of supporting subsisting rights in land, there is little preparedness to go further and recognise Aboriginal customary laws in the area of criminal law. The High Court in this area has clearly baulked 'at recognising, without legislative mandate, Aboriginal law as an independent and autochthonous system of legally enforceable rules, surviving the assumption of sovereignty'.[11] It is disappointing that such a significant matter was determined on an interlocutory application before a single judge of the High Court.

There have, of course, been numerous cases in which Australian Courts have acknowledged the continuing reality of Aboriginal law, including Aboriginal laws in what the Australian law defines as the 'criminal' domain. The ALRC Report No.31 on *Recognition of Aboriginal Customary Law*[12] identified a number of areas relating to liability and sentencing where Aboriginal law has been recognised. The difficulty in the Walker case appears to have been that it raised issues of sovereignty.

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References

1. See Order 26 rule 18(1).
2. See Order 26 rule 18(2).
3. See *Coe v The Commonwealth of Australia* (1979), 53 *ALJR* 403 at 408; 24 *ALR* 118 at 129.
4. See (1978) 52 *ALJR* 334; 18 *ALR* 592.
5. *Mabo v Queensland [No. 2]* (1992) 175 *CLR* 1.
6. See (1993) 68 *ALJR* 110 at 115; 118 *ALR* 193 at 200.
7. *Commentaries*, 5th ed. (1773) Bk I, ch. 4 at 107.
8. *Cooper v Stuart* (1889) 14 *AC* 286.
9. See *Mabo v Queensland [No.2]* (1992) 175 *CLR* at 34.
10. See *Racial Discrimination Act* 1975 (Cth), s. 10.
11. K.E. Mulqueeny, 'Folk-law or Folklore: When a Law is Not a Law. Or is it?', In: M.A. Stephenson and Suri Ratnapala, (eds), *Mabo: A Judicial Revolution* 1st ed., Brisbane: University of Queensland Press, 1993, p 178.
12. Australian Law Reform Commission, *Recognition of Aboriginal Customary Law*, Report No.31, AGPS, Canberra, 1986 (recently reprinted).

ATSIC

Money and power

PETER POYNTON examines ATSIC's defunding powers

ATSIC's impartiality has been impugned in two recent cases. *In ATSIC v Jurkurrakur Aboriginal Resource Centre, in Liq* (1992) 10 ACSR 121, Asche J ordered a liquidator to step down because 'an appearance of partiality or conflict of interests' was able to be construed from the circumstances (at 124). ATSIC was to be the major beneficiary in any distribution of assets and ATSIC's account represented 10% of the income of the Alice Springs office of the liquidator's employers. An apprehension of bias could clearly be made out.

Western Districts Foundation for Aboriginal Affairs (The Foundation) v ATSIC[1] concerned ATSIC defunding an Aboriginal Corporation in Western Sydney. The Foundation alleged bad faith and unreasonableness on the part of ATSIC. One element of the bad faith argument was that ATSIC bureaucrats had stalled funding to the Foundation purposively, to build up the ability of a competitor organisation to assume delivery of some welfare services the Foundation provided. The Foundation also alleged that ATSIC bureaucrats had withheld the findings of a financial review on the Foundation's workings. Wilcox J accepted that the delay in releasing the report might have been mere bureaucratic caution, not unfairness, describing the delay as 'unfortunate', and adding:

> Under the circumstances, I think the report should immediately have been delivered to the Foundation, with an invitation to comment. [at 18]

Without wishing to ascribe *mala fides* to the bureaucracy, stalling is a favourite game and time-worn tactic often used to the disadvantage of parties with whom bureaucrats differ.

Wilcox J had other peremptory advice for the ATSIC bureaucracy. He reminded them that their role 'is not to save money but to ensure that it is effectively expended', and that ATSIC's responsibility is:

> . . . not to any particular grantee or organisation, but to the public; *to the people that the organisations were supposed to assist* and to the taxpayers, throughout Australia, who provide the funds available for distribution.' [at 18; emphasis added]

Going on, Wilcox J pointedly noted:

> Of course, the adoption of a fair procedure does not negative bad faith if a decision maker is in fact influenced by an improper motive. [at 19]

Unreasonableness, a ground Australian courts tend to 'treat with circumspection',[2] was the second ground in the Foundation's case. It is arguably the most powerful ground of administrative review as a favourable finding negates the merits of a decision on a wide variety of grounds, including: misdirection; improper purpose; disregard of relevant considerations; and advertence to immaterial factors;[3] the decision being returned to the decision-maker for reconsideration, 'according to law' as laid down in the given judgment.[4]

Wednesbury[5] unreasonableness has been used in England to overturn a politically motivated decision disguised in administrative drag. In *Wheeler v Leicester City Council* [1985] AC 1054 the Leicester City Council attempted to force the local football club to pressure some of its players not to join a rugby tour of South Africa in support of a sports boycott against apartheid. Dissatisfied with the football club's response, the Council refused the club leave to utilise its football ground, which use it had extended to the club for many years under statutory discretionary power. On appeal, the House of Lords found that the Council was attempting '. . . to force acceptance by the club of their own policy on their own terms . . . ', which, in combination with the threat of a sanction, came within the pale of *Wednesbury* unreasonableness (at 1078).

The focus in such cases is often the competing elements of social policy, '. . . a conflict which pervades the whole spectrum of judicial review on the ground of unreasonableness'.[6] The Australian judiciary have been reluctant to address competing public policy agendas and their impact on people. In discussing public policy considerations in relation to legitimate expectation, however (and the point is equally applicable to unreasonableness), Mason CJ has boldly declared unlocked Brennan J's 'gate which shuts the court out of review on the merits',[7]and taken up arms against a sea of troubles.[8] He has held:

> It is possible perhaps that there may be some cases in which substantive protection can be afforded and ordered by the court, without detriment to the public interest intended to be served by the exercise of the relevant statutory or prerogative power.[9]

Although Brennan J[10] and some other judges oppose this 'expansion' of the judicial role, it is to be hoped that Mason CJ's principled stand will survive his term at the bench and in time emerge as the rule of the Australian common law.

It may be that the antipodean judicial imagination is strapped by the supposed tyranny of Australia's distance from other legal systems, and that parochialism is the basis of the judiciary's reluctance to undertake substantive review of administrative decisions. Such is happily not the case in England, where the influence of EC administrative law is increasing,[11] and unreasonableness, fairness and legitimate expectation have all emerged as grounds for judicial action against injustices perpetrated by statutory administrations. As the executive state unceasingly erodes parliamentary sovereignty,[12] perhaps the Australian judiciary will adopt principles that broaden the scope for substantive review of administrative decision and chart a principled course that prevents them going adrift on Brennan J's 'featureless sea of pragmatism'[13] as they serve the people and the public interest, protecting both from the administrative pirates roaming that sea.

Wilcox J cites Lord Diplock in *Bromley London Borough Council v Greater London Council* [1983] 1 AC 68 at 821, where unreasonableness was rephrased as referring to:

> . . . decisions that, looked at objectively, are so devoid of any plausible justification that no reasonable body of persons could have reached them.

Wilcox J says that he would have to hold the decision appealed against 'irrational' to find it unreasonable. He finds problems with the constitution, membership, management and staff recruitment procedures of the Foundation, and predicts that ATSIC would face 'substantial burdens' on its resources in negotiating solutions with the Foundation's Directors. In so finding, Wilcox J impliedly impugns the financial integrity and competence of the Foundation, insisting that ATSIC grantees 'be beyond financial reproach' (at 20).

A major criterion in ATSIC's defunding the Foundation was that its activities overlapped those of a rival welfare organisation, the Blacktown Aboriginal Corporation (BAC), which the ATSIC management was apparently grooming to take over the Foundation's functions. Wilcox J went to some lengths to explain that if none of the above problems existed:

> . . . it would seem harsh for ATSIC to withdraw funding from the Foundation because there was an overlap between its services and those now provided by a recently formed organisation. [at 20]

He went on to note that the BAC's operations were geographically confined whilst the Foundation operated over a much wider area, and that, unless there was a major expansion in the reach of BAC, if the Foundation's funding were permanently withdrawn, '. . . many Koori clients are likely to be left without assistance'.

This being the only retrievable ATSIC defunding case, the dicta and rulings of Wilcox J must stand as indicators of the parameters within which both ATSIC and its grantees ought to operate.

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2. McLachlan, 'Substantive Fairness: Elephantine Review of Guilding Concept?', (1991), 2 *PLR* 19.
3. Peiris, G.L., 'Wednesbury Unreasonableness: The Expanding Canvas', (1987), 46 *CLJ* 54.
4. For an Australian example, see *Chan v Minister for Immigration and Ethnic Affairs*, (1989) 63 ALJR 561.
5. *Associated Picture Houses Ltd. v Wednesbury Corp.* (1948) 1 KB 223.
6. Peiris, above, p.54.
7. *AG (NSW) v Quin*, (1990) 170 CLR 1 at 40 per Brennan J.
8. Shakespeare, *Hamlet*, III.I.59.
9. *AG (NSW) v Quin*, above, at 23.
10. *AG (NSW) v Quin*, above, at 39; Brennan J has described merit review as 'a stalking horse for excesses of judicial power'; Gaudron J has likewise expressed herself wary of such a move: *Haoucher v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 648 at 671-676.
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12. O'Brien, P., and Webb, M., *The Executive State: WA Inc. and the Constitution*, Constitutional Press, Perth, 1991.
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