¹⁶⁰ prohibition was sought following the Tribunal's imposition of certain conditions on an authorisation to operate revolving credit arrangements. The validity of these conditions was based on s.6(6) of the Consumer Credit Act, 1972-1973, which empowered the Tribunal "to grant such authorisations upon such [other] conditions as [it] thinks fit". While there was a measure of disagreement as to whether the conditions had been validly imposed, deriving largely from disagreement on whether the stores were reporting agencies for the purposes of the Fair Credit Reports Act, 1974-1975, there was no dissent from the proposition that even such a wide discretionary and subjective jurisdiction is

153. (1974) 9 S.A.S.R. 320, 324-325.

154. (1976) 13 S.A.S.R. 290.

155. *Id.*, 293-294; see further the *Teachers'* case, *supra* n.151.

156. (1976) 13 S.A.S.R. 290, 295 *per* Bray C.J. This provides an example of the sort of situation in which the ground of patent non-jurisdictional error of law may still be viable despite the decision in *Anisminic v. Foreign Compensation Commission* [1969] 2 A.C. 147. The point is discussed by de Smith, *op. cit.*, 99, 105-106.

157. (1976) 13 S.A.S.R. 290, 295.

158. Benjafield and Whitmore, *op. cit.*, 180-181.

159. See *e.g.*, *Carjay Pty. Ltd. and Ors. v. Target Cellars Pty. Ltd. and Anor.* (1972) 3 S.A.S.R. 484, 490 *per* Bray C.J. on the meaning of "judicial discretion" (Full Court: appeal from Licensing Court); *Hamood v. Forsyth and Tower Hotel Pty. Ltd.* (1972) 3 S.A.S.R. 496, esp. 500-501 *per* Bray C.J. (Full Court: appeal from Licensing Court); *Pacminex (Operations) Pty. Ltd. v. Australian (Nephrite) Jade Mines Pty. Ltd.* (1974) 7 S.A.S.R. 401 (Wells J.: appeal from a mining warden; discussion of the reviewability of jurisdiction conferred in subjective discretionary language: *id.*, 412ff.); *R. v. Olsson, ex p. E. Smith & Co. Pty. Ltd.* (1973) 5 S.A.S.R. 248, 253 *per* Bray C.J.; *In re John Martin & Co. Ltd.* (1974) 8 S.A.S.R. 237 (Full Court: jurisdiction vested in Credit Tribunal in subjective language; discussion of legal limits of such a power: *id.*, 242-243, *per* Bray C.J.; 260 *per* Sangster J.)

160. (1975) 12 S.A.S.R. 214.

limited, and "must not be exercised arbitrarily or for objects extraneous to the purpose of the legislation".¹⁶¹

(c) *Jurisdictional Error and Violation of the Rules of Natural Justice*

It seems from the decision in *R. v. Corporation of Town of Glenelg, ex parte Pier House Pty. Ltd.*¹⁶² that violation of any of the principles of natural justice would have been fully equated with want of jurisdiction had it not been for the decision of the Privy Council in *Durayappah v. Fernando*.¹⁶³ That decision was distinguished by holding that some breaches of natural justice, e.g., the hearing rule, produced decisions that are voidable only, with consequent limitations in terms of the available remedies¹⁶⁴ and without the potential for collateral attack.¹⁶⁵ Other breaches of natural justice were more fundamental and were to be equated with want of jurisdiction; they were void, i.e., nullities, and might be impugned by persons other than parties to the original decision whether in direct (as in the instant case) or collateral proceedings. A decision reached on frivolous or futile grounds would be such a decision. Since the council's decision in the instant case was so reached *certiorari* was granted. It was an ingenious but perhaps unnecessarily elaborate way out of the dilemma posed by *Durayappah's* case, for such errors may properly be regarded as jurisdictional in nature.¹⁶⁶ The hard fact remains that had there merely been violation of the core procedural due process concept of our administrative law, the hearing rule, the applicant would have had no *locus standi* to seek *certiorari*, and the decision would have remained valid until challenged in appropriate proceedings by a person with the appropriate interest.¹⁶⁷ At the same time it ought to be noted that for the purpose of privative clauses, denial of any of the rules of natural justice may still be regarded as "an excess or want of jurisdiction."¹⁶⁸

(d) "Excess or Want of Jurisdiction"

While there are difficulties and deficiencies in the language used to describe the phenomenon of jurisdictional defect¹⁶⁹ they are not generally of any great significance. Occasionally, however, it is more than a matter of the adequacy of existing terminology. In *R. v. Industrial Commission, ex parte Minda Home Inc.*¹⁷⁰ it was argued that declining jurisdiction could not be described as "excess or want of jurisdiction" for the purposes of s.95(b) of the Industrial Conciliation and Arbitration Act, 1972-1975. Accordingly, it was said, the privative clause operated to prevent the granting of *mandamus* and *certiorari* against the Industrial Commission where that body had erroneously declined jurisdiction. The argument was emphatically rejected:

"It would mean that if the Commission had wrongly decided that there was a valid appeal before it we could interfere, but not . . . if it had wrongly decided that there was no valid appeal before it."¹⁷¹

161. *Id.*, 229 *per* Bray C.J.; 239-240 *per* Jacobs J.

162. [1968] S.A.S.R. 246, 253 *per* Bray C.J.

163. [1967] 2 A.C. 337; see further *infra*, text at n.191.

164. *Infra*, text at n.212.

165. *Infra*, text at n.199.

166. de Smith, *op. cit.*, 99, 101, 117-118; Benjafield and Whitmore, *op. cit.*, 180.

167. See *Hinton Demolitions Pty. Ltd. v. Lower (No. 2)* (1971) 1 S.A.S.R. 512; *infra* text at nn.199, 212.

168. *R. v. Johns, ex p. P.S.A. of S.A. Inc.* [1971] S.A.S.R. 206, 210 *per* Bray C.J.

169. See *R. v. Chislett, ex p. P.S.A. of S.A. Inc.* (1973) 4 S.A.S.R. 427, 438 *per* Bray C.J.; *R. v. Johns, ex p. P.S.A. of S.A. Inc.* [1971] S.A.S.R. 206, 218 *per* Chamberlain J. See further Sykes and Maher, "Excess of Jurisdiction — A Problem in Administrative Law", (1970) 7 *M.U.L.R.* 385, 388.

170. (1975) 11 S.A.S.R. 333.

171. *Id.*, 337 *per* Bray C.J.

That is to say, just as a tribunal constructively exceeds its jurisdiction where it refuses to act because it has taken into account extraneous matters, so a court should grant *mandamus* where a tribunal has declined jurisdiction because it has failed to take into account matters which it should have taken into account. In short the words "save on the ground of excess or want of jurisdiction" should be taken as including "all jurisdictional matters which at common law would have induced the Court of Queen's Bench to interfere by the machinery of the prerogative writs".¹⁷²

(iv) *Natural Justice*

Procedural due process in our administrative system currently depends to a high degree on the operation of the rules of natural justice: the two major constituents are the right to a hearing (*audi alteram partem*) and the rule against bias (*nemo debet iudex, etc.*). Examples of the latter in relation to administrative bodies have been somewhat rare during the relevant period.¹⁷³

(a) *The Right to a Hearing*

Whether an administrative body will be placed under a duty to hear no longer depends in any significant degree upon classification of its powers and functions as judicial or quasi-judicial, but rather on some perception by a court that the relevant source of authority implicitly requires those powers and functions to be carried out fairly.¹⁷⁴ It is a truism that the specific requirements of the sort of hearing required will shift and fluctuate from administrative body to administrative body. There are, however, some cases worth noting which have dealt with the specific content of the hearing rule.

(i) *Prior Notice*

Notwithstanding reminders that on occasion flagrant violation of this requirement may occur,¹⁷⁵ such cases are fortunately comparatively rare.

(ii) *Conduct of the Hearing*

(1) *Application of the Rules of Evidence*

It is frequently the case that an administrative tribunal is expressly exempted from compliance with the strict rules of evidence. What is the position where there is neither express exemption from, nor express imposition of, such rules? Here all will depend upon the view the court takes of the functions of the particular tribunal and whether and to what extent imposition of those rules is consonant with the task entrusted to that body. So where the Licensing Court had, over objection, admitted "double perhaps even treble hearsay evidence", it was held by the Full Court to have violated the principles which should guide it in properly informing itself in the exercise of its statutory powers.¹⁷⁶

(2) *Duty of Disclosure*

"Statutory tribunals are set up because they already have or can be expected to acquire specialised expertise".¹⁷⁷ Furthermore, special tribunals may be specifically exempted from compliance with the strict rules of evidence, which obviously opens up a potentially wide range of sources for informing

172. *Id.*, 344: *accord*, Wells J.

173. See e.g., *Fagan v. National Coursing Asscn. of S.A. Inc.* (1975) 11 S.A.S.R. 451.

174. *Perre Bros. v. Citrus Organization Committee* (1975) 10 S.A.S.R. 555, 561-562 *per* Wells J.

175. E.g., *R. v. S.A. Trotting Control Board, ex p. Roufos* (1974) 10 S.A.S.R. 223 (Full Court: *certiorari*); *Gardiner and Ors. v. Land Agents Board* (1976) 12 S.A.S.R. 458, esp. 470-471 *per* Walters J.

176. *Hoban's Glynde Pty. Ltd. and Ors. v. Firle Hotel Pty. Ltd. and Anor.* (1973) 4 S.A.S.R. 503, esp. 506-510 *per* Bray C.J.; Zelling J., *passim*.

177. *de Smith, op. cit.*, 181.

themselves as to material facts, including, of course, reliance on their accumulated knowledge and expertise. Such bodies are nevertheless obliged to act in accordance with natural justice, which means in this context a duty to disclose all material which may be relevant to their decision "if it is gleaned from an outside source, or in the course of their own investigations, or from evidence given in earlier cases."¹⁷⁸ Some discussion and application of these principles may be found in *In Re John Martin & Co. Ltd.*¹⁷⁹ which was an appeal from the Credit Tribunal on the ground *inter alia* that in reaching a decision to grant a revolving credit authorization, subject to a requirement that a certain method be used, the Tribunal had wrongly taken into account evidence given in applications by other credit providers at which the applicant was not represented. The Tribunal is not bound by the strict rules of evidence, but pursuant to s.21(5) of the Consumer Credit Act, 1972-1973, "may inform itself on any matter in such manner as it thinks fit." It was held that this provision did not exempt the tribunal from the duty to act in accordance with natural justice. In particular it was still required "at least [to] inform the parties of what it has done or what it intends to do and give them an opportunity to correct, contradict or comment on any material on which the tribunal might act."¹⁸⁰ It was held, however, that on the facts there was no breach of natural justice. Taken on its own the general statement quoted above could be seen as imposing a further requirement that a tribunal should disclose those aspects of its expertise and accumulated wisdom which may be relevant to its determination. As such it may be a somewhat clearer and more stringent prescription than the case-law has hitherto provided.¹⁸¹ The point, however, is put only tentatively.¹⁸²

Finally, it should be noted that provisions like s.21(5) of the Consumer Credit Act are directed "to the way in which [a] Tribunal can elicit information, not to the use it can make of it when it is elicited".¹⁸³ Thus the rule that the parliamentary history of legislation is not a permissible aid in the interpretation of statutes was held binding on the Credit Tribunal, notwithstanding the amplitude of the information-gathering power.¹⁸⁴

(III) Special Situations Arising Under the Hearing Rule

(1) Dismissal from Office

There is a useful discussion of this point by Jacobs J. in *Thorpe v. S.A. National Football League*,¹⁸⁵ where it was held that on the facts this was a "pure" master and servant case devoid of any element of public service or employment. Provided reasonable notice was given such employment was terminable without the need for a hearing or reasons being assigned.

(2) Licensing

*Perre Bros. v. Citrus Organization Committee*¹⁸⁶ was an appeal from decisions of the committee refusing two applications, one for a new packer's

178. *Ibid.*

179. (1974) 8 S.A.S.R. 237. See further *R. v. Corporation of Town of Glenelg, ex p. Pier House Pty. Ltd.* [1968] S.A.S.R. 246, 272 *per* Mitchell J.; *Perre Bros. v. Citrus Organization Committee* (1975) 10 S.A.S.R. 555, 563.

180. (1974) 8 S.A.S.R. 237, 245 *per* Bray C.J.

181. See de Smith, *op. cit.*, 180-181; Smillie, "The Problem of Official Notice: Reliance by Administrative Tribunals on the Personal Knowledge of Their Members", [1975] *P.L.* 64.

182. *Cf.* (1974) 8 S.A.S.R. 237, 247 *per* Bray C.J.

183. *S.A. Prices Commissioner v. Charles Moore (Aust.) Ltd.* (1976) 12 S.A.S.R. 214, 220-221.

184. *Id.*, 219-221 *per* Bray C.J.; 237-238 *per* Jacobs J.; *cf.* 232-234 *per* Zelling J.

185. (1974) 10 S.A.S.R. 17.

186. (1975) 10 S.A.S.R. 555.

licence, and the other for renewal of an existing packer's licence. Wells J. held that the relevant powers of decision attracted a duty to hear and made the following points. First, conceptual tests or analytical approaches are irrelevant to this question. The true test is "whether the duties of a non-judicial authority must, having regard to the wording of the Act, be carried out in a spirit of judicial fairness".¹⁸⁷ Secondly, applications for the original grant of new licences, as opposed to renewals of existing licences, may in appropriate circumstances attract the duty to hear.¹⁸⁸ A point which was neither taken in argument nor considered in the judgment was that the provision for an *ex post facto* hearing by way of an appeal to the Supreme Court was arguably sufficient to negative the existence of any duty to hear on the part of the Committee prior to making its original determination.¹⁸⁹

(b) *The Effect of Breach*

In *R. v. Corporation of Town of Glenelg, ex parte Pier House Pty. Ltd.*¹⁹⁰ precedent obliged the Full Court to follow the Privy Council in *Durayappah v. Fernando*¹⁹¹ on this question, though a contrary view had been expressed by some members of the House of Lords in *Ridge v. Baldwin*.¹⁹² Since the decision in the instant case, however, the House of Lords has emphatically reiterated the now clearly dominant view of that court that violation of natural justice is a form of jurisdictional defect producing nullity,¹⁹³ and the Chief Justice of the High Court of Australia has expressed unqualified support for Lord Reid's speech in *Ridge v. Baldwin*, which could be taken as support for the view that breach of the hearing rule makes a decision void (a nullity) and not merely voidable.¹⁹⁴ In the light of this apparent conflict there have been some limited opportunities for resiling from *Durayappah's* case.¹⁹⁵

Thus in *R. v. Johns, ex parte P.S.A. of S.A. inc.*,¹⁹⁶ room for manoeuvre was gained from the suggestion of Bray C.J. that *Durayappah* be confined "to the specific point dealt with therein".¹⁹⁷ So breach of the hearing rule was in the instant case equated with an excess or want of jurisdiction for the purpose of avoiding a privative clause. And in another case an inquiry under the Land and Business Agents Act, 1973-1975, which was tainted by violations of the hearing rule was deemed to be void and of no effect.¹⁹⁸

Even though *Durayappah's* case is not apparently to be applied "across the board", problems still remain. A major one involves the way in which a decision in breach of natural justice may be attacked. May one who is a "party affected", thus possessing impeccable *locus standi* credentials to attack such a decision *directly*, for example by way of *certiorari*, also attack such a

187. *Id.*, 561. On the constitutional (*i.e.*, s.92) aspects of these licences see *Perre v. Pollitt* (1976) 9 A.L.R. 387.

188. The complexities of this question are pursued by de Smith, *op. cit.*, 195-197.

189. A recent High Court decision was based on precisely this ground: *Twist v. Randwick M.C.* (1977) 12 A.L.R. 379. See further de Smith, *op. cit.*, 169-170.

190. [1968] S.A.S.R. 246, discussed *supra*, text at n.162.

191. [1967] 2 A.C. 337.

192. [1964] A.C. 40.

193. *Anisimic Ltd. v. Foreign Compensation Commission* [1969] 2 A.C. 147.

194. See *Banks v. Transport Regulation Board (Vic.)* (1968) 119 C.L.R. 222, 233 *per* Barwick C.J.

195. *Supra*, n.191.

196. [1971] S.A.S.R. 206.

197. *Id.*, 210. Bray C.J. has since preferred the view that the remarks of Barwick C.J. in *Banks* (*supra*, n.191) were spoken in a different context and are not to be taken as an implicit repudiation of *Durayappah*: see *Hinton Demolitions Pty. Ltd. v. Lower* (No. 2) (1971) 1 S.A.S.R. 512, 521-522.

198. *Gardiner and Ors. v. Land Agents Board* (1976) 12 S.A.S.R. 458, 481.

decision in collateral proceedings; or is one of the consequences of regarding such a decision as voidable, not void, to exclude the latter option? The point was considered at length in *Hinton Demolitions Pty. Ltd. v. Lower (No. 2)*.¹⁹⁹ There the company owner of a truck had been convicted of an offence which depended upon an assessment of the load capacity of a truck by the Registrar of Motor Vehicles. One argument was that the conviction could not be sustained because the decision of the Registrar involved a violation of the hearing rule. This in turn raised the question whether that decision could be impugned in this way, *i.e.*, collaterally, by one who as a "party affected" would presumably have had standing to avoid the decision in direct proceedings. It might be argued that the following passage from *Durayappah's* case suggests an affirmative answer to the above question:

"It cannot possibly be right, however, in the type of case which their Lordships are considering, to suppose that, if challenged successfully by the person entitled to avoid the order, yet nevertheless it has some limited effect even against him until set aside by a court of competent jurisdiction."²⁰⁰

This view, however, was not accepted. Bray C.J. was clear that a person with a sufficient interest to avoid a decision in direct proceedings taken for that purpose may not have sufficient *locus standi* for the purpose of collateral impeachment of that decision prior to the decision being avoided in direct proceedings:

"But it seems to me that, if the analogy, dangerous though it is, with the distinction between acts which are nullities and acts which are merely voidable in other branches of the law is logically applied, it must follow that even the party affected can only assert the invalidity of a voidable act of the type in question in proceedings appropriate for the purpose, and not whenever the question arises incidentally."²⁰¹

Finally, what is the consequence of taking action to avoid a voidable decision in proceedings appropriate to that purpose? It is apparently the view of the Full Court that once a decision is voided, it is void *ab initio*. In the words of Wells J.'s seventh proposition: "It is deemed to be and to have been (*esse et fuisse*) null and void".²⁰² But is this precisely what is meant? Assume a voidable decision has been avoided in direct proceedings by a person with the requisite *locus standi*. Is its voidness thereafter available to any person in any proceedings in which that person has an appropriate interest? If so, what seems to be permitted is not merely a form of postponed collateral attack, a prospect which is contrary to the whole tenor of Wells J.'s judgment in particular, but attack upon a potentially greatly enlarged range of transactions directly or indirectly based upon the once voidable, now "null and void" decision. The degree of administrative disruption which might be seen as flowing from this fresh vulnerability to attack is a strong argument for treating a decision once avoided as generally (*i.e.*, for all persons except the person directly affected) *prospectively* avoided.²⁰³ If a prospective avoidance only *is* in general the intended consequence of so holding surely the matter could have been expressed in language more clearly conveying that meaning.

199. (1971) 1 S.A.S.R. 512.

200. [1967] 2 A.C. 337, 354-355.

201. (1971) 1 S.A.S.R. 512, 522; and see further 549 *per* Wells J. (second proposition).

202. *Id.*, 549; see further 551; and 522 *per* Bray C.J.

203. See *e.g.*, *R. v. Paddington Valuation Officer, ex p. Peachey Property Corporation Ltd.* [1966] 1 Q.B. 380, 401-404 *per* Lord Denning M.R.

(B) REMEDIES

Despite recent reforms at Commonwealth²⁰⁴ level there are no similar prospects for the system of administrative law remedies in this State. We shall accordingly have to endure the complexity and ornateness of their plural and frequently conjoint charms for a while longer.²⁰⁵

(i) *Certiorari*

Certiorari to quash is available in respect of a wide range of administrative decisions by a variety of bodies, including those whose authority is primarily consensual.²⁰⁶ It is a means for directly calling in question administrative decisions, but may on occasion further involve collateral attack on the source of authority for such decisions.²⁰⁷ It is frequently resorted to, and, like prohibition, has become far easier to invoke since the departure of conceptual tests in relation to the requirement of a duty to act "judicially".²⁰⁸ Moreover, even though it is generally thought that *certiorari* to quash will still be denied where a decision is regarded as being "legislative" in nature,²⁰⁹ Zelling J. in *R. v. Credit Tribunal, ex parte Charles Moore (Aust.) Ltd. and Ors.*²¹⁰ saw no difficulty in allowing orders for *certiorari* and prohibition to be made against a body whose licensing functions he characterised as *legislative* and not judicial. The implications of this view are both novel and interesting.

During the relevant period there does not appear to have been any radical departure from, or particularly significant reliance on, the usual grounds for seeking this particular remedy.²¹¹

A problem that has arisen, however, has been that of defining the kind of interest (*locus standi*) necessary to support an application for *certiorari* as a result of the decision of the Privy Council in *Durayappah v. Fernando*.²¹² There it was held that only a party directly affected by a particular decision has *locus standi* to seek *certiorari* where the ground relied on is breach of the rules of natural justice. The Board went on to apply this notion of a "party affected" in so stringent a manner as to suggest that only a party to the original decision would be recognised as having the requisite interest. It may be argued that what happened in *Durayappah* was that the question of the effect of a breach of the hearing rule became confused with the quite separate one of *locus standi*, or capacity to challenge, in direct proceedings by way of *certiorari*. This excessively narrow view of the requisite interest has been justly criticised.²¹³ It would surely have been possible to distinguish

204. Administrative Decisions (Judicial Review) Act, 1977 (No. 59/1977).

205. This is not, of course, to deny that considerable reformulation and expansion has taken place; see, e.g., *Byrne v. D.C. of Noarlunga* [1970] S.A.S.R. 523, 530 *per* Wells J. The point is that further improvements probably require legislative initiative.

206. *R. v. S.A. Trotting Control Board, ex p. Roufos* (1975) 10 S.A.S.R. 223 (Full Court).

207. E.g., *R. v. Olsson, ex p. Vahlberg* (1975) 11 S.A.S.R. 156 (regulation pursuant to which decision taken asserted to be *ultra vires*).

208. *Ridge v. Baldwin* [1964] A.C. 40 now appears to be fully accepted: see e.g., *R. v. Corporation of Town of Glenelg, ex p. Pier House Pty. Ltd.* [1968] S.A.S.R. 246; *Perre Bros v. Citrus Organization Committee* (1975) 10 S.A.S.R. 555, 561-562 *per* Wells J.

209. See Benjafield and Whitmore, *op. cit.*, 134, 143, 200-201; de Smith, *op. cit.*, 348-349.

210. (1975) 12 S.A.S.R. 214, 231-232.

211. *Viz.* jurisdictional error; denial of natural justice; error of law apparent on the face of the record; fraud.

212. [1967] 2 A.C. 337; *supra*, text at n.191.

213. E.g., Nettheim, "The Privy Council, Natural Justice and Certiorari", (1967) 2 *Fed. L. Rev.* 215, 236ff.

between the *locus standi* requirements for *collateral* attack²¹⁴ and the *locus standi* requirements for direct attack, *e.g.*, by way of *certiorari*. In the case of the former the only person with capacity to challenge a voidable decision would be a person directly affected or a party to the original decision. On the other hand to impose a similarly stringent interest requirement in the latter situation drastically reduces the efficiency of *certiorari*.²¹⁵

The attitude of the Supreme Court to this dilemma has been instructive. As a matter of precedent *Durayappah* has been followed. Nevertheless its significance has been limited in the following ways. First the *locus standi* requirements indicated in *Durayappah* for *certiorari* are not necessarily to be applied to grounds other than "some types of violation of the rules of natural justice".²¹⁶ Secondly the court on one occasion at least has suggested that *Durayappah* is arguably inconsistent both with more recent statements of the House of Lords and with remarks of the Chief Justice of the High Court.²¹⁷ Moreover for certain purposes there has been a continued equation of violation of the hearing rule with want of jurisdiction.²¹⁸ These attempts to confine *Durayappah* in other areas as far as may be legitimate suggests that similar attempts may not be entirely inappropriate in relation to the *locus standi* requirements of *certiorari*.²¹⁹ Finally it remains the case that *certiorari* is a discretionary remedy, and this may provide a further way of rationalising and reducing the impact of *Durayappah*.²²⁰

(ii) *Prohibition*

Provided an administrative body is not *functus officio*, prohibition remains the most effective remedy for restraining such a body from entering upon²²¹ or continuing with²²² or purporting to carry into effect²²³ a decision in a matter in which it has exceeded or lacks jurisdiction. The cases referred to above testify to the continued viability and utility of the writ, particularly in relation to the workings of the State's industrial law system.

(iii) *Mandamus*

In essence *mandamus* lies to enjoin the performance of a public duty which, whether actually or constructively, remains unperformed.²²⁴ As has been

214. *Supra*, text at n.199.

215. See Wade, "Unlawful Administrative Action: Void or Voidable?" (Part I), (1967) 83 *L.Q.R.* 499, 503.

216. *R. v. Corporation of Town of Glenelg, ex p. Pier House Pty. Ltd.* [1968] S.A.S.R. 246, 254 *per* Bray C.J.; see further *id.*, 252-255.

217. *Supra*, text at nn.193, 194. Bray C.J. has since denied any such inconsistency: *supra*, n.197.

218. *R. v. Johns, ex p. P.S.A. of S.A. Inc.* [1971] S.A.S.R. 206; *Hinton Demolitions Pty. Ltd. v. Lower (No. 2)* [1971] 1 S.A.S.R. 512, 522 *per* Bray C.J.

219. *Cf.* the whole tenor of Wells J.'s remarks on the *locus standi* question in *Hinton Demolitions Pty. Ltd. v. Lower (No. 2)*, *supra*, n.218.

220. See *R. v. Corporation of Town of Glenelg, ex p. Pier House Pty. Ltd.* [1968] S.A.S.R. 246, 254 *per* Bray C.J. Other cases dealing with the discretionary nature of the remedy are: *R. v. Johns, ex p. P.S.A. of S.A. Inc.* [1971] S.A.S.R. 206, 208-210 *per* Bray C.J. (futility, alternative remedy); *R. v. Smith, ex p. Jones* [1966] S.A.S.R. 47 (alternative remedy).

221. *R. v. Olsson, ex p. Amalgamated Wireless (A'Asia) Ltd.* (1971) 1 S.A.S.R. 453 (Full Court); *R. v. Stanley, ex p. Redapple Restaurants Pty. Ltd.* (1976) 19 S.A.S.R. 290 (Full Court).

222. *R. v. Bleby and Ors., ex p. Public Service Board (No. 1) (Teachers' Case)* (1974) 9 S.A.S.R. 320 (Full Court); *R. v. Bleby and Ors., ex p. S.A. Public Service Board (No. 2) (Public Servants' Case)* (1974) 9 S.A.S.R. 330 (Full Court); *R. v. Credit Tribunal, ex p. Charles Moore (Aust.) Ltd. and Ors.* (1975) 12 S.A.S.R. 214., esp. 227 *per* Bray C.J. (Full Court).

223. *R. v. Olsson, ex p. E. Smith & Co. Pty. Ltd.* (1973) 5 S.A.S.R. 248 (Full Court).

224. For a succinct statement as to the general nature of the writ see *R. v. Wilson, ex p. Jones* [1969] S.A.S.R. 405, 409 *per* Bray C.J.

recently pointed out, in the course of its long life this remedy has “undergone dramatic transformation”, and is probably now the pre-eminent remedy for controlling the exercise of administrative discretionary powers including the jurisdictions of administrative tribunals vested in discretionary terms.²²⁵

(a) *General Nature of Writ*²²⁶

(b) *Persons or Bodies Amenable to the Writ*

The general rule is that *mandamus* does not lie against the Crown itself or its servant if the latter is performing a duty only in the capacity of agent for the Crown. If, on the other hand, a Crown servant is the person designated (*persona designata*) to perform a duty in favour of the subject, the writ may lie if the duty goes unperformed.

An interesting gloss on the *persona designata* principle was suggested by Zelling J. in *Michell v. Minister of Works*.²²⁷ In his view *mandamus* would only lie against a Minister as *persona designata* where the public duty imposed was devoid of significant discretionary elements, and would be most obviously inappropriate where matters of governmental policy were involved.²²⁸ The sole possible exception arose where the Minister was guilty of an equivalent of *détournement de pouvoir*.²²⁹ Bray C.J., however, regarded the Minister as *persona designata* and perceived *mandamus* as the appropriate remedy whether the duty was simply ministerial, or one which concurrently involved the exercise of significant discretionary power.²³⁰

(c) *Locus Standi*

In *R. v. Corporation of City of West Torrens, ex p. Kentucky Fried Chicken Pty. Ltd.*²³¹ one of the questions considered by the Full Court was whether the interest of the applicant company was sufficient for it to seek *mandamus* against the council enjoining it to grant building approval, an approval which it had earlier granted but had subsequently purported to rescind. The relevant facts were that land had been purchased on behalf of a certain company on which it proposed to build premises for the sale of food under franchise from the applicant company. The applicant company had no legal interest in the contracts for the purchase of the land, and did not intend to build on it. According to Hogarth and Bright JJ. this was sufficient to disentitle it from applying for *mandamus*.²³² Bray C.J., on the other hand, thought the applicant's interest clearly sufficient; as grantor of the franchise it had a special interest in procuring approval to the plans and in seeing that the contracts with the vendors were carried out and the building constructed.²³³ This does, with respect, appear to be a more realistic view and one which better accords with the recent, more liberal approach to the question of standing for *mandamus*.²³⁴

225. *R. v. Industrial Commission of S.A., ex p. Minda Home Inc.* (1975) 11 S.A.S.R. 333, 344 *per* Wells J. This is an important decision on the scope and purpose of *mandamus* and its relationship with *certiorari*.

226. See *R. v. Wilson, ex p. Jones* [1969] S.A.S.R. 405-410, 418-419.

227. (1974) 8 S.A.S.R. 7.

228. *Id.*, 30-31.

229. *Id.*, 32. For the meaning of the term see Brown & Garner, *French Administrative Law* (2nd ed., 1973), 130-134.

230. (1974) 8 S.A.S.R. 7, 14-15.

231. [1969] S.A.S.R. 545.

232. *Id.*, 566-567.

233. *Id.*, 562-563.

234. See Benjafield and Whitmore, *op. cit.*, 219; de Smith, *op. cit.*, 493.

(d) Discretionary Nature of the Remedy(I) Futility²³⁵(II) Alternative Remedy²³⁶*(iv) Injunction and Declaration*

Probably the most significant development within the field of administrative law remedies has been the evolution of what were in origin equitable remedies into *sui generis* public law remedies. Together they cover most if not all the ground of the prerogative remedies, and are, to a degree, free from the more complex and limiting accretions associated with the latter. Accordingly they are not merely viable but also desirable alternatives, and are found in more and more frequent use in administrative law suits, particularly the action for a declaration which "bids fair to develop into one of the most important means of ascertaining legal powers of public authorities in the intricate mixture of public and private enterprise which is becoming a distinctive feature of . . . Australian life".²³⁷

(a) Injunction

*A.-G. ex rel. Daniels and Ors. v. Huber Sandy and Wichmann Investments Pty. Ltd.*²³⁸ is significant for its extension of injunctive relief to restrain violations of regulatory legislation into the sphere of the general criminal law, despite a powerful dissenting opinion from Bray C.J.²³⁹ It further deals with the principles relevant to the grant of the Attorney-General's *fiat* for the purpose of bringing relator actions, a matter of considerable administrative law significance. Since, however, the suit was both for an injunction and a declaration, and since the principles governing relator actions for both injunction and declaration are cognate, this aspect of the case will be examined below.

(b) Declaration

(I) Uses of the Declaratory Judgment

There are sufficient examples of the use of the declaratory judgment²⁴⁰ as a means of defining the rights and obligations of public authorities in this State to support the large claims made for it earlier. For example, it has been used to test the legal limits of the powers of administrative bodies as they affect both public and private rights and interests;²⁴¹ to test the validity of subordinate legislative instruments;²⁴² and to secure a declaration as to the existence of a public duty.²⁴³

(II) Locus Standi

Where public rights are affected the *fiat* of the Attorney-General is normally required before a private plaintiff may be heard in an application for an injunction or a declaration. There are statements to the effect that the bringing of a relator action is a matter for the discretion of the Attorney-

235. *R. v. Wilson, ex p. Jones* [1969] S.A.S.R. 405, 410 *per* Bray C.J.

236. *R. v. Johns, ex p. P.S.A. of S.A. Inc.* [1971] S.A.S.R. 206, 211 *per* Bray C.J. (diss.).

237. Benjafield and Whitmore, *op. cit.*, 232.

238. (1971) 2 S.A.S.R. 142 (Hogarth J.); 150 (Full Court).

239. *Id.*, 161-166, 172; *cf.* 176-180 *per* Walters J.; 188-200 *per* Wells J.

240. As to the nature of declaratory relief see *Harrison v. City of Adelaide Development Committee* (1976) 12 S.A.S.R. 593, 597-598 *per* Wells J.

241. *Leverington v. State Planning Authority and District Council of East Torrens* [1970] S.A.S.R. 387; *Becker v. Corporation of City of Marion* (1974) 9 S.A.S.R. 543.

242. *A.M.A. Inc. (S.A. Branch) v. South Australia* (1973) 6 S.A.S.R. 350 (proclamation under Prices Act).

243. *Michell v. Minister of Works* (1974) 8 S.A.S.R. 7; *Becker v. Corporation of City of Marion, supra*, n.241.

General.²⁴⁴ Thus a court may well regard the granting of the *fiat* as a matter most relevant to the grant or denial of the relief sought.²⁴⁵ This view is not, however, universally held. Bray C.J. has stated that once an Attorney-General is satisfied of some probable violation of a public duty, he is under a quasi-judicial *duty*, albeit of imperfect obligation, to issue his *fiat*.²⁴⁶ The fact that a *fiat* has been granted may therefore be regarded as substantially irrelevant to the question whether the relief sought should be granted. Moreover, there is recent authority for the proposition that a refusal of the *fiat*, in such circumstances as to suggest abuse of discretion, if discretion there be, may itself be called in question and where appropriate the court may permit the private plaintiff to pursue the action in his own name.²⁴⁷

While considering *locus standi* there is the further question whether the *Durayappah*²⁴⁸ characterization of the effect of a breach of the *audi alteram partem* rule reduces the effectiveness of the remedy of declaration. Wade²⁴⁹ and others have argued that the declaration is available only in respect of decisions which are nullities. On the other hand, one may quite legitimately ask whether the courts are so technical and restrictive as Wade suggests. Apparently not. For example, in *Ridge v. Baldwin*²⁵⁰ a declaration was granted despite the fact that at least two of the judges in that case regarded a breach of the *audi alteram partem* principle as leading to a decision which was voidable only and not void. In short, the scope of the declaration was not regarded as turning in any way upon the distinction between void and voidable. Moreover, there are expressions as to the availability of remedies in the decision of the Full Court in *Hinton Demolition Pty. Ltd. v. Lower (No. 2)*²⁵¹ which support the proposition that the void/voidable distinction is of no real consequence so far as the availability of remedies, prerogative or equitable, is concerned.²⁵² One should perhaps say that the main limitation in respect of the availability of this and other remedies may lie in having on occasion to satisfy relatively stringent *locus standi* requirements.²⁵³

(III) Restrictions

(1) The Discretionary Nature of the Remedy

That the declaration is a discretionary remedy is a general proposition, long-accepted. There are many examples of situations where as a matter of discretion the courts have declined the relief sought.²⁵⁴

244. E.g., *A.G. v. Harris* [1961] 1 Q.B. 74, 94 *per* Pearce J.

245. See *A.G. ex rel. Daniels and Ors. v. Huber Sandy and Wichmann Investments Pty. Ltd.* (1971) 2 S.A.S.R. 142, 212-215 *per* Wells J.; see further *A.G. v. Bastow* [1957] 1 Q.B. 514, 520-521 *per* Devlin J.

246. *A.G. ex rel. Daniels etc., supra*, n.241, 171 (following Dixon A.J. in *A.G. v. Gill* [1926] V.L.R. 414, 416).

247. *A.G. ex rel. McWhirter v. I.B.A.* [1973] 1 All E.R. 689, discussed in de Smith, *op. cit.*, Appendix 3, 527-529.

248. *Durayappah v. Fernando* [1967] 2 A.C. 337; *supra*, text at n.199.

249. "Unlawful Administrative Action: Void or Voidable?" (Part II), (1968) 84 *L.Q.R.* 95, 100-101.

250. [1964] A.C. 40.

251. (1971) 1 S.A.S.R. 512.

252. *Id.*, 522-523 *per* Bray C.J.; 549 *per* Wells J. (third proposition); and see further 550-551 *per* Wells J.

253. *Id.*, 551 *per* Wells J.

254. See generally Benjafield and Whitmore, *op. cit.*, 233-234, 243-244. For a recent illustration see *Myer Queenstown Garden Plaza Pty. Ltd. and Anor. v. Corporation of City of Port Adelaide (No. 1)* (1973) 6 S.A.S.R. 240 (declaration refused lest contradictory orders be given in separate actions for declaratory relief); see further *Myer Queenstown Garden Plaza and Anor. v. Corporation of City of Port Adelaide and the A.G. (No. 2)* (1975) 11 S.A.S.R. 505, 509-510, 511-513.

(2) Purely Academic or Hypothetical Questions

In *A.G. (ex rel Waltham and Anor.) v. Corporation of City of Glenelg*²⁵⁵ a declaration was sought that the provisions of a lease entered into between the council and the lessee permitting certain activities to be carried on were *ultra vires*. It was argued that until such activities actually took place the question of illegality was hypothetical and speculative. It was held that the suit was not premature. It was not necessary that the permitted activities should actually be carried on, for it was the validity of the council's action in entering into the lease that was primarily at issue and only consequentially the validity of any action or possible action on the part of the lessee.

In *Leverington v. State Planning Authority and District Council of East Torrens*²⁵⁶ declarations were sought that certain quarrying activities were permissible and would not, if carried on, lead to criminal prosecution. It was held that these were not theoretical questions, but questions which derived from the conjoint operation of a proclamation as to the status of the land upon which the proposed work was to take place, and a prohibition of certain activities on any such land under the Planning and Development Act, 1966-1975. The difficulty lay not so much in the hypothetical nature of the questions as in delimiting the precise scope of the prohibition and thus the specific matters as to which declarations should be given. This might obviously affect discretion, but did not go to jurisdiction.²⁵⁷ The court also considered whether the determination of hypothetical questions was a matter which they were *jurisdictionally* inhibited from deciding or which they would desist from deciding as a matter of discretion. Bray C.J. thought the court's refusal might depend on discretion rather than on lack of jurisdiction,²⁵⁸ and Walters J. was quite clear that this was so.²⁵⁹ Zelling J. dissented on the ground that the case was one in which the plaintiff had sought a declaration as to the lawfulness of proposed quarrying activities and that the court was *without jurisdiction* to give an advisory opinion on the question.²⁶⁰

(C) STATUTORY APPEAL PROCEDURES

The difficulty with general appeal provisions is that they offer a range of possible approaches.²⁶¹ They can be seen as authorizing a wide-ranging *de novo* investigation of the merits of the decision, or they can be read more or less narrowly to encompass certain sorts of errors of law or fact or mistakes of principle. It is by no means clear that this latter is a form of review significantly different from that provided by prerogative remedy,²⁶² or that in some instances an appeal against an exercise of discretion affords any wider scope of review than would be permitted under the doctrine of *ultra vires*, in particular the quasi-ground of unreasonableness.²⁶³

That the courts face a dilemma of some proportions is not in doubt.²⁶⁴ It is nevertheless a dilemma requiring some resolution. It is in this regard that the

255. [1970] S.A.S.R. 111.

256. [1970] S.A.S.R. 387.

257. *Id.*, 396-398 *per* Bray C.J.; *cf.* 411ff. *per* Zelling J. (diss.).

258. *Id.*, 397.

259. *Id.*, 400.

260. *Id.*, 414.

261. See generally Harris, "A Critical Analysis of South Australian Administrative Tribunals", (1972) 4 *Ad. L.R.* 389, 411-413.

262. See *Byrne v. District Council of Noarlunga* [1970] S.A.S.R. 523, 529-550.

263. *E.g.*, *Storey v. Director of Planning and Anor.* (1975) 11 S.A.S.R. 227, 247-250 *per* Wells J.

264. On occasion they may even regard particular functions as wholly inappropriate for review by a court. This may lead to a denial of any statutory right of appeal

approach of Wells J. in the Land and Valuation Court is most instructive. S.23(3) of the Planning and Development Act, 1966-1975, empowers the Land and Valuation Court, on an appeal from the Planning Appeal Board, to act "as it thinks just". There is no statement in the Act of the rules or principles which should guide the court. In *Santin v. Corporation of the City of Woodville*²⁶⁵ Wells J. considered the following *a priori* options. First, the court could engage in a total rehearing of the evidence and arguments without regard to the Board's decision or reasoning. Second, it could decline to interfere unless the Board had manifestly committed a fundamental error of law or principle. Third, the hearing of the appeal could be conducted much as an appeal is conducted under the Justices Act, 1921-1975. Instead he concluded that the clearest guidance would be derived from examining "the fascicule of sections pursuant to which members of the Board are appointed and from the nature of the problems they are to solve".²⁶⁶ Employing this approach he noted the expert nature of the Board, the wide area of relevant matters they are obliged to take into account and the measure of trust reposed in them by the legislature. Having regard to these matters and the general scope of the legislation he concluded that he should as a matter of course examine any errors of law or mixed law and fact (which would presumably encompass both jurisdictional and non-jurisdictional errors, latent or patent); that he should be slow to interfere either with findings of primary fact (unless, presumably there were no evidence to support them) or "the more or less arcane matters of planning" where the Board had called on "their special abilities", but that there might be occasions where inferences drawn by the Board from primary facts would have to be critically examined, or where *arcania* would have to be grappled with in order to make such orders and give such directions as were just.²⁶⁷ These remarks were repeated in *Storey v. Director of Planning and Anor.*,²⁶⁸ a case in which, given the state of the evidence, there was no basis for interfering with the Director's discretion, far less for substituting his own opinion. Nevertheless, as the decision in *Twenty-Seven Properties Ltd. v. Corporation of Noarlunga and Ors.*²⁶⁹ shows, on rare occasions there may be a body of uncontroverted evidence rationally suggesting that the Board (or some other body or functionary in the planning administration) has gone so wrong as to permit the court to substitute its own decision on the merits.²⁷⁰

This rather perceptive approach is also to be found in connection with appeals against decisions given in other specialist jurisdictions. One finds it, for example, in both licensing cases²⁷¹ and in mining cases. So in *Pacminex (Operations) Pty. Ltd. v. Aust. (Nephrite) Jade Mines Pty. Ltd.*,²⁷² *Santin*²⁷³ was specifically cited in order to justify limiting the appeal provision in respect

where the statute is ambivalent on the point: e.g., *Faulkner v. Land Valuers Licensing Board* (1972), 3 S.A.S.R. 444, 449-450 (Wells J.), or may result in the particular statutory right being rendered nugatory: e.g., *Kalliontzis v. Citrus Organization Committee* [1966] S.A.S.R. 294 (Travers J.); cf. *Perre Bros v. Citrus Organization Committee* (1975) 11 S.A.S.R. 227 (Wells J.).

265. (1971) 1 S.A.S.R. 336.

266. *Id.*, 338.

267. *Id.*, 338-339.

268. (1975) 11 S.A.S.R. 227, 247-250. See further *Brewarrana Pty. Ltd. v. Commissioner of Highways (No. 2)* (1973) 6 S.A.S.R. 541, 544-545.

269. (1975) 11 S.A.S.R. 188.

270. *Id.*, esp. 202-204.

271. *Pope v. Maynorth Pty. Ltd.* [1966] S.A.S.R. 85, 88 *per* Napier C.J.

272. (1974) 7 S.A.S.R. 401.

273. *Supra*, n.265.

of a mining warden's decision to correcting "some egregious blunder in his findings of fact" or misdirection in law. In short a court should be slow to interfere with decisions dependent upon the employment of a mining warden's specialised knowledge of "the esoteric world of mining and mining tenements".²⁷⁴ A further example is the appeal that lies from the Credit Tribunal to the Supreme Court. In *In Re John Martin & Co. Ltd.*²⁷⁵ the court confronted what was formally a full and unrestricted right of appeal. It was noted that the tribunal was an expert body operating in a specialist field in a demonstrably expert way. Thus the theoretically unrestricted right of appeal was to be somewhat limited, *i.e.*, to clear errors of fact or law or the making of manifestly unreasonable decisions.²⁷⁶

Finally, the Citrus Industry Organization Act, 1965-1972, provides a right of appeal to the Supreme Court against a refusal to grant a licence. On appeal the court may refuse the appeal, or, if it is of opinion that the application was refused "without good and sufficient cause", order a licence to be granted.²⁷⁷ Once again the construction of this provision has been conditioned by the circumstance of an expert body, the Citrus Organization Committee, whose connection with the industry and knowledge of its workings was to be presumed and accorded significance. Therefore a court ought not to engage in a hearing *de novo*. Review of merits was to be confined to a wholly untenable or unreasonable conclusion unsupported by the evidence.²⁷⁸

(D) EXCLUSION OF JUDICIAL REVIEW

Courts are frequently required to determine the scope and meaning of legislative formulae designed to limit, if not exclude, their supervisory role in relation to a range of administrative decisions. It has often been observed that the courts will resist such intrusions if it is open to them to do so. Equally, however, if the wording or intention is clear such provisions may be effective.²⁷⁹ The following aspects of the problem may be noted.

(i) "Conclusive Evidence" Provisions

A provision which has attracted a considerable degree of attention is s.725(1) of the Local Government Act, 1934-1975, which provides that a notice published in the *Gazette* "shall be conclusive evidence (a) of the resolution passed . . ." The results of a trilogy of cases during the relevant period seem to be as follows: that whatever extrinsic evidence may exist to the contrary, publication of a notice of resolution in the *Gazette* is "conclusive evidence" of its having been passed;²⁸⁰ that a notice published in the *Gazette* is, in the absence of appropriate correction being made to such notice following publication, "conclusive evidence" of a resolution having been passed in the terms in which it appears in the notice;²⁸¹ and that the section is procedural only and not conclusive evidence of the substantive validity of matters set out in such notice.²⁸²

274. (1974) 7 S.A.S.R. 401, 415 *per* Wells J. See also *Mines Exploration Pty. Ltd. v. Mills and Anor.* (1972) 2 S.A.S.R. 464, 468 *per* Zelling J.

275. (1974) 8 S.A.S.R. 237.

276. *Id.*, 247-248 *per* Bray C.J.

277. This is not, as a matter of construction, the only order which the court may grant: *Perre Bros. v. Citrus Organization Committee* (1975) 10 S.A.S.R. 555, 567-568.

278. *Id.*, esp. 559, 565-568.

279. *E.g.*, *Pioneer Tourist Coaches Pty. Ltd. v. Jackman and Ors.* [1968] S.A.S.R. 355.

280. *Howie v. Hollobone* [1973] 8 S.A.S.R. 148.

281. *Fereday v. Corporation of the City of Campbelltown* [1967] S.A.S.R. 203, 207 *per* Hogarth J. (*contra*, 212 *per* Travers J.); *Willing v. Young* (1974) 11 S.A.S.R. 86, 90 (Full Court).

282. *Howie v. Hollobone*, *supra* n.280, 157 *per* Wells J.

(ii) *Collateral Attack*

Privative clauses which purport to exclude the reviewing role of the courts save where "excess or want of jurisdiction" on the part of the relevant body can be shown²⁸³ may also operate so as to restrict the scope of collateral attack on decisions which, being nullities, might otherwise be open to unrestricted attack. The point first arose in *R. v. Chislett, ex parte P.S.A. of S.A. Inc.*²⁸⁴ in which prohibition was sought against an Industrial Registrar to restrain him from registering certain amendments to the rules of the respondent association. The applicant association argued that the proceedings for registration were incompetent on the ground that an earlier decision of the Industrial Commission, upon which the proceedings before the Registrar were based, had been made without jurisdiction. It was the opinion of Bray C.J. that "whatever the circumstances, if any, in which orders and decisions of tribunals can be treated as nullities when their validity is indirectly called in question in a proceeding not directly impeaching it" (*sic*),²⁸⁵ on a proper construction of s.53(2) of the Industrial Code, 1967-1972, the only way in which the Commission's decision could be impugned on the ground of excess or want of jurisdiction was in proceedings "in which the Commission itself is directly impleaded".²⁸⁶

Since that case there has been occasion to elaborate and explain the relevant principles. First, there has been further consideration of the circumstances in which a determination is to be regarded as having been collaterally impugned in a way which violates these principles. In the *Teachers* case²⁸⁷ it was argued that by seeking prohibition to restrain the Industrial Commission from exceeding its jurisdiction the applicant was collaterally impugning a decision of the Full Industrial Court, given on a reference to it from the Commission, as to the extent of the latter's jurisdiction, pursuant to s.102 of the Industrial Conciliation and Arbitration Act, 1972-1975. It was held that when the Commission refers a question of law to the Court, for the purposes of the privative clause in s.95 of the Act "the reference is made in a proceeding before the Commission and when the Commission gives effect to the opinion of the Court pursuant to s.102(2) that, too, takes place in a proceedings before the Commission".²⁸⁸ There was no analogy with *Chislett*,²⁸⁹ for there "there was an order of the Industrial Commission operating of its own force on the parties, not a mere advisory opinion . . . Here the opinion of the Full Industrial Court is merely an incident in the proceedings before the Commission and it is those proceedings that are directly attacked here."²⁹⁰

283. The best-known examples are the privative clauses in the Industrial Code, 1967-1972, s.53 and in its successor, the Industrial Conciliation and Arbitration Act, 1972-1975, ss.92, 95. For recent examples of the construction and application of these provisions see *R. v. Bleby and Ors., ex p. Royal Australian Nursing Federation* (1973) 4 S.A.S.R. 445, 447-448 *per* Bray C.J. (Full Court); *R. v. Johns, ex p. P.S.A. of S.A. Inc.* [1971] S.A.S.R. 206, 210 *per* Bray C.J.; 218 *per* Chamberlain J. (Full Court); *R. v. Industrial Commission, ex p. Minda Home Inc.* (1975) 11 S.A.S.R. 333, 337-339 *per* Bray C.J.; 344 *per* Wells J. (Full Court).
284. (1973) 4 S.A.S.R. 427.

285. *Id.*, 437; see *supra*, n.143.

286. *Id.*, 438. This view is concurred in by Mitchell J., *id.*, 442-443, and with some vehemence by Wells J., *id.*, 443-444 (reaffirming his views in *Hinton Demolitions Pty. Ltd. v. Lower* (No. 2) (1971) 1 S.A.S.R. 512, 539-549).

287. *R. v. Bleby, ex p. S.A. Public Service Board* (No. 1) (1974) 9 S.A.S.R. 320.

288. *Id.*, 324 *per* Bray C.J.

289. *Supra*, n.284.

290. (1974) 9 S.A.S.R. 320, 326 *per* Bray C.J.

It should, however, be recalled that in the *Teachers'* case this view did not preclude a concurrent application for prohibition, directly impleading the opinion of the Full Industrial Court.²⁹¹ Indeed, although such a proceeding was there regarded as unnecessary, prohibition against the Commission *alone* would obviously in one sense have involved challenging and calling in question the opinion of the Full Industrial Court. The significance of this point was perceived in *R. v. Stanley, ex parte Redapple Restaurants Pty. Ltd.*²⁹² where prohibition was sought against a single Judge of the Industrial Court to prevent further action in proceedings whose jurisdictional validity had earlier been confirmed in an opinion of the Full Industrial Court on a case stated. No prohibition was, however, sought against the Full Industrial Court. It was noted that the Industrial Conciliation and Arbitration Act contained a curious hiatus in that the privative clauses protect decisions of the Full Industrial Court (s.92(3)) and those of the Commission and its Committees (s.95(b)) but not decisions of a single judge of the Industrial Court. This in turn suggested that proceedings before a single judge could in some situations be challenged on a wider spectrum of grounds than was available against other industrial bodies and functionaries. So far as the present proceedings were concerned, however, it was recognised that a degree of collateral attack of the Full Industrial Court was involved. This served to limit the grounds on which a determination of a single judge of the Industrial Court might be attacked to those upon which a determination of the Full Industrial Court could be impugned in proceedings *directly* impleading it, *i.e.*, to "excess or want of jurisdiction" (s.92(3)).

4. Crown Liability

The single most important development in this area was the passing of the Crown Proceedings Act in 1972.²⁹³ The principal changes made are procedural in nature, consisting essentially of a rationalization and consolidation of a number of disparate and/or controverted aspects of the adjectival law. There are also provisions dealing with the Crown's legal liability in which the language used at least arguably brought about, no doubt inadvertently, certain additional substantive changes. These are examined below.

(A) PROCEDURAL CHANGES

(i) *Actions Against the Crown*

In the first place there is a further simplification of the procedures necessary to bring suit against the Crown.²⁹⁴ Essentially the Crown may be impleaded in any court in which the relevant action lies "in accordance with the ordinary practice and procedure of the court in proceedings between subject and subject"²⁹⁵ in proceedings brought under the title "The State

291. *Supra*, text at n.151.

292. (1976) 13 S.A.S.R. 291.

293. Decisions involving the Crown have been few. See, however, *In the Matter of John Wiper Ltd. (Receiver Appointed) (In Liquidation)* (1973) 5 S.A.S.R. 360 (Crown in right of Commonwealth; priority of debts); *Director of Posts and Telegraphs v. Abbott* (1974) 7 S.A.S.R. 540 (Crown in right of Commonwealth; liability in contract).

294. Formerly actions in tort and contract were instituted pursuant to the now repealed petition of right provision: s.74, Supreme Court Act, 1935-1974. The Crown is defined in the Crown Proceedings Act, 1972-1975, (S.A.) (hereinafter cited as C.P.A.), s.4(1) as "(a) the Crown in right of this State (b) any Minister of the Crown in right of this State; (c) any instrumentality or agency of the Crown; (d) any person, body or authority declared . . . to be an instrumentality of the Crown".

295. *Id.*, s.5(1).

of South Australia".²⁹⁶ Furthermore special periods of limitation have been abolished, so that actions in tort and contract against the Crown shall be brought within the same time as proceedings between subject and subject.²⁹⁷ Ancillary to this is a section providing that there shall be no distinction procedurally between the Crown and the subject where discovery of documents is sought or interrogatories are required to be answered.²⁹⁸ There is, however, an explicit statement to the effect that this "does not affect the operation of any rule of law under which a person may refuse to discover or produce documents or to answer an interrogatory on the ground that to do so would be prejudicial to the public interest."²⁹⁹

(ii) *Enforcement of judgments*

The first point to observe is that the Crown Proceedings Act preserves the immunity of Crown property from execution or attachment.³⁰⁰ S.8(4)(a) provides a continuing authority "to pay out of the General Revenue of the State, or the funds of that instrumentality . . . any moneys to be paid by the Crown in pursuance of the judgment . . ." and the moneys so required "are hereby appropriated to the extent necessary . . ."³⁰¹ Judgments obtained by the Crown may be enforced "in the same manner as a judgment in proceedings between subjects and not otherwise".³⁰²

(B) THE LIABILITY OF THE CROWN

(i) *Liability in Contract*

With deceptive simplicity the Crown Proceedings Act provides that "subject to this Act, and any other Act, the Crown shall be liable in respect of any contract made on its behalf in the same manner and to the same extent as a private person of full age and capacity is liable in respect of his contracts . . ."³⁰³ A question of some significance is the effect, if any, of this formula on the existing special rules relating to the Crown's liability in contract, and in particular on the doctrine of executive necessity,³⁰⁴ and the common law rule that Crown servants are dismissible at pleasure.³⁰⁵

Initially it might appear feasible for the language of the section to be construed as abolishing these rules. It is entirely possible so to read the expressions "shall be liable in respect of any contract" and "in the same manner and to the same extent as a private person . . ."³⁰⁶ There is, moreover, no such explicit preservation of any of the special rules relating to Crown contractual liability as one finds elsewhere in the Act, e.g., in relation to the Crown's power to claim privilege in respect of certain documents which it would not be in the public interest to have produced.³⁰⁷

296. *Id.*, s.5(2).

297. *Id.*, s.11. In *Commercial Oil Refiners Pty. Ltd. v. State of S.A.* (1974) 9 S.A.S.R. 88, it was held that s.11(1) did not operate so as to revive causes of action already statute-barred before the passing of the Act.

298. C.P.A., s.7(1).

299. *Id.*, s.7(3).

300. S.8(1).

301. C.P.A., s.8(5). These provisions are not novel. Their predecessor, now repealed, was s.77 of the Supreme Court Act, 1935-1969 (S.A.). The theoretical importance of fixed appropriation is discussed in *N.S.W. v. Bardolph* (1934) 52 C.L.R. 455, 508-510.

302. C.P.A., s.9.

303. S.10(1).

304. See generally Hogg, *The Liability of the Crown* (1971), 129-140.

305. *Id.*, 150-158.

306. C.P.A., s.10(1).

307. *Id.*, s.7(3).

There are several responses to this construction. The first is that abolition of these rules may only be done by express words or necessary implication.³⁰⁸ Indeed this is but to state the general rule governing the amenability of the Crown to the operation of statutes, a rule which itself incidentally remains untouched by the present legislation.³⁰⁹ Second, the statute has elsewhere wrought substantive changes of the sort presently being examined in quite explicit language: *e.g.*, the abolition of the so-called "independent discretion" rule for the purpose of fixing the Crown's liability in tort.³¹⁰ Finally, and this is perhaps the most legally satisfying analysis, the section is capable of being construed as positively *preserving*, albeit by implication, the Crown's special status as a contracting party. For s.10(1) speaks of the Crown being liable "in the same manner and to the same extent as a private person . . ." Thus, to the extent that the Crown and a private person are in the same relation as contracting parties to a particular contract, the Crown's liability is to be determined only by reference to the rules which will determine the private person's contractual liability. But where special rules are raised, such as the doctrine of executive necessity, or the dismissibility of Crown servants, the private person's liability is no longer legally relevant to determining the Crown's liability, for the private person by definition does not and cannot rely on a plea of executive necessity or employ Crown servants. There is, in short, no mutuality in respect of the *special* rules governing the Crown's liability in contract, for if there were they would cease, in a juridical sense, to be special rules.

(ii) *Liability in Tort*

The relevant section provides that "the Crown shall be liable in tort in the same manner and to the same extent as a private person of full age and capacity"³¹¹ both vicariously³¹² and in respect of any breach of duty that *would as between subjects* give rise to liability in tort.³¹³ There is presently no common law requirement in Australia of a private analogy in order to make the government (Crown) tortiously liable.³¹⁴ Have the above-quoted provisions introduced such a requirement?³¹⁵ The private analogy argument has it that the government (Crown) may only be tortiously liable in respect of damage brought about by an activity which is analogous to the activities in which private persons are or may be engaged. So where damage is caused to an individual which flows from an activity with no private analogy³¹⁶ it may be argued in the language of the statute that the Crown cannot "be liable . . . in the same manner and to the same extent as a private person . . .", since there is no "breach of any duty that would, as between subjects, give rise to liability in tort . . ."³¹⁷ The section could have been more abundantly

308. Clearly enough the C.P.A. itself binds the Crown by necessary implication. This however, is a general proposition. Whether and to what extent particular provisions affect the Crown is logically and in law a separate question.

309. *Infra*, text at n.322. On the question of statutes see Hogg, *op. cit.*, ch.7, esp. 167-175.

310. *Infra*, text at n.321. C.P.A., s.10(2).

311. *Id.*, s.10(1)(b).

312. *Id.*, s.10(1)(b)(i).

313. *Id.*, s.10(1)(b)(ii).

314. See Hogg, *op. cit.*, 77-78. S.74(1) of the Supreme Court Act, 1936-1974, (now repealed) certainly imposed no such requirement.

315. If there were a pre-existing legal requirement the language of the section could be read as abolishing it. However, one would need to further consider such a construction in the light of arguments similar to those presented above in relation to the potential *abolition* of any special contractual rules.

316. For example military operations; police; licensing; see further Hogg, *op. cit.*, 77-78.

317. C.P.A., s.10(1)(b)(ii).

cautious perhaps.³¹⁸ Even so it would be far preferable to assume that the statute subjects the whole range of governmental activity to tortious liability and does not seek to introduce a requirement that would be both novel³¹⁹ and undesirable in principle, as well as difficult to apply in practice. The true effect of the relevant provisions should be taken to be that “the Crown is only liable in tort under recognized heads of tortious liability; the statut[e] giv[es] no mandate to construct a new ‘public’ law of torts.”³²⁰

As a final matter one should draw attention to the abolition of the “independent discretion” rule.³²¹ Here our statute breaks new ground for Australia. We should feel no sense of loss at the passing of a doctrine which ill-served the just and coherent development of this area of public law.

(iii) *Shield of the Crown*

The essential point is that the statute makes no substantive changes to or inroads into the wide-ranging and somewhat disparate catalogue of Crown attributes still adhering to it and still highly relevant in fixing the incidents and obligations attendant on the Crown’s legal relations.³²² Of these, the most significant are those exempting the Crown from taxes and charges, and generally from statutes. These immunities are frequently claimed by bodies, particularly statutory corporations, claiming some assimilation to the Crown for legal purposes.³²³ The Crown Proceedings Act is disappointing in two respects. First it is limited in its scope; it seeks only to deal with the amenability to suit of the Crown and certain bodies assimilable to it, and leaves untouched and unreformed the general field of Crown immunity. Secondly, it makes no contribution to the logically prior general question of defining those bodies which for particular legal purposes may be assimilated to the Crown. Instead of specifying *indicia* of Crown attributes which would at least have made more rational and predictable what is presently an intractable and unsatisfactory area of administrative law,³²⁴ the Act offers a number of definitions of the Crown which are either self-evident, *e.g.*, “Crown means . . . (b) any Minister of the Crown in right of this State”,³²⁵ or circular, *e.g.*, “The Crown means— (a) the Crown in right of this State . . . (c) any instrumentality or agency of the Crown in right of this State.”³²⁶ Accordingly the question whether a particular statutory corporation comes within the ambit of the present legislation or is for that matter entitled to claim any of the other numerous advantages deriving from the “Shield of the Crown” remains as complex and uncertain as ever. So far this aspect of the legislation has attracted only one case of any significance. In *Commercial Oil Refiners Pty. Ltd. v. The State of South Australia*³²⁷ the question was whether the Fire Brigades Board was “an instrumentality or agency of the Crown” for the purposes of s.4 of the Act. In essence “an instrumentality or agency of the Crown” was characterised as an entity which may properly be assimilated to the Crown.

318. *E.g.*, the Crown Proceedings Act, 1958-1969 (Vic.), s.23(1)(b) provides that the Crown shall be liable in tort “as nearly as possible in the same manner as a subject is liable”; other Australian Crown Proceedings statutes are analysed on this point in Hogg, *op. cit.*, 79-80.

319. *Supra*, n.314.

320. Hogg, *op. cit.*, 80. On the recognized heads of liability see *id.*, 81-104.

321. C.P.A., s.10(2).

322. See Hogg, *op. cit.*, 204.

323. *Wynyard Investments Pty. Ltd. v. Commissioner for Railways (N.S.W.)* (1955) 93 C.L.R. 376, 392-393.

324. For criticism see Hogg, *op. cit.*, 213-214.

325. C.P.A., s.4(1).

326. *Ibid.*

327. (1974) 9 S.A.S.R. 88.

This obviously circular³²⁸ definition was, of course, the direct result of the Act's failure to indicate any further specific criteria to assist in the process of identification. The chosen expression is one of denotation only, not of connotation. The Act in this area, therefore, becomes wholly dependent upon an appreciation of the complexities and inconsistencies of the current tests for determining when a body is "the Crown" or otherwise to be assimilated to the Crown. These the court examined and applied with a sound appreciation of the difficult questions involved,³²⁹ concluding that the Fire Brigades Board was not within any definition of the Crown in the Act. Their most significant contribution to this difficult area deserves to be quoted (and heeded!):

"Perhaps it would be better, if this area of the law were to be reviewed, not to characterize corporations as being the Crown in respect of certain activities but as not being the Crown in respect of certain other activities. It seems to us more logical to specify what privileges and immunities if any shall apply to a Crown instrumentality in respect of that area of its activities which may for present purposes be loosely called its ordinary commercial activities. It may well be that the differences between trading corporations which are Crown instrumentalities and those which are not should as a matter of principle be reduced to the greatest extent politically appropriate. But these are mere speculations and we are clearly not free to give effect to them."³³⁰

328. Its "circuitousness" was openly conceded by the Court: *id.*, 93.

329. *Id.*, 93-99.

330. *Id.*, 94.