

Natural Justice and the New Property

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INTRODUCTION — ADMINISTRATIVE LAW AND THE IMPORTANCE OF ANNIVERSARIES

In recent years, there has been an increasing trend towards commemoration in Australian public law. There have been, for instance, conferences to commemorate the seventy-fifth anniversary of the *Engineers' Case*,¹ the twentieth anniversary of the dismissal,² and the tenth anniversary of Lionel Murphy's death.³ The prospective centenary of federation (in conjunction with, one supposes, the debate about the republic) has rekindled an interest in the proceedings of the constitutional conventions and in the lives of key participants in the foundation of the Commonwealth.⁴ But for the most part, it has been *constitutional* scholars who have been engaged in the retrospection. The province of Australian administrative lawyers, it seems, remains the present and the future.⁵

In some ways, this is perfectly understandable. While it can no longer really be called 'new', the administrative law that we practice and study in Australia is still in its adolescence and there remain significant parts of legislation whose bounds are yet to be fully explored. Recent parliamentary initiatives in the field (most notoriously at the moment, the moves to reintroduce privative clauses which limit access to judicial review) leave no question for the administrative law scholar that there are many pressing issues with which to concern herself in the present day. Yet it is a pity that the administrative law community tends not to take more time to pause and reflect on the past. To take today's issue of pressing concern, for instance, were we as a group less agnostic about our history, we would realise that the battle over the privative clause is one that has been fought (and lost by the Executive) many times before. Superior courts in the common law world have *never*, for very long at least, capitulated to any attempt by the government to restrict in a wholesale way access to judicial review.⁶ The same observation can be made for attempts to 'de-legalise'

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¹ *Amalgamated Society of Engineers v Adelaide Steamship Co* (1920) 28 CLR 129. See M Coper and G Williams, (eds) *How Many Cheers for Engineers?* (1997).

² See M Coper and G Williams, (eds), *Parliament, Power and the People* (1997).

³ See M Coper and G Williams, (eds), *Justice Lionel Murphy: Influential or Merely Prescient?* (1997).

⁴ *Vide* the work of the Constitutional Centenary Foundation. See also the reissue of A Inglis Clark, *Studies in the Australian Constitution* (1901) and W Harrison Moore, *The Constitution of the Commonwealth of Australia* (2nd ed, 1910), as well as the publication of H Irving, *To Constitute a Nation: a cultural history of Australia's constitution* (1997); M Glass, *Charles Cameron Kingston: Federation Father* (1997). Consider, too, the publication of the new journal series, *The New Federalist*.

⁵ There were, it is fair to mention, conferences held to commemorate the anniversaries of the 'new' administrative law: one to commemorate the twenty-fifth anniversary of the issue of the report of the Kerr Committee and another to celebrate the silver jubilee of the Administrative Appeals Tribunal. The fact is, though, that even these conferences tended to consider legal issues either contemporarily or prospectively, rather than historically.

⁶ See I Holloway 'A Sacred Right: Judicial Review of Administrative Action as a Cultural Phenomenon' (1993) 22 *Manitoba L Rev* 28, and, generally, M Aronson and B Dyer, *Judicial Review of Administrative Action*.

tribunals. A study of history shows that a creeping judicilisation has always followed upon the creation of new forms of deliberative administrative decision-making bodies.⁷ An awareness of legal history, in other words, increases our depth of knowledge of the field.

There is, though, a more profound reason for legal scholars to exhibit a greater interest in the history of administrative law. That is that historical sensitivity can help us better understand the nature of our legal culture. As the American historian Carl Schorske recently put it, 'if we locate ourselves in history's stream, we can begin to look at ourselves . . . as conditioned by the historical present as it defines itself out of — or against — the past'.⁸ This observation is particularly apposite with respect to administrative law. As Harlow and Rawlings once reminded us, 'behind every theory of administrative law, there lies a theory of the state'.⁹ When we describe the doctrines of administrative law of today, we are offering a snapshot of today's accepted assumptions about the nature of civil governance. If we go a step further, and trace the *evolution* of administrative law doctrines, we are assembling something much more revealing: a portrait — a kind of Bayeux Tapestry — of our society as it has progressed through the ages.

Nevertheless, it is comparatively seldom that the mind of the administrative lawyer engages in any sort of historical reflection. She or he may work on a daily basis with the tools of history (in the form of previously decided cases), but the reality of modern-day legal practice is that lawyers' minds tend to be focussed on the immediate. The working lawyer's concern is with the law as it is today, for that is the thing on which clients seek advice. Thus, rather than being concerned with legal history properly described, we tend instead to engage in antiquarianism — the simple interest in old things for the sake of their age.¹⁰ The notion, for example, that the more hoary a precedent becomes, the more venerated it ought to be, is an antiquarian one. In a similar vein, when I teach undergraduate administrative law students, I often say (in a grandiloquent sweep, I must confess) that the writ of certiorari has been in use as a means of checking the executive for over half a millennium. Taken alone, this sort of a statement reflects an antiquarian view of the law. It is only to describe the choices and values of departed societies. It does not say anything at all about the values and prejudices of our own — except, possibly, the fact that we adhere to an inherently conservative legal system.

Now, there is nothing wrong with antiquarianism *per se*. For those interested in legal anthropology, antiquarianism must be the chief point of departure for research. Furthermore, in a reactive, inherently conservative¹¹ legal system such as the common law, it is understandable that the lawyer's inclination is to concentrate on the present, and to make use of the past as a means of providing the governing word on what the substantive law of today is. In a field like administrative law, where the

⁷ On this, see generally, I Holloway, 'The Transformation of Canadian Administrative Law' (1993) 6 *Can J Admin Law and Practice* 295.

⁸ C Schorske *Thinking With History: Explorations in the Passage to Modernism* (1998).

⁹ C Harlow and R Rawlings, *Law and Administration* (1984) 1.

¹⁰ For more on antiquarianism as false legal history, see Holdsworth, *Some Lessons From Our Legal History* (1928) 4–9.

¹¹ Because the past — in the form of previously decided cases — is the yardstick against which the propriety of present-day conduct is measured.

remedies available to the judiciary still bear the stamp of ancient practice,¹² a degree of familiarity with antiquity — a kind of ‘*certiorari* and all that’ approach to law — is a necessary thing.

Viewed in these terms, the commemoration of legal anniversaries can be a double-edged sword. On one hand, it can run the risk of amounting to little more than an encouragement to antiquarianism — to what Selden once called ‘the sterile part of antiquity’.¹³ On the other, anniversaries can also serve as the milestones of our legal evolution; and as the departure points for journeys of social and legal introspection. They can both offer us a lesson in doctrinal humility — the point being that there really is very little of controversy in public law that can be said to be truly new — and provide us with an occasion for contemplation on the relationship of the law’s evolution to the evolution of society.

One anniversary which ought to have been such a milestone occurs this year. 1998 is the thirtieth anniversary of the judgment of the High Court in *Banks v Transport Regulation Board (Victoria)*.¹⁴ Viewed from the standpoint of today, when we are concerned with such weighty substantive issues as the very foundations of our system of property ownership and the basis for our system of constitutional government, the anniversary does not seem like one much worth noting. Indeed, the only thing which strikes one when reading *Banks* today is its seeming unsingularity. In fact, the sole thing which might impress the casual reader from a review of the case report is that the litigation actually made it to the High Court. As for the holding — frankly, the law as expounded by the Court in *Banks* seems to the current generation of administrative lawyers trite in the extreme.

Simply put, *Banks v Transport Regulation Board* involved the question of whether the Victorian Transport Regulation Board was entitled to revoke, on the basis of non-compliance with its conditions, the licence of a taxi-cab driver without first putting the specific allegations of non-compliance to him, and without giving him a chance to refute them. In holding that such a revocation was illegal and that *Banks* had in the circumstances been denied natural justice, the High Court was mirroring a position on natural justice taken by the House of Lords nearly four years beforehand in *Ridge v Baldwin*.¹⁵ But in doing so, the Court was heralding a revolution for Australian administrative law. For one thing, in its judgment in *Banks*, the Court overruled one of its own decisions of just a few years standing,¹⁶ at a time when such things were not so common.

Even more significantly, the Court in *Banks* came expressly, if only indirectly, to embrace a profound change in thinking about the relationship between the citizen, the state, and public wealth that had been brewing in the common law world for some time. In so doing, it also set the scene for what Australian administrative lawyers of today would see as the controversial issues: the nature of, and the basis for, the doctrine of ‘legitimate expectation’; the clouding of the boundary between merit and

¹² This is even so in the case of s 16 of the *ADJR Act 1977* (Cth). See *Park Oh Ho v Minister for Immigration and Ethnic Affairs* (1989) 167 CLR 637.

¹³ Quoted in Holdsworth, *op cit* (fn 10) 6.

¹⁴ (1968) 119 CLR 222.

¹⁵ [1964] AC 40.

¹⁶ *Testro Bros v Tail* (1963) 109 CLR 353.

judicial review; and the limits of judicial power under the Commonwealth Constitution. The aim of this article is to explore the jurisprudential line which led up to *Banks*, much of which is all but forgotten today, and to consider the judgments in *Banks* in their proper context. The contention is that when viewed according to its *own* terms, rather than today's — when seen, in other words, in the context of the accepted assumptions of Anglo-Australian administrative law at mid-century — *Banks v Transport Regulation Board* stands out as a truly remarkable decision; a judgment representing what the American legal scholar Bruce Ackerman would call a 'constitutional moment'.¹⁷ It is for that reason that its anniversary is one worth marking.

THE NEW PROPERTY

In April 1964, Professor Charles Reich of Yale Law School published an article entitled 'The New Property'.¹⁸ It was part of a series of pieces that he wrote in the early to mid-1960s in which he explored the more jurisprudentially troubling side of the welfare state (or the 'public interest state', as he termed it).¹⁹ However, it is wrong to think of Reich's work as negatively reactionary. On the contrary, he regarded the use of the administrative apparatus as an instrument of wealth distribution as a good thing. His concern had to do rather with the way in which the law — which he viewed in a Hobbesian fashion as the shield for the citizen against the potentially soul-less power of the state — had allowed itself to fall out of step with reality of government; and had thereby allowed to become perilously close to irrelevant. In Reich's view, the problem was that the new role for the executive state as guarantor of what Sir Isaiah Berlin described as 'positive liberties'²⁰ had not been accompanied by an assumption of new responsibility by the judicial branch.

In this sense, 'The New Property' and its sister pieces represented an important response to the sort of administrative legal scholarship that had emanated in the United States from the New Deal,²¹ and in the British Commonwealth from the London School of Economics.²² This is because the courts had, consciously or not, adopted the distinction between legally enforceable 'rights' and un-enforceable 'privileges' or 'licences' that Hohfeld had described in his famous article.²³ In the Hohfeldian analysis, only the former could command any correlative duty — for our purposes, any correlative duty on the part of the state to accord natural justice. In Reich's opinion, such a viewpoint could no longer stand. Or, at least, it could no longer serve as the foundation upon which procedural rights *vis à vis* the administration could be based.

¹⁷ *Reconstructing American Law* (1984).

¹⁸ 73 *Yale LJ* 733.

¹⁹ *Ibid.*

²⁰ 'Two Concepts of Liberty', in *Four Essays on Liberty* (1969), 131 *ff.*

²¹ See, for example the writings of Felix Frankfurter and John Landis.

²² For an interesting discussion of the link between the LSE and the early administrative law scholarship, see M Loughlin, *Public Law and Political Theory* (1992) 190–205.

²³ 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1913) 23 *Yale LJ* 16.

In Reich's view, without an effective means for the law to check executive power, the public interest state would give rise to what he called a 'new feudalism'.²⁴ This is because American (and, by extension, Anglo-Australian) society retained the notion of individual dominion as the cornerstone of its conception of free humanity. Without the security of social tenure conferred by property rights, or an equivalent thereto, humankind could easily find itself at the mercy of a new feudal despot:

The institution called property guards the troubled boundary between individual man and the state. It is not the only guardian; many other institutions, laws and practices serve as well. But in a society that chiefly values material well-being, the power to control a particular portion of that well-being is the very foundation of individuality.²⁵

Similarly:

Property is a legal institution the essence of which is the creation and protection of certain private rights in wealth of any kind. One of these functions is to draw a boundary between public and private power . . . Thus, property performs the function of maintaining independence, dignity and pluralism in society by creating zones within which the majority has to yield to the owner.²⁶

In stating this, he noted that it is important to remember that property is a creature of law — and hence, the responsibility of the law-givers to safeguard:

Wealth or value is created by culture and by society; it is culture that makes a diamond valuable and a pebble worthless. Property, on the other hand, is the creation of law. A man who has property has certain legal rights with respect to an item of wealth; property represents a relationship between wealth and its 'owners'.²⁷

The problem, as Reich saw it, was that '[g]overnment largess [*sic*] is plainly "wealth", but it is not necessarily "property"'.²⁸ Simply put, when *choses* of value were not owned by their holders, but instead held upon conditional and revocable grant from the state, the effect was to recreate the medieval relationship of feudalism. The extent of state involvement in modern life is what gave rise to the sinister aspect of welfare-ism: 'the doctrine that the wealth that flows from government is held by its recipients conditionally, subject to confiscation in the interest of the paramount state'.²⁹ To put it more crudely, Reich's concern was that when peoples' livelihoods have come to depend upon the active patronage of government, the failure of the law to appropriate to itself a role in the regulation of the patronage — the treatment of the government's activity with respect to wealth distribution as non-justiciable 'largesse' rather than a new form of justiciable entitlement, in other words — was to undermine the very foundations upon which our vision free society was built.

²⁴ Op cit (fn 18), 768.

²⁵ Id 734.

²⁶ Id 771.

²⁷ Id 739.

²⁸ Ibid.

²⁹ Id 768.

The solution, therefore, was for the law to update the way in which it viewed the relationship between the citizen and the government; for it to recognise a 'new property':

There can be no retreat from the public interest state. It is the inevitable outgrowth of an interdependent world. An effort to return to an earlier economic order would merely transfer power to giant private governments which would not rule in the public interest, but in their own interest. If individualism and pluralism are to be preserved, this must be done not by marching backwards, but by building these values into today's society. If public and private are now blurred, it will be necessary to draw a new zone of privacy. If private property can no longer perform its protective functions, it will be necessary to establish institutions to carry on the work that private property once did but can no longer do.³⁰

In many ways, Reich's work reads remarkably freshly even now. His discussion of the blurring between public and private could easily come from the pen of many of today's feminist scholars. His conclusion that one could not turn the clock back — that to do so would merely be to transfer power to giant private 'governments' — rings very familiar to anyone interested in the debate over the merits of economic rationalism. But the real genius of Reich's scholarship from an administrative law perspective was that it captured so well the challenge to which the system had to rise if it was to survive as anything more than a relic of a pre-Diceyan age of local government. At the time that Reich was writing, administrative law was in the doldrums. So much so that in the first edition of his classic work, published in 1958, de Smith felt confident in predicting that '[j]udicial self-restraint has won a decisive victory over judicial activism in a field where the contest might well have been an even one'.³¹ The challenge of the 1960s, the beginning of the post-modern evolution towards rights consciousness, was to re-assert an active place for the judiciary, without undermining the benefits that collectivist legislation was intended to provide.

THE OLD NATURAL JUSTICE

The notion of 'natural' justice is as old as the western tradition of law itself. As an integral part of the common law tradition, it can trace its roots back several centuries. Until relatively recently natural justice was part of a doctrine of much broader reach — the idea of 'natural law'. In a way, natural law was the original English constitution. The notion that there were some things that one simply did not do — even if one were King — unless one wished to suffer eternal damnation, was the first limit on the power of government. This limit accompanied the gradual shift in the centre of power from the Crown to Parliament. When read in context, the famous passage in *Dr Bonham's Case*, that courts could declare void Acts of Parliament which were 'against common right and reason', represents a claim about the primacy of judicially enforced natural law.³²

³⁰ Id 778.

³¹ S A de Smith, 'Constitutional and Administrative Law' (1958) 18.

³² (1610) 8 Co Rep 113b, 118a; 77 ER 646, 652.

Even more straightforward in this respect — and more relevant to a discussion of natural justice — was the judgment in *Day v Savadge* that ‘an Act of Parliament made against natural equity, as to make a man judge in his own cause, is void in itself’.³³ The sheer baldness of an assertion like this was not to be seen again in English law,³⁴ but the sentiment, and the confidence with which it was expressed, is significant, for it provides evidence that in fictionalising the notion of parliamentary supremacy, today’s judges are carrying on a tradition of public law which pre-dates the constitutional settlement. The judgement in *Day v Savadge* is also important in that it provides one of the earliest examples of the link between natural law (though it was described there as ‘natural equity’) and the bias rule, one of the two planks of today’s doctrine.³⁵

The case which is most often cited in illustration of the early, ‘unconstructed’ way in which natural justice was seen to fit into the scheme of things is *Cooper v Wandsworth Board of Works*,³⁶ in which Byles J famously held that where a statute permitting interference with private property rights did not require a prior hearing, ‘the justice of the common law will supply the omission of the legislature.’³⁷ But the pre-World War I decision of the High Court in *Municipal Council of Sydney v Harris*³⁸ provides an Australian example of the very same sentiment. In holding that a municipal council was obliged to provide a hearing before charging a property owner for council-ordered repair work, Griffith CJ, for instance, stated simply:

The general rule of law is that a person so circumstanced — that is, who is liable to be called upon by some public authority to incur a heavy burden or loss — is entitled to be heard and to have the opportunity of giving reasons why such an order should not be made and enforced against him.³⁹

He continued:

[the obligation to observe natural justice] is not confined . . . to strictly judicial proceedings, but applies to any case in which a person or public body is invested with authority to decide. Whenever a public body is entrusted with power to decide whether a person shall suffer pecuniary loss the principle applies.⁴⁰

³³ (1614) Hob 85, 87; 80 ER 235, 237.

³⁴ Though as late as 1824, in *Forbes v Cochrane* 2 B & C 448, 469–470; 107 ER 450, 458–459, Best J suggested that in the case of slavery, natural law could still trump the parliament. After referring to two West Indian statutes which permitted the sale of slaves, he said:

Both these statutes, however, were local in their application being confined to the West India Islands only. I do not, therefore, feel myself fettered by anything expressed in either of them . . . If indeed there had been any express law commanding us to recognise those rights we might then have been called upon to consider the propriety of that which has been said by the great commentator upon the laws of this country: ‘That if any human law should allow or injoin us to commit an offence against the divine law we are bound to transgress that human law’ . . . We have the authority of the civil law for saying that slavery is against the rights of nature.

³⁵ The link between natural law and the other present-day element of natural justice — the so-called ‘hearing rule’ — was explicitly made in the famous case of *Dr Bentley*, in which Fortescue J is reported as having said that ‘The laws of God and man both give [a] party an opportunity to make his defence, if he has any’ (*R v Chancellor of the University of Cambridge* (1723) 1 Str 557, 567; 93 ER 698, 704).

³⁶ (1863) 14 CB(NS) 180; 143 ER 414, 420.

³⁷ (1863) 14 CB(NS) 180.

³⁸ (1912) 14 CLR 1.

³⁹ (1912) 14 CLR, 1, 5.

⁴⁰ (1912) 14 CLR, 1, 7–8.

Yet despite the vigour of the Chief Justice's formulation, beginning in the early years of this century, the doctrine of natural justice had started into a decline, so that, as de Smith once put it, by the 1950s, 'valedictory addresses to the *audi alteram partem* rule in English administrative law were becoming almost commonplace'.⁴¹

There were several factors which contributed to this.⁴² One, of course, was the fact that more often in this century than at any other time since the demise of feudalism as a working system, society has been mobilised *en masse* in the interests of the state. Ours has been the century of both total war and cold war, and of citizen armies. It has also been the century of Great Depression, long-term recession and jobless recovery. The existence of a succession of perceived national crises — which stretched in a near un-broken line from about 1903⁴³ to the mid-1960s⁴⁴ — served to give the state a much greater claim on the private lives of the citizenry than it had previously had.

A second factor, which in fact is related to the first, is the increased trend towards urbanisation that took place in the nineteenth and twentieth centuries. Simply put, people were living in much closer contact with one another than in the past. So even if it had been true at some point in the past that man could be an island, this became quite impossible after he forsook the bush for the city. And the inevitable offshoot of the great population shift to the cities was a growth in governmental power: both as planner of public works, and as arbiter of disputes over competing claims on public wealth.

The third cause for the expansion of government in this century is related to, and in a philosophical sense underlies, the first two. As Friedmann described it, there was in the modern era 'an evolution of social philosophy'.⁴⁵ Simply stated, the advent of the modern era brought about an amendment to the terms of the old whiggish conception of the social contract. Dicey discussed this in his work *Law and Public Opinion in the Nineteenth Century*.⁴⁶ He dated the naissance of the change earlier, to the publication of John Stuart Mill's *Political Economy*,⁴⁷ with its attempt to marry economic concerns with concerns of social welfare, but in his view in the modern era, 'an alteration becomes perceptible in the intellectual and moral atmosphere of England'.⁴⁸ Dicey described this alteration as the 'growth of collectivism', and he attributed it to a combination of moral philanthropism⁴⁹ and perceived commercial necessity.⁵⁰ The result was a decided push towards executive-empowering legislation

⁴¹ de Smith, 'Judicial Review of Administrative Action' (2nd ed, 1968) 154.

⁴² The first three of these factors were discussed by W Friedmann, in an article published in 1951 in the *Canadian Bar Review*: 'Judges, Politics and the Law', 29 *Can Bar Rev* 811.

⁴³ With the publication of Erskine Childers' novel *The Riddle of the Sands*, which first raised a popular fear in Great Britain of German imperial expansionism.

⁴⁴ The 1960s are chosen here because viewed with the hindsight of thirty years, they seem to represent a sea change in the attitudes of people in the Western world to authority. Perhaps a later generation will see it differently.

⁴⁵ Op cit, (fn 42) 822.

⁴⁶ London, 1905 (2nd ed, 1914).

⁴⁷ J S Mill, *Principles of Political Economy With Some of Their Applications to Social Philosophy* (1909).

⁴⁸ Dicey, op cit (fn 46) 245.

⁴⁹ Id lxi:

In truth a somewhat curious phenomenon is amply explained by the combination of an intellectual weakness with a moral virtue, each of which is discernible in the Englishman of today.

⁵⁰ Id 247.

(which, as all know, Dicey thought anti-constitutional⁵¹), and away from the emphasis on local regulation that had been the feature of welfare provision up to and including late century.

A fourth factor, which stemmed from the Victorian obsession with progress, was an extreme faith in science, and the development of a cult of expertise. This spirit was captured nicely by an American political slogan of the period: 'There is no Republican way to pave a road or Democratic way to pave a road. There is just the *right way*'. This sounds positively pre-post-modernist to us, but throughout the latter half of the last century and the first half of this one, it was an article of faith that the 'scientific' application of non-partisan expertise could remedy most of society's ills.

Together, these three shifts drove governments to increase their level of activity, and their consequent output. But to cope with the new pressures and new demands, governments demanded the power to *plan*, rather than merely to react:

The planned state is today an irrevocable reality in modern society, far more than party controversies would admit. Every modern state exercises a multitude of supervisory regulating and managing activities which no modern government, whatever its complexion, could afford to drop. The notion of a government which concerns itself with military defence, foreign affairs, police and legal justice, is now a thing of the past.⁵²

This concern was perhaps even more pronounced in Australia than elsewhere.⁵³ Indeed, the federation movement itself was arguably a manifestation of the feeling that in the modern polity, planned efficiency was more important than old-fashioned notions of individual negative liberty. In an article written just two years after federation, Harrison Moore alluded to this:

The statute book abounds with instances not merely of new functions of administration cast upon old or new authorities, but with powers of a very far reaching kind. This is largely due to a change in the working of our constitutional forces. During the nineteenth century, the preparation of legislation has come to be one of the principal duties of the Government, and it takes its modern form from the fact that it is no longer devised by a body distinct from and jealous of the Executive, but expresses to a very great extent the views of the Executive as to the public needs. Thus we have in an ever increasing degree the delegation of a power of supplementary legislation to the Government . . .⁵⁴

⁵¹ See generally, *The Law of the Constitution* (1885 and later editions).

⁵² Friedmann, *The Planned State and the Rule of Law* (1948) 5.

⁵³ See, eg, W G K Duncan, 'Modern Constitutions', in *Studies in the Australian Constitution*, (1933) 10:

[T]he whole conception of government, and governmental functions, has changed during the course of this century. The state can no longer be conceived as a policeman 'keeping the ring' and enforcing a few Marquess of Queensberry prohibitions. The state must now assume an active and positive role in the regulation of the whole social process. In particular, it has been forced to undertake an elaborate network of 'social services' in order to mitigate the consequences of economic and social inequality.

⁵⁴ 'The Enforcement of Administrative Law' (1903) 1 *Comm L Rev* 13, 14. A slightly different twist was placed on the rationale for the 'new' legislation in a piece by a Canadian scholar:

[There is a] growing conviction in Canada, that the development of new industries, natural resources, colonisation, transportation, communications, due to the vastness of the country, and the unremunerative character of these enterprises and undertakings in their early stages, imposes an obligation on the governments to aid and to supervise.

W P M Kennedy, 'Aspects of Administrative Law in Canada' (1934) 46 *Jurid Rev* 203, 207.

Certainly, it was the case that after federation, the new Commonwealth government embarked upon a programme of regulation with some vigour. Insofar as the hallmark of the modern approach to legislation included, as Moore suggested, the delegation of law-making power to the executive, it is interesting to note that in the first twenty-seven years after federation, the Commonwealth government alone proclaimed no less than three thousand six hundred pages of regulations!⁵⁵

The point is that the legal and political context in which the superior courts faced the modern era was one which was really quite different from that in which the doctrines of judicial control, including the doctrine of natural justice, were developed. Inevitably, this had a significant effect on the way in which judges reacted to natural justice cases. Whereas in the old days, the courts felt more-or-less comfortable in applying the doctrine in a manner unencumbered by technicality, in the twentieth century in particular, they were much more insecure in their role. They now found themselves having to balance their instinctive concern with the fairness of individual treatment against a political admonition to defer to the demands of collective efficiency.

The changing judicial attitudes towards natural justice can be seen in the two (in)famous judgments of the House of Lords in *Board of Education v Rice*⁵⁶ and *Local Government Board v Arlidge*.⁵⁷ In these cases, the Lords displayed a decidedly more deferential tone towards the executive, which involved a relaxation of the actual procedural requirements associated with the doctrine of natural justice. As Stevens said in his classic study of the House of Lords, these cases 'removed any serious threat that the courts might exercise even procedural due process over departments of the central government'.⁵⁸ The thing which served really to cast a pall over the doctrine of natural justice, however, was the 1924 decision of the Court of Appeal in *R v Electricity Commissioners, ex parte London Electricity Joint Committee*.⁵⁹ In a nutshell, *Electricity Commissioners* came to stand for the proposition that in order for writs of certiorari or prohibition to issue — in other words, in order for there to be a *legally enforceable* obligation to observe the rules of natural justice — the administrative entity not only had to have power to affect a citizen's legal rights, but it also had to have had a 'superadded' duty to act judicially.

Atkin LJ's formulation was that the writs of certiorari and prohibition would lie against 'any body of persons having legal authority to determine questions affecting the rights of subjects, *and* having the duty to act judicially' (emphasis added).⁶⁰ The difficulty lay in his use of the conjunction 'and'. This came to be interpreted⁶¹ as being deliberate, and of controlling effect. 'In order that a body may satisfy the required test', Lord Hewart CJ said in *R v Legislative Committee of the Church Assembly; ex parte Haynes-Smith*, 'it is not enough that it should have legal authority to determine questions affecting the rights of subjects; there must be superadded

⁵⁵ K H Bailey, 'Administrative Legislation in the Commonwealth' (1930) 4 ALJ 7, 9.

⁵⁶ [1911] AC 179.

⁵⁷ [1915] AC 120.

⁵⁸ R Stevens, *Law and Politics: The House of Lords as a Judicial Body, 1800-1976*, 192 (discussing in particular, *Local Government Board v Arlidge*).

⁵⁹ [1924] 1 KB 171.

⁶⁰ [1924] 1 KB 171, 205.

⁶¹ In what must be one of the most delicious ironies in the whole of the common law, by Lord Hewart CJ.

to that characteristic the further characteristic that the body has the duty to act judicially.⁶²

In other words, it came to be assumed that in order for the obligation to observe procedural fairness to be triggered, the decision-maker not only had to have the power to call upon a citizen to bear a burden or loss,⁶³ but his decision-making process also had to resemble that of a court. In the case before Lord Hewart CJ, for example, neither the National Assembly of the Church of England nor its Legislative Committee were found to be amenable to the writ of prohibition on the basis that they were engaged in the business of drafting legislation.

NATURAL JUSTICE AS A MORIBUND DOCTRINE

Three cases can be used to illustrate well the state of the Australian inheritance at the dawn of the 1960s. The first is the decision of the House of Lords in the *Stevenage Case*.⁶⁴ In it, the House of Lords adopted an approach which was in some respects quite different from that taken by the Court of Appeal in *Electricity Commissioners*. As in the earlier case, however, the *Stevenage* approach had the effect of significantly limiting the circumstances in which natural justice was seen to be required. Specifically, it used the existence of a statutory decision-making procedure to *negate* the obligation to observe natural justice! Rather than using it as proof of the super-addition — to establish the fact that there existed in the decision-maker a duty to act judicially — the Lords in this case used it to show that there was no such duty.

The litigious context of the *Stevenage Case* is really quite interesting. The case arose out a plan to build a 'new town' after the Second World War. *The New Towns Act* 1946 was part of Britain's post-war reconstruction programme of legislation. The new towns were intended both to provide homes for people who had been bombed out, and to act as a showcase for the Labour Government's agenda of post-war central planning. One of the ideas was to build a series of 'garden towns' away from large population centres, in order to avoid urban sprawl.

Stevenage was a small town north of London, in Hertfordshire, set amidst farmlands, which had been identified as the candidate for the first of the new towns. None of the landowners had indicated a firm desire to sell their land, however. Accordingly, in 1946, just before the *New Towns Bill* received second reading, the Minister of Town and Country Planning visited Stevenage to meet with the landowners, purportedly to discuss their concerns. But by this time, the actual plans for the Stevenage new town were fairly well developed. And in the course of the meeting, the Minister suggested that it would be futile for the property owners to resist

⁶² [1928] 1 KB 411, 415 (holding that the writs of certiorari and prohibition would not issue to stop implementation of the new Prayer Book). His Lordship continued:

The duty to act judicially is an ingredient which, if the test is to be satisfied, must be present. As these writs in the earlier days were issued only to bodies which without any harshness of construction could be called, and naturally would be called Courts, so also to-day these writs do not issue except to bodies which act or are under the duty to act in a judicial capacity.

⁶³ To use the description of Griffith CJ in *Sydney Corporation v Harris*, op cit (fn 38).

⁶⁴ *Franklin v Minister of Town and Country Planning* [1948] AC 87.

the new town idea.⁶⁵ The owners sought to quash the draft Order in Council declaring Stevenage to be a new town on the basis that it had been actuated by bias. In the King's Bench Division, they had succeeded, but the Court of Appeal had held that no bias had been made out.⁶⁶

Rather than affirming the decision of the Court of Appeal, the House of Lords took the opportunity to correct the law, and to hold that the question of possible bias was irrelevant because, in the circumstances, the Minister did not have a duty to act judicially.⁶⁷ Speaking for all their Lordships,⁶⁸ Lord Thankerton said that the Minister's only obligation was to comply with the statutory procedure, which required him to consider all objections raised to a new town scheme (which, the Minister testified in an affidavit, he had done).

In one sense, Lord Thankerton's approach has some logical appeal to it. Insofar as natural justice is a common law bill of procedural rights, the Lord Hewart reading of the *Electricity Commissioners* formulation is problematic. It arguably defeats the purpose of the natural justice requirement if its existence must depend upon the pre-existence of parliamentarily included procedural safeguards. But to take the older approach, such as was seen in *Municipal Council of Sydney v Harris*, and to say that natural justice always applies any time one's rights are proposed to be interfered with, raises serious questions of legitimacy. By what right do the courts impose procedural requirements on the decision-making process if parliament has not done so? One tack is to say that the obligation to observe natural justice arises as a matter of a presumption of statutory interpretation. But it is readily apparent that in many cases this can involve a serious stretching of the interpretive process.

The situation is a perplexing one: if one says that natural justice *always* applies any time that rights are being interfered with, it is difficult to square this with the notion of parliamentary supremacy. If, on the other hand, one takes the line of Lord Hewart in *Electricity Commissioners*, then natural justice arises a matter of presumed legislative intent. But the legislative intent must be evidenced by parliamentary-conceived procedural safeguards. This can mean that in situations which strike the layperson as most deserving of protection, people may find themselves without it. The Thankerton view, in contrast, fits most easily with the basic constitutional premises, but by confining the duty to accord natural justice to the procedures statutorily provided, it would seem to provide the least protection of all!

The second, and formally more significant (since it was binding on Australian courts) of what Professor Wade called the 'twilight' cases,⁶⁹ is the well-known

⁶⁵ Although 'harangue' might be a more accurate description than 'suggest'. The following is an excerpt from the transcript of the Minister's talk with the residents:

I want to carry out a daring exercise in town planning (*Jeers*). It is no good your jeering: it is going to be done (*Applause and boos; cries of "Dictator"*) . . . The project will go forward. It will do so more smoothly and more successfully with your help and cooperation. Stevenage will in a short time become world famous (*Laughter*) . . . [W]e have a duty to perform and I am not going to be deterred from that duty. While I will consult as far as possible all the local authorities, at the end, if people are fractious and unreasonable, I shall have to carry out my duty (*Cry of "Gestapo!"*). ([1948] AC, 90-91).

⁶⁶ (1947) 176 LT 312 (CA).

⁶⁷ [1948] AC, 102.

⁶⁸ Lords Thankerton, Porter, Uthwatt, du Parc and Normand.

⁶⁹ H W R Wade, 'The Twilight of Natural Justice?' (1951) 67 LQR 103.

decision of the Judicial Committee of the Privy Council in *Nakkuda Ali v Jayaratne*.⁷⁰ In this case, the Privy Council held that the Ceylonese Controller of Textiles was not required to observe natural justice in deciding to revoke a licence to engage in business as a fabric merchant.

In revoking the licence, the Controller of Textiles was purporting to act under the authority of the wartime-era Defence (*Control of Textiles*) Regulations 1945, reg 62 of which empowered him to do so where he 'had reasonable grounds to believe that any dealer is unfit to be allowed to continue as a dealer'. The allegation was that Nakkuda Ali had fraudulently falsified his books, so as to be able to unlawfully claim credit from the bank.

Nakkuda Ali's argument of substance, of course, was that he had been denied natural justice. He claimed that he had not been permitted to see the affidavits on file with the Controller, which had presumably been used to counter his own letter of explanation.⁷¹ But to get to the substantive stage of the case, he first had to show that the Controller was amenable to the writ of certiorari — ie that he was engaged in quasi-judicial decision-making and that he had the power to affect Nakkuda Ali's rights.

It was on this point that Nakkuda Ali fell down. He argued that the inclusion of the requirement that the belief of unfitness be 'reasonable' in reg 62 imported an obligation on the part of the Controller to act judicially. This placed the Privy Council on the horns of a dilemma. On one hand, they were anxious to distance themselves from the highly-criticised and disreputed judgment of the House of Lords in *Liversidge v Anderson*.⁷² But on the other, they were concerned (since they were effectively deciding a question of English law⁷³) not to unnecessarily deviate from the principles espoused by Atkin LJ and Lord Hewart.

One cannot help but wonder what the Privy Council's position might have been had the alleged violation of Nakkuda Ali's procedural rights been more egregious (for the record shows that Nakkuda Ali actually knew the substance of the allegations made against him⁷⁴), but in the end, the Board found that the Controller of Textiles did *not* have a superadded duty to act judicially, hence the remedy of certiorari was not available to quash any departure from the obligation to observe natural justice.⁷⁵ In reaching this conclusion, the Board pointed to the fact that the statutory regime did not lay down any procedure at all according to which the Controller was to exercise his power. Nor did the regulations provide for a right of appeal, or anything else which might have suggested that the Controller was to engage in judicial-like deliberations when determining a licence.

The third of the twilight cases is *R v Metropolitan Police Commissioner, Ex parte Parker*.⁷⁶ In fact, while not formally binding upon Australian authorities in the way that *Nakkuda Ali v Jayaratne* was, *Parker* is, for reasons which will become apparent *infra*, of perhaps greater interest in its actual holding.

⁷⁰ [1951] AC 66.

⁷¹ [1951] AC 70.

⁷² [1942] AC 206.

⁷³ It should be noted that the Board stated that the law of Ceylon on this point was the same as the law of England. See [1951] AC 75.

⁷⁴ [1951] AC 66, 68–9.

⁷⁵ [1951] AC 78.

⁷⁶ [1953] 1 WLR 1150.

Parker was a licensed taxi-cab driver in London of many years standing. Unfortunately, he was also something of a libertarian spirit who viewed the administrative state as a nuisance. In the course of his career as a driver, Parker had had several encounters with the law. As the evidence in the proceeding showed,⁷⁷ he had been convicted on several occasions of traffic offences whilst driving his taxi. As a result, prior to this litigation, he had incurred two suspensions: one in 1947 and another in 1951.

In October of 1952, he was alleged to have allowed his taxi to be used for the purpose of allowing prostitutes to engage in their trade. Thereupon, the Commissioner of the Metropolitan Police summoned Parker to a hearing before the Taxi Licensing Committee, where he was given the chance to hear the evidence of the two police constables who had made the allegations against him. Parker was given a chance to speak on his own behalf after having heard the evidence against him, but he was refused the opportunity to call his own alibi witness. At the conclusion of the hearing, the decision was taken to revoke his licence, which was later confirmed in writing. Not surprisingly, Parker applied for a writ of certiorari to quash the revocation on the basis that by having been denied the right to call his own witness, he had been denied natural justice.

The revocation had been carried out under the authority of para 30 of the *London Cab Order* 1934, which, like the Textile Regulation in *Nakkuda Ali*, contained a 'state of mind' provision. It gave the Commissioner the right to revoke a taxi licence 'if he is satisfied, by reason of any circumstances arising or coming to his knowledge . . . that the licensee is not a fit person to hold such a licence'.

As the Privy Council had done two years beforehand (though it is worthwhile to note that *Nakkuda Ali* was neither cited in argument nor judgment in *Parker*), the Divisional Court found that in exercising his powers, the Commissioner of Police was not acting in a judicial capacity. In the opinion of Lord Goddard CJ,⁷⁸ this was because he had made no order:

[I]n considering whether a tribunal is a judicial tribunal or a quasi-judicial tribunal, one would expect to find that the tribunal had to make an order or something in the nature of an order, because otherwise there is nothing to be brought up and quashed in this court.⁷⁹

In this case, he concluded, there was no order:

The motion is to bring up an order of the Commissioner. There is nothing here to show that there ever was an order. It was simply a decision of the Commissioner that by reason of facts coming to his knowledge, he was satisfied that the licensee was not a fit person to hold the licence, and that is all.⁸⁰

This interpretation of the legislative scheme is clearly suspect, but the most startling part of the judgment was Lord Goddard's discussion of the legal rights pertaining to a licence. In a word, there were none:

⁷⁷ [1953] 1 WLR 1150, 1150–1151.

⁷⁸ Parker and Donovan JJ each delivered concurring reasons, in which they both expressed agreement with the Lord Chief Justice.

⁷⁹ [1953] 1 WLR 1150, 1155.

⁸⁰ [1953] 1 WLR 1150, 1155.

[T]he very fact that a licence is granted to a person would seem to imply that the person granting the licence can also revoke it. The licence is nothing but a permission, and if one man gives permission to do something it is natural that the person who gives the permission will be able to withdraw the permission. As a rule, where a licence is granted, the licensor does not have to state why he withdraws the permission.⁸¹

A more perfect Hohfeldian view of the distinction between legally enforceable rights and unenforceable licences one would be hard pressed to imagine!

In all three of the twilight cases, it can be difficult in real terms to gainsay the outcome. In *Stevenage*, the courts were concerned with the provision of housing for people dispossessed by a world war. In *Nakkuda Ali*, the plaintiff knew perfectly well what the allegation against him was, and he had been given a full opportunity to meet the case for revocation. Likewise, Parker had been given an oral hearing, and had even been allowed to place on the record the evidence that his alibi witness would have given.⁸² Moreover, one cannot help but think that the outcome in Parker was motivated at least in part by a judicial perception of relative equities — not least of all in light of the fact that Lord Goddard was presiding.⁸³

But there is another way of looking at the cases, too. That is to consider them within the context of their time — the aftermath of the Second World War. During the War, the private rights that were associated with public law understandably came to be interpreted in a limited fashion. Consider the administrative law decisions of the House of Lords during the period: *Liversidge v Anderson*,⁸⁴ *Greene v Secretary of State for Home Affairs*,⁸⁵ *Duncan v Cammell, Laird and Company Ltd*⁸⁶ and *Barnard v Gorman*.⁸⁷ Each of these displays a highly deferential attitude towards the Executive. At the end of the war, of course, the Atlee Labour government was elected, with its large-scale programme of nationalisation and central planning. Aneurin Bevan made clear the new government's attitude towards judicial review when he said that Labour 'would allow no judicial sabotage of its legislation'.⁸⁸

The Labour Lord Chancellor, Viscount Jowitt, was not one to engage in sabotage, and it is significant that of the combined number of seven law lords who heard *Stevenage* and *Nakkuda Ali*, six (Thankerton,⁸⁹ Uthwatt, du Parc and Normand in *Stevenage*; Oaksey and Radcliffe in *Nakkuda Ali*) were Labour appointees. Only Lord Porter was appointed by a non-Labour prime minister (Chamberlain, in 1938). And while in his early years, Porter showed some antipathy towards state authority

⁸¹ [1953] 1 WLR 1150, 1154.

⁸² Its substance is referred to in the judgment of Donovan J [1953] 1 WLR, 1150, 1157–8.

⁸³ In the *Oxford Companion to Law*, for instance, Lord Goddard is described as a 'strong, stern judge with little faith in lenient treatment of criminals [who] frequently increased sentences in frivolous appeals'.

⁸⁴ [1942] AC 206.

⁸⁵ [1942] AC 284 (holding, like *Zadig* in the First World War, that Habeas Corpus rights had been suspended by wartime regulations).

⁸⁶ [1942] AC 624 (upholding the right of Crown privilege with respect to documents sought to be produced in litigation).

⁸⁷ [1941] AC 378 (holding that Customs officials could not normally be liable for false imprisonment or malicious prosecution).

⁸⁸ 425 Parliamentary Debates (House of Lords) 5th ser, column (23 July 1946) 1982

⁸⁹ Though it should be noted that Lord Thankerton was appointed by the MacDonald government in 1929.

(he had dissented, for example, in the Lord Haw Haw appeal in 1945⁹⁰), the evidence is that he became significantly more 'statist' as he got older.⁹¹

Stevens has described this as the period of 'substantive formalism' in the British judiciary, in which faced first with an extended period of extreme national peril, and then with a government which enjoyed a huge electoral mandate for social and economic reform, the bench developed a pronounced disinclination to wish to interfere with the work of the executive.⁹²

A DOCTRINE REBORN

It is a commonplace that the doctrine of natural justice was given a new lease on life by the decision of the House of Lords in 1963, in *Ridge v Baldwin*.⁹³ For in that case, their Lordships expressly adopted the sort of 'new property' characterisation which underlay Reich's thesis.

Ridge v Baldwin involved the dismissal of the Chief Constable of Brighton — Ridge. Along with several colleagues in the Brighton Police, both senior and junior, Ridge had been charged with conspiracy to obstruct the course of justice. At trial, some of the policemen were convicted, but Ridge was acquitted. In the course of sentencing, however, the trial judge offered some highly critical remarks about Ridge's unfitness for leadership, and the poor example that he had set amongst his men. Subsequently, Ridge was charged with another offence of taking a bribe, but of that, too, he was acquitted.⁹⁴ Nevertheless, acting on the basis of the original trial judge's remarks, the local Watch Committee which, under the *Municipal Corporations Act* 1882, was the local police authority, resolved to sack Ridge from his post. After learning of this, Ridge's solicitor requested an audience with the Watch Committee. This was granted, but the solicitor was not informed of the specific reasons upon which the decision to sack Ridge was based. Ridge then sought a declaration that his dismissal was contrary to natural justice. He also caused it to be made clear that he was not seeking reinstatement, but rather the restoration of his pension rights, which had been forfeited as a result of the dismissal.

Ridge lost at both levels prior to the House of Lords. At first instance, Streatfield J had held that natural justice was required in the circumstances, but that it had been accorded. The Court of Appeal,⁹⁵ however, held that the Watch Committee was here acting *administratively*, rather than judicially, and hence that natural justice was not required.⁹⁶ The case in the House of Lords involved four separate issues, but the question which occupied most of the time of their Lordships (and the only important question for present purposes) was whether the Watch Committee was obliged to observe natural justice in the course of determining whether to dismiss Ridge.

⁹⁰ *Joyce v Director of Public Prosecutions* [1946] AC 347.

⁹¹ See Porter, 'English Practice and Procedure', 13. He also seems to have become quite anti-academic. In a debate in the House of Lords over the Defamation Bill 1952, he said of legal scholars: 'If it were not for the mercy of God, they might be judges themselves'. (117 Parliamentary Debates (House of Lords) 5th ser, column (15 July 1952) 1109).

⁹² See, generally, *op cit* (fn 58), chaps 10–11.

⁹³ [1964] AC 40.

⁹⁴ After the Crown led no evidence.

⁹⁵ *Holroyd Pearce, Harman and Davies LJJ*.

⁹⁶ [1963] 1 QB 539, 541

⁹⁷ [1964] AC 121.

In Lord Morris's opinion, the fact that Ridge was being dismissed on the basis of unfitness was sufficient to turn the action of the Committee into a judicial action: 'before it could be decided that there had been neglect of duty, it would be a prerequisite that the question should be considered in a judicial spirit'.⁹⁷ In Lord Hodson's view, it was the *consequence* of the Committee's action that made natural justice necessary: 'the deprivation of a pension without a hearing is on the face of it a denial of natural justice . . .'.⁹⁸ For his part, Lord Devlin rather testily attributed the problem here to the attempt by the legislation to oust the jurisdiction of the courts over dismissals.⁹⁹ Lord Evershed dissented, but even he would have been willing to extend the obligation to observe natural justice to administrative activity.¹⁰⁰ But the speech which has come to be viewed as the classic is Lord Reid's. For it was he who, through his skilful manipulation of precedent, managed to render *Nakkuda Ali* virtually lifeless.

Lord Reid noted that in holding that natural justice was not applicable, the Court of Appeal had not gone back any further in its authority than 1911, and the decision in *Board of Education v Rice*. This was problematic in his Lordship's view, because it had meant that the Lord Justices were only looking at cases on the 'new' legislation. They had, he noted, overlooked the long line of cases going back to 1615,¹⁰¹ in which natural justice was held to apply to dismissal from employment. His Lordship then proceeded to work his way methodically through the cases.¹⁰² His conclusion was that the law on the point was clear: except in the case of service at pleasure, or in the case of contractual terms to the contrary, no person can be dismissed from employment without a hearing.

Lord Reid also deconstructed the *Electricity Commissioners* requirement of superaddition of a duty to act judicially. In his view, Atkin LJ's judgment had been misunderstood, most notably by Lord Hewart in the *Church Assembly Case*. What had been forgotten was the fact that certiorari had actually lain against the *Electricity Commissioners*, a 'new' body if ever there were one. And, he noted, neither Atkin LJ nor any of the other Lords Justices had based their judgment on the existence of a superadded duty. Rather, what had happened was that Atkin LJ had 'inferred the judicial character of the duty from the nature of the duty itself'.¹⁰³ In Lord Reid's view, if this was permissible in a 'polycentric' decision-making process such as was in issue in *Electricity Commissioners*, then it could hardly be held not to apply in a basic dismissal case like Chief Constable Ridge's.¹⁰⁴

So it was that the House of Lords managed to get around the serious restrictions presented by the twilight cases. But insofar as Lord Reid was correct in suggesting

⁹⁸ [1964] AC 40, 133.

⁹⁹ [1964] AC 40, 140.

¹⁰⁰ [1964] AC 40, 86:

I am, however, content to assume that the invocation [of the rules of natural justice] should not be limited to cases where the body concerned . . . is exercising judicial or quasi-judicial functions strictly so called; but that such invocation may also be had in cases where the body concerned can properly be described as administrative — so long as it can be said, in Sir Frederick Pollock's language, that the invocation is required in order to conform to the ultimate principle of fitness with regard to the nature of man as a rational and social being.

¹⁰¹ *To Bagg's Case* 11 Co Rep 93b; 77 ER 1271.

¹⁰² [1964] AC 40, 66–71.

¹⁰³ [1964] AC 40, 76.

¹⁰⁴ [1964] AC 40, 76.

that *Electricity Commissioners* had been given its life as a result of misunderstanding, the same thing can arguably be said about *Ridge v Baldwin* itself. As Lord Reid plainly noted, the reason that the new cases could be avoided was that *Ridge v Baldwin* was a case of a much older class. It was, in addition, an isolated, bi-partite instance, not involving a significant element of governmental policy. Yet, *Ridge v Baldwin* has come to be understood to have heralded an unrestricted approach to natural justice generally. Perhaps the point with both *Ridge v Baldwin* and *Electricity Commissioners*, as with the twilight cases, is that their force is not so much in their exact holding, but rather where they stand in the evolution of the public view of the executive. If the twilight cases were in part a function of the post-war reconstruction and the Labour government, then perhaps *Ridge v Baldwin* can partly be explained by the fact that it followed the Suez crisis and coincided in time with the Beatles.

THE AUSTRALIAN COURTS AND THE OLD NATURAL JUSTICE

The Australian paradigm of the 'twilight' approach to natural justice is the 1963 decision of the High Court in *Testro Bros Pty Ltd v Tait*.¹⁰⁵ In it, the Court avowedly adopted the sort of analysis engaged in by the Privy Council in *Nakkuda Ali v Jayaratne* and by Lord Goddard in *Parker*.

The Testro brothers were principals in a series of companies engaged in speculative building projects. The litigation involved the appointment of Tait as an inspector under the Victorian *Companies Act* 1961, to carry out a special investigation into the affairs of the companies with a view to seeing whether they should be wound up, or whether prosecutions should be instituted against the Testros.

Section 173 of the *Companies Act* 1961 (Vic) conferred upon company inspectors the power to compel witnesses and to take examination on oath. After he had been so summoned, Mr R C Testro, one of the brothers, requested leave to appear by counsel, which was granted. Counsel then requested the right to put questions to Testro following his examination by Tait. Counsel also requested that as the representative of the companies, he be permitted to be present throughout the taking of evidence and that he have the right to cross-examine all witnesses. He further requested to be informed of all allegations against the companies which might arise during the investigation.

Tait's position was that while he would have been prepared to allow counsel to appear for Testro personally during his examination, he would not agree to the requests made by counsel on behalf of the companies. Thereupon, both Testro and Testro Bros Pty Ltd applied to the Supreme Court for a writ of prohibition to stop Tait from proceeding further, or alternatively for a writ of mandamus directing him to accede to the requests. The basis of the Testro case was that through the issuance of his report, the Inspector had a power to affect their reputation and, hence, their pecuniary interests.¹⁰⁶ In the circumstances, therefore, Tait was obliged to observe

¹⁰⁵ (1963) 109 CLR 353.

¹⁰⁶ (1963) 109 CLR 355.

the principles of natural justice. O'Bryan J refused the applications, however, relying on the decision of the Full Court of the Supreme Court of Victoria in a similar case decided the year beforehand, *R v Coppel; Ex parte Viney Industries*.¹⁰⁷

In *Viney Industries*, the Full Court¹⁰⁸ held that an Inspector under the *Companies Act* was not required to act judicially, and hence was not obliged to accord with natural justice. The Court reviewed the existing authorities, including *Electricity Commissioners*, *Legislative Committee of the Church Assembly* and *Nakkuda Ali v Jayaratne*. It concluded that a Company Inspector was not required to observe the rules of natural justice for two reasons. First, it held that there was no superadded obligation on his part to act judicially. Reviewing the provisions of the *Companies Act* in issue, it found, like the Privy Council found in *Nakkuda Ali*, that there was nothing in the Act which would suggest that parliament had intended that the Inspector carry out his investigation in a judge-like fashion.¹⁰⁹

The Court also stated that having regard to 'broader considerations as to the object, purpose and scope of the investigation', as well as 'the nature of the report which it is contemplated will be produced as the result thereof', it was not of the view that the Inspector had the power to interfere with a company's legal rights.¹¹⁰ In the Full Court's view, a report could either lead to the institution of a prosecution by the Attorney-General for violation of the *Companies Act*, or to an application to wind the company up. In either case, any actual interference with the firm's legal rights would come from the Court, not from the Inspector's report.¹¹¹ As the High Court put it in *Testro Bros v Tait*, the conclusion in *Viney Industries* was that an Inspector's report could not of its own force prejudicially affect the rights of a company.¹¹² It is equally clear from the judgment, though, that one of the things which weighed heavily upon the Court was a fear of rendering the inspection process unworkable, were a requirement to observe natural justice to be imposed.¹¹³

But in *Testro Bros v Tait*, Testro Bros argued that an amendment to the *Companies Act* subsequent to the *Viney Industries* case had changed the complexion of the Inspector's power. The amendment in question was sub-s 171(10) of the Act, which provided that an Inspector's report was 'admissible in any legal proceeding as evidence of the opinion *and of the facts upon which his opinion is based* of the inspector in relation to any matter contained in the report' (emphasis added). In the version in issue in *Viney Industries*,¹¹⁴ an inspector's report was only admissible as evidence of the opinion of the inspector. There was no reference to their admissibility as evidence of fact. In the view of Testro Bros, this was sufficient to vest Tait with the power, should he arrive at adverse conclusions about them, to adversely affect their rights.

¹⁰⁷ [1962] VR 630.

¹⁰⁸ Herring CJ, Sholl and Hudson JJ.

¹⁰⁹ [1962] VR 638.

¹¹⁰ [1962] VR 639.

¹¹¹ *Ibid.*

¹¹² (1963) 109 CLR 363.

¹¹³ See, especially [1962] VR 638, line 28 *ff.* It is also worthwhile to note that the Court was heavily influenced by the decision of the Court of Appeal in *Re Grosvenor and West-End Railway Terminus Hotel Co* (1897) 76 LT 337, which held that an Inspector acting under the British *Companies Act* 1862 was not under an obligation to act judicially.

¹¹⁴ *Companies Act* 1958 (Vic), sub-s 146(9).

Unfortunately for the Testros Bros, the majority of the High Court took a different view. In a joint judgment, McTiernan, Taylor and Owen JJ held that notwithstanding the legislative amendment, one could not say that an Inspector appointed under the Act had a duty to act judicially. Starting from the premise that the interpretation given to the Act by the Victorian Full Court in *Viney Industries* — that the *Companies Act* did not disclose an intent that Inspectors had an obligation to act judicially — was correct, their Honours said that there was nothing in the new sub-s 171(10) or elsewhere which ‘justifie[d] the conclusion that the Legislature intended to make such a fundamental change as is suggested in the character of an investigation’.¹¹⁵

Kitto and Menzies JJ both dissented. In Kitto J’s view, the amendments *did* give the Inspector’s report new significance: ‘the report itself prejudices the rights by placing them in a new jeopardy’.¹¹⁶ Likewise, Menzies J noted that an adverse report was ‘an incontrovertible finding against the company which must be accepted by the Court upon a petition for winding up as establishing a ground for making an order’.¹¹⁷ In his view, this was the critical distinction between this case and its predecessor:

[A]s soon as findings or opinions are given legal consequences and are made the foundation in law for further proceedings in relation to the company, then the position changes and well-established principles require that the enquiry be subject to the control of the law to prevent departures from the basic principles of justice which are commonly described as natural justice.¹¹⁸

Testro Bros v Tait stands, with cases like *Stevenage*, *Nakkuda Ali v Jayaratne* and *R v Metropolitan Police Commissioner, Ex parte Parker*, as a testament to a way of thinking that so concerned Professor Reich. *Parker* is the most overt in this respect, but in each of the cases, the way in which the court described the obligation to observe natural justice illustrated that the law had not arrived at a stage where it was willing to take account of the new property — of interests which, while not accorded exactly with traditional common law notions of proprietary dominion, were also deserving of protection from arbitrary interference by the executive.

The most interesting thing about *Testro Bros v Tait*, however, was not its holding. In that respect, it was just one in a series of several cases taking a restrictive line to the obligation to observe natural justice. Rather, the remarkable thing about it was its timing, for it was actually argued *after* the decision of the House of Lords in *Ridge v Baldwin*. In England, the law had finally cast aside the handicap of the narrow and circular Atkin/Hewart formulation of the circumstances in which natural justice was required. But in Australia, the High Court declined a similar invitation.

One cannot help but wonder why *Ridge v Baldwin* did not feature in the High Court’s deliberations. That it did not, certainly stands in contrast to the popularly held view that institutional ‘cringe’ amongst the Australian legal establishment was at its height and that the High Court happily lapped up whatever fell from the table of their Lordships fifteen thousand miles away. Perhaps unintentionally, it bears

¹¹⁵ (1963) 109 CLR 363, 364.

¹¹⁶ (1963) 109 CLR 363, 368.

¹¹⁷ (1963) 109 CLR 363, 375.

¹¹⁸ (1963) 109 CLR 363, 373.

witness to the holding in the Australian *Parker* case of the same year — *Parker v R*¹¹⁹ — that the High Court no longer viewed itself as bound by decisions of the House of Lords. Whichever the case, what really carried the day in *Banks* was a decision of an inferior Australian court.

One of the most fascinating aspects of the common law method is the process by which some cases become leading cases while others are forgotten. Someone once said that in order for a case to become an instant landmark, what is required is either notoriety of the parties or of the judge. Maybe the problem in 1963 was that there was no Newscorp to spread the news in Australia of the allegations that had been made against Chief Constable Ridge. Maybe it was that there were no Dennings, Goddards or Atkins involved in the hearing of *Ridge v Baldwin*. Whatever the case, the only reference in *Testro Bros v Tait* to *Ridge v Baldwin*¹²⁰ is found in the dissent of Kitto J. In discussing what sort of dispositive power amounted in law to a power to affect rights, his Honour referred twice to Lord Reid's speech, but each time only in passing.¹²¹ None of the other judges referred to the case at all.

This surely must be telling of the High Court's mindset at the time. For had the Court been inclined to want to depart from the restrictive approach to natural justice, there would have been every reason to wish to make liberal use of *Ridge Baldwin*. One of the chief things that Lord Reid did in his speech was to discredit the decision in *Nakkuda Ali*. Normally, it would have been open to him merely to ignore the decision, since it had nothing formal to do with the English legal system. But since the Board had said that English and Ceylonese law were the same on the question of natural justice, he had to deal with it — and as has been discussed, so he did by saying that it was based on 'a serious misapprehension' of the older case law, and consequently could not be regarded as authoritative.¹²² Had the High Court wished to move the law in this country away from the restrictions inherent in the *Nakkuda Ali*-type interpretation of Atkin LJ's formulation, in order to take account of the sorts of new property concerns raised by their Lordships in *Ridge v Baldwin*, this would have given them licence to do so.

That *Ridge v Baldwin* was not addressed in any real way by the High Court in *Testro Bros v Tait* seems really quite extraordinary to us, given the fame that has come subsequently to attend to it — and especially to Lord Reid's speech. Wade and Forsyth describe *Ridge v Baldwin* as 'an important landmark',¹²³ and devote more space to it and its aftermath than to any other case in their treatise. The current editors of de Smith say that it 'gave a powerful impetus to the emergent trend' of judicial activism which as of 1995 'shows little sign yet of diminishing'.¹²⁴ But as far as the High Court of Australia was concerned in 1963, it was apparently seen as not worthy of any special attention. It was not for five years — until 1968, in its decision in *Banks v Transport Regulation Board* — that the High Court came to consider the new approach to natural justice.

¹¹⁹ (1963) 111 CLR 610.

¹²⁰ Apart, that is, from the singularly un-enlightening statement in the summary of argument that counsel for *Testro Bros* 'also referred to *Ridge v Baldwin*' (109 CLR 358). As an aside, it is fascinating to note that counsel for *Tait* was none other than E G Coppel QC — the respondent in *Viney Industries*!

¹²¹ (1963) 109 CLR 363, 369–370.

¹²² [1964] AC 79.

¹²³ *Administrative Law* (7th ed, 1994) 510.

¹²⁴ de Smith, Woolf and Jowell, *Judicial Review of Administrative Action* (5th ed, 1995) 397.

TOWARDS A RECOGNITION OF THE NEW PROPERTY

Banks v Transport Regulation Board is an interesting case, in that it deals with the very same question that was at issue in *R v Commissioner of Metropolitan Police, ex Parte Parker*, namely the nature of the rights of a taxi-cab driver in his licence. This question — the question of the licence-as-property that Lord Goddard had rejected so directly — had a unique significance in *Banks*. This was because one of the threshold issues which faced the High Court was whether *Banks* had an appeal to the Court as of right in respect of his loss. This turned upon whether in his writ of summons, he was raising a question concerning property or a civil right in excess of \$3000.00.¹²⁵

Attacking the issue just as directly as had Lord Goddard (as one would only expect him to do), Barwick CJ made plain his disagreement with Goddard's opinion:

I do not find the description of the licence which found favour with the Lord Chief Justice appropriate to a statutory licence to which a fit and proper person has a right and which relates to such an occupation as that of a cab driver. I do not think such a licence can be equated to the mere grant of a permission by a private person in respect of his own property.¹²⁶

Having concluded this, his Honour then expressed 'entire agreement' with Lord Reid's speech in *Ridge v Baldwin*.¹²⁷ And as for *Nakkuda Ali*, he neatly dismissed it both on the basis of Lord Reid's criticism of it not representing an accurate statement of the law, and on the basis that it pertained to wartime exigencies and therefore ought not be applied to the circumstances of peacetime civil life.

On the question of the Transport Regulation Board having a duty to act judicially, the Chief Justice said that in his view, 'the nature of the power and the circumstances of its exercise' were the source of the obligation.¹²⁸ He referred as well to the obligation that the legislation placed on the Board to provide reasons for a revocation (which had not been the case in *Parker*), but he said that this merely reinforced the conclusion that he had drawn from the nature of the power itself.¹²⁹ As will be discussed below, this was a critically important point.

The rest of the Court concurred with Barwick CJ. Significantly, the bench also included McTiernan, Owen and Taylor JJ — the three judges who had formed the majority in *Testro Bros v Tait*.

CONCLUSION - BANKS AND ITS TRUE LEGACY

At the outset, I suggested that to today's reader, the only thing which strikes one about *Banks* is its unsingularity. But if read in its historical context, the judgment represents a significant advance for the High Court in two respects. First, the case went a long way — further than even *Ridge v Baldwin*, in fact — in breaking the

¹²⁵ *Judiciary Act* 1903 (Cth), s 35(1)(a)(ii).

¹²⁶ (1968) 119 CLR 222, 231.

¹²⁷ (1968) 119 CLR 222, 233.

¹²⁸ (1968) 119 CLR 222, 234.

¹²⁹ (1968) 119 CLR 222, 234.

argument of circularity created by the Atkin/Hewart analytical formulation that the obligation to observe natural justice depended upon a power to affect rights *and* a superadded duty to act judicially. In Barwick CJ's view, the former was the source of the latter. It was the sheer enormity of the power — in this case, the power to deprive someone of their livelihood — that made procedural safeguards so imperative.

Secondly, in its holding, the Court came expressly to embrace the concept of the new property. Through its decision, it did exactly what Reich had urged the law to do: to acknowledge that the old ways of viewing the nature of proprietary interests were insufficient to protect civil rights in the era of the public service state. When the Chief Justice said that the taxi-cab licence amounted to a property interest within the meaning of the *Judiciary Act*, he was implicitly asserting a right within the courts to supervise the work of the executive with respect to new property interests. This is something that the Australian courts had not yet done in the modern era.

In this respect, if we place *Banks* in its time frame — if, to paraphrase Professor Schorske,¹³⁰ we locate the case in history's stream — we can see that it represents a reconfirmation of the basic liberal premises of our society. The theory of the state that underlay its holding was one in which the interests of the individual are not to be readily sacrificed to the interests of collective efficiency. It was also one which preserved within the unwritten terms of the Constitution a significant role for the judicial branch as protector of the (comparatively) powerless citizen against the state as Leviathan. In both of these respects, the judgment represents a reaction against much of the administrative law scholarship of the period post-World War I. This tended to place a heavy emphasis upon the importance of 'expertise', and favoured the vesting in the Executive of extensive, non-judicially reviewable, discretion.

It is no surprise that it was not until the relative economic prosperity of the 1960s that the courts felt confident to assertively restate liberalism as a basic social principle as was done in *Banks* and *Ridge v Baldwin*. Lord Hewart CJ and other judges may have blustered about 'the prospect of administrative lawlessness',¹³¹ but at least since the Second World War, the law had in its basic tenor remained static in its insecurity *vis à vis* the administration during that time. There had been some important and (as time would show) far-reaching decisions, to be sure — notably *Wednesbury*¹³² and *Northumberland Compensation Appeal Tribunal*¹³³ — but the accepted doctrine remained such that Lord Hewart could have just as happily railed against the state of the law in 1959 as he had in 1929. It was for that reason that de Smith felt that he could confidently assert, as he did in the first edition, that '[j]udicial self-restraint has won a decisive victory over judicial activism in a field where the contest might well have been an even one'.¹³⁴

¹³⁰ See, *op cit* (fn 8).

¹³¹ His classic anti-administration work being, of course, *The New Despotism* (1929). See also *Not Without Prejudice* (1935) 96. For a like view from the Dominions, see the statements of Sir William Mulock, the Chief Justice of Ontario, (1934) 12 *Can Bar Rev* 35.

¹³² *Associated Provincial Picture Houses v Wednesbury Corporation* [1948] 1 KB 223.

¹³³ *R v Northumberland Compensation Appeal Tribunal, ex parte Shaw* [1952] 1 KB 338.

¹³⁴ *Judicial Review of Administrative Action* (1st ed) 18.

Consider, though, what was to come within the next few years. Here in Australia, Sir Owen Dixon — the steadfast proponent of ‘strict legalism’ — was to retire. In his place as Chief Justice was appointed Sir Garfield Barwick — a conservative, but (to use his own title¹³⁵) a *radical* conservative; an unrepentant (if not entirely consistent¹³⁶) judicial activist. Similarly, in England, Lord Denning was to be appointed Master of the Rolls in 1962. In the House of Lords, the old guard - characterised most aptly by Lord Devlin — was passing. In Devlin’s stead as the *de facto* chair of the Appellate Committee came Lord Reid, a Scottish judge without the same deferential instinct towards precedent as an English judge. Consider, too, the line of decisions that was to follow: *Ridge v Baldwin*,¹³⁷ *Padfield v Minister of Agriculture*,¹³⁸ *Anisimic*,¹³⁹ and *Conway v Rimmer*¹⁴⁰ were all decided within a few years of one another. In this country, the change was mirrored both by cases like *Banks*, and by the appointment of the Kerr, Ellicott and Bland Committees, whose administrative law ‘package’ reflects very much a liberal view of public law rights.

The continuing (if forgotten) importance of Banks and its era is made plain when we consider that in each of the important natural justice cases today: *Kioa*,¹⁴¹ *Teoh*,¹⁴² *Haoucher*,¹⁴³ *FAI v Winneke*,¹⁴⁴ *Annetts v McCann*¹⁴⁵ and the others, the Court was acting to protect a new property interest. The very notion of a legally-enforceable ‘legitimate expectation’ is a new property interest. For each of these cases, the judgment in *Banks v Transport Regulation Board* was a necessary — though today largely unattributed — conceptual forebear. But the governmental ground has shifted considerably since 1968. Then, the necessary focus of concern about interference with individual autonomy was the state.¹⁴⁶ To borrow Lord Denning’s words, it was sufficient for the judiciary to have as its animating spirit ‘a sense of the supreme importance of the individual and a refusal to allow his personality to be submerged in an omnipotent state’.¹⁴⁶ Now, however, we are in an era in which the state’s role in regulating private affairs, at least *qua* direct actor, has decreased. The moves to privatisation have necessarily shifted to the private sector the focus of concern about interference with what were once public rights.

¹³⁵ Sir Garfield’s autobiography was entitled *A Radical Tory: Garfield Barwick’s Reflections and Recollections* (1995).

¹³⁶ It is worthwhile to note in this regard, that on the question of natural justice itself, Barwick came in the 1970s to adopt a much more restrictive approach than was foreshadowed in *Banks*. In *Twist v Randwick Municipal Council* (1976) 136 CLR 106, he continued to express the natural justice’s doctrinal basis in somewhat open-ended terms, but the next year, in *Salemi v MacKellar (No 2)* (1977) 137 CLR 396, he retreated from this.

¹³⁷ [1964] AC 40.

¹³⁸ [1968] AC 997.

¹³⁹ *Anisimic Ltd v Foreign Compensation Commission* [1969] 2 AC 147.

¹⁴⁰ [1968] AC 910.

¹⁴¹ *Kioa v West* (1985) 159 CLR 550.

¹⁴² *Teoh v Minister for Immigration and Ethnic Affairs* (1995) 183 CLR 273.

¹⁴³ *Haoucher v Minister for Immigration and Ethnic Affairs* (1990) 169 CLR 648.

¹⁴⁴ (1982) 151 CLR 342.

¹⁴⁵ (1990) 170 CLR 596.

¹⁴⁶ ‘The Spirit of the British Constitution’ (1951) 19 *Can Bar Rev* 1180, 1182.

This, then, is the challenge facing Australian public law today. Public law, as many have noted,¹⁴⁷ is facing a doctrinal dilemma. In terms of providing protection for individuals against the new bureaucracy, the old public law seems just as deficient as did the old natural justice in the 1960s. If we are to maintain as a basic premise of our society the notion of respect for the individual, then a conceptual leap of the sort exhibited by the High Court in *Banks* will be necessary. It is for that reason, if none other, that 1968 ought, for administrative lawyers, to be a year worth remembering.

¹⁴⁷ See, for example, the essays in M Taggart, ed, *The Province of Administrative Law* (1997).