COMMENT

JUDICIAL REVIEW OF INQUIRIES IN ADMINISTRATIVE LAW

I *Introduction*

This Comment is an investigation of one of the borderlands of judicial review of the administration. It deals with the attitude of the courts to governmental bodies whose function is not the making of an order or the giving of a decision which immediately affects the rights of individuals in any legal sense,[1] but which have been established to propose, initiate, recommend or report on action which a higher governmental authority may at its discretion take. I propose to refer to all such bodies by the generic term "inquiries".

In English governmental experience these bodies have been used in one form or another (including the early jury system, and *quo warranto* inquiries) since at least the eleventh century.[2] Their importance as an instrument of government may perhaps be gauged by the attitude of Parliament in the seventeenth century, which, being aware of the potency of this weapon in the King's hands, largely replaced it by a system of select committees of one of the Houses of Parliament, usually the Commons.[3] However, the demands of the "welfare state" exposed the weakness of a relatively inexpert body in this field, and the nineteenth century saw the revival of the inquiry as a tool of the executive.

The functions which these inquiries perform vary immensely. Some may deal with questions of major governmental policy[4] while others may be set up to give a report prior to possible action of a disciplinary nature.[5] Some bodies are set up on a permanent or *ad hoc* basis to hear objections to proposed governmental action,[6] while others may be concerned with preparing schemes to submit to higher governmental bodies.[7]

What factors do all these different types of inquiries have in common so as to make them a legitimate field for study as a whole? First, all these bodies occupy a subordinate role in the governmental process, in the sense that a higher governmental authority (often Parliament, or the appropriate

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[1] For the purposes of this Comment a body "affects rights" if its determination purports *proprio vigore* to vary or extinguish existing legal rights or to declare existing legal rights by the interpretation of common law rules or of statutory norms and their application to a set of facts. I shall not deal with the difficult question of whether a licence or a privilege can, in this field, be a right, partly because it is believed that this is a distinct problem and partly for reasons of space. The whole issue now seems to have been clarified for Australia by *Banks* v. *Transport Regulation Board* (1968) 42 A.L.J.R. 64.

[2] For the history of the public inquiry see W. A. Robson, "Public Inquiries as an Instrument of Government" (1954) 1 *British Journal of Administrative Law* 71.

[3] See W. R. Anson, 1 *Law and Custom of the Constitution* (4 ed. 1909) 376ff.

[4] E.g., the Tariff Board and certain Royal Commissions.

[5] E.g., *Reynolds* v. *A.-G.* (1910) 29 N.Z.L.R. 24 (board inquiring into charge of misconduct by civil servant).

[6] E.g., *William Denby & Sons Ltd.* v. *Minister of Health* (1936) 1 K.B. 337 (public local inquiry re proposed clearance order).

[7] E.g., *R.* v. *Electricity Commissioners* (1924) 1 K.B. 171 (scheme for joint electricity authority).

Minister) has the final say as to whether what the inferior body recommends or decides shall be the basis for further action which itself will have legal force to affect rights. Secondly, most if not all of the bodies are governmental organs, access to which is granted to those members of the public whose interests will ultimately be affected by the decision of the higher authority.

The double aspect of these inquiries is usually the source of friction and the factor which has brought them frequently before the courts. To the government the inquiry is a means of sifting out demands, damming the unruly tide of public opinion, or making more palatable certain decisions that are to be imposed;[8] to that part of the public which is affected the inquiry is either a vital safeguard against governmental arrogance or an important lobby. In other cases these bodies resemble courts in their recommendation of the settlement of a specific dispute between citizen and government.[9]

II *The Problem*

The marked development in recent years in the field of administrative law may perhaps be explained as the lawyer's reaction to the encroachments of the welfare state upon the individual and his rights. Whatever its causes, it has been marked by a striving for procedural fairness (as in the emphasis on natural justice) and the rule of law (as in the doctrines of *ultra vires*, jurisdictional error and error of law). Coupled with this has been the extension of the traditional judicial remedies of mandamus, certiorari and prohibition[10] and the forging of newer weapons in the form of injunction[11] and declaration of rights[12] in the field of administrative law.

In view of their important functions in the field of government and administration, it is not surprising that the actions of inquiries should come under the increasing surveillance of the courts. However, as will become apparent, the courts have often had second thoughts as to whether the activities of inquiries present justiciable issues at all.

Almost invariably these bodies are the creature of statute. It is therefore to the relevant Act that resort must first be had in determining the questions whether the courts will review the actions of the body and, if so, then on what grounds and by what remedies. A statute might also purport to exclude judicial review altogether; or it may exclude review on certain grounds or by certain remedies, or according to time or other limitations. Where the plaintiff seeks review on the ground of denial of natural justice, the Act may spell out the nature and extent of the hearing which is to be given.[13] Where the preliminary body is established with a particular end in view it may be a question of statutory interpretation whether the inquiry or report in question falls within the terms of the statute,[14] alhough the mere fact that the body is acting beyond its jurisdiction or *ultra vires* may not be sufficient ground to enable challenge to be made at this stage.[15]

Assuming, however, that the statute is silent or ambiguous, the courts must decide according to general principles of administrative law. Three questions usually must be answered in these cases:

(1) Has the court jurisdiction to review this body?

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[8] See, e.g., *Franklin* v. *Minister of Town & Country Planning* (1947) 1 All E.R. 396, at 398; and *cf.* the comments of H.W.R. Wade, *Towards Administrative Justice* (1963) 60.

[9] E.g., *R.* v. *Woodhouse* (1906) 2 K.B. 801.

[10] *Ridge* v. *Baldwin* (1964) A.C. 40; *Durayappah* v. *Fernando* (1967) 2 A.C. 337.

[11] *Boyce* v. *Paddington Borough Council* (1903) 1 Ch. 109.

[12] *Dyson* v. *A.-G.* (1911) 1 K.B. 410.

[13] *R.* v. *Fowler; ex p. McArthur* (1958) Qd.R. 41.

[14] *R.* v. *Electricity Commissioners, supra* n. 7.

[15] Because the court may decide it is a "mere inquiry".

(2) On what grounds will relief be given?
(3) Will the court grant the remedy sought?

The answer to these questions lies in an examination by the court of the body in question in its appropriate statutory context.[16] This very factor (of statutory context) makes it difficult to present any clear principles of law to be applied in a novel situation. Nevertheless the next three parts of this Comment will attempt an answer to the three questions posed above.

III *Jurisdiction to Review*

This is the first hurdle which the plaintiff must leap. If the court refuses to review the actions of the particular inquiry the plaintiff fails *in limine*. Traditionally this question is linked inextricably with the problem of the remedy sought. Often the court has merely asked: will certiorari and/or prohibition go to this body?

Several tests have been laid down. The two most famous are those of Brett, J. in *R.* v. *Local Government Board*[17] and Atkin, L.J. in *R.* v. *Electricity Commissioners*.[18]

According to Brett, J.:

> My view of the power of prohibition at the present day is that the Court should not be chary of exercising it, and that wherever the legislature entrusts to any body of persons other than to the superior Courts the power of imposing an obligation upon individuals, the Courts ought to exercise as widely as they can the power of controlling those bodies of persons if those persons admittedly attempt to exercise powers beyond the powers given to them by Act of Parliament.[19]

Atkin, L.J. expressed it thus:

> Whenever any body of persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially, act in excess of their legal authority they are subject to the controlling jurisdiction of the King's Bench Division exercised in these writs (prohibition and certiorari).[20]

Applying Atkin, L.J.'s test of "affecting the rights of subjects", the courts have reviewed a draft scheme for the appointment of an electricity authority which was subject to confirmation by the Minister and Parliament,[21] a report and recommendation by a Board set up to deal with objections to proposed orders for the closing of buildings on the ground that they were unfit for human habitation,[22] and a report by an inspector to the Minister as to the questions on which the Minister's power to dissolve a local government council depended.[23]

Where the inquiry is set up to report on whether action should be taken against individuals in respect of some particular breach of discipline,[24] or

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[16] See, e.g., *Banks* v. *Transport Regulation Board, supra* n. 1.
[17] (1882) 10 Q.B.D. 309.
[18] *Supra* n. 7.
[19] (1882) 10 Q.B.D. at 321.
[20] (1924) 1 K.B. at 205.
[21] This was the issue in the *Electricity Commissioners' Case* itself. (Parliament could itself modify the scheme.)
[22] *Estate & Trust Agencies Ltd.* v. *Singapore Improvement Trust* (1937) A.C. 898. (The Governor in Council could make an order approving or revoking the decision of the Board.) See also *Banks' Case, supra* n. 1.
[23] *Durayappah* v. *Fernando, supra* n. 10.
[24] *Reynolds* v. *A.-G., supra* n. 5. *Cf. Re Clifford & O'Sullivan* (1921) 2 A.C. 570—a "very special case in which in the course of armed rebellion, military tribunals were set up to put down force by force. In other words their activities were altogether outside the field of law now under consideration" (*per* Lord Parker, C.J., in *R.* v. *Criminal Injuries Compensation Board; ex p. Lain* (1967) 2 All E.R. 770 at 777; and see Diplock, L.J. at 780).

some act which would entitle the Minister,[25] or other appropriate authority,[26] to revoke a licence, the courts have held that they have jurisdiction to review the report or recommendation, unless the inquiry is a mere administrative safeguard set up to prevent the taking of disciplinary proceedings with respect to trivial offences[27] or to inquire whether there is *prima facie* evidence on which to take subsequent action.[28] In this regard the courts view the inquiry as similar to a judicial inquiry before an ordinary court, an assumption which the presence of many of the "trappings" of the courts does nothing to belie. This willingness to review at this stage is based partly on the further assumption that since the Minister or other authority will in most cases accept the report by the inquiry and make no further examination of the facts of the case the practical effect of the inquiry's report may be very serious.[29]

Other factors tending in favour of intervention by the courts in this field are the undesirability of keeping an individual in anxiety while the Minister deliberates on a report that contains some vitiating aspect[30] and the fact that once the ultimate decision is made by Parliament[31] judicial review may be precluded on other grounds.[32] Where the ultimate decision is to be made by the Governor or the Governor-in-Council, the courts have occasionally intervened to quash the earlier recommendation seemingly on the ground that once the Governor has acted it is too late notwithstanding any irregularity in the preliminary inquiry.[33] However, in the recent case of *Banks* v. *Transport Regulation Board*[34] the High Court, particularly Barwick, C.J. and Owen, J.[35] considered that a void decision by an inquiry could be quashed notwithstanding the fact that it had been approved by the Governor-in-Council. However, the question of whether this would apply in the case of a decision merely voidable on the ground of denial of natural justice[36] was expressly left open;[37] and furthermore such an analysis might not be applied to a differently worded provision establishing the inquiry.[38]

On the other side of the fence is the attitude of the courts to inquiries and reports carried out by inspectors appointed to examine companies. At first such reports merely served to inform shareholders and other interested parties of the condition of the company and its directors. They could in practice have serious and far-reaching effects since not only could they provide vital information upon which the court or shareholders could seek to wind up the company, but furthermore they could present to the police or the public a picture of fraud on the part of the responsible officers of the company. Notwithstanding these factors, the Court of Appeal in *Re Grosvenor & West-End Railway Terminus Hotel Co. Ltd.*[39] refused to grant prohibition to an inspector allegedly acting without jurisdiction, on the ground that "the beginning and the end of the duty of an inspector . . . is to examine and report. . . . The report cannot be made the foundation of any subsequent action, it is

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[25] *Ex p. Wilson; re Cuff* (1940) 40 S.R. (N.S.W.) 559.

[26] *Banks' Case, supra* n. 1; *R.* v. *City of Melbourne; ex p. Whyte* (1949) V.L.R. 257; see *contra R.* v. *Fowler, supra* n. 13, which, it is submitted, was wrongly decided.

[27] *Medical Board of Queensland* v. *Byrne* (1958) 100 C.L.R. 582.

[28] *Parry-Jones* v. *Law Society* (1968) 1 All E.R. 177; *Wiseman* v. *Borneman* (1967) 3 All E.R. 1045.

[29] *R.* v. *City of Melbourne, supra* n. 26 at 263 (O'Bryan, J.).

[30] *Reynolds* v. *A.-G., supra* n. 5; *Byerley* v. *Windus* (1826) 5 B. & C. 1 at 21.

[31] *R.* v. *Electricity Commissioners, supra* n. 7.

[32] See *infra*, text accompanying nn. 106-08.

[33] E.g., the *Estate & Trust Case, supra* n. 22. But see *Ex p. R., ex rel. Warringah Shire Council & Jones; Re Barnett* (1967) 2 N.S.W.R. 746.

[34] *Supra* n. 1.

[35] At 71 and 76 respectively.

[36] See *Durayappah* v. *Fernando, supra* n. 10.

[37] (1968) 42 A.L.J.R. at 70.

[38] See esp. Owen, J. at 76.

[39] (1897) 76 L.T. 337.

merely evidence of the opinion of the inspector."[40] Although this case could have been later distinguished on the ground that on the facts no jurisdiction had been exceeded[41] it was followed by the House of Lords in *Hearts of Oak Assurance Co. Ltd.* v. *Attorney-General*.[42]

In *O'Connor* v. *Waldron*[43] the Privy Council was called upon to decide whether such an inquiry was an absolutely privileged occasion for the purposes of the law of defamation. Lord Atkin said:

> . . . while it is true that some tribunals charged with the duty of inquiry whether an offence or breach of duty has been committed have been held entitled to judicial immunity, such as a military court of inquiry (*Dawkins* v. *Lord Rokeby*[44]) or an investigation by an ecclesiastical commission (*Barratt* v. *Kearns*[45]), there were in those cases conditions as to the way in which the tribunal exercised its functions, and as to the effect of its decisions which led to the conclusion that such tribunals were similar to those of a court of justice.[46]

Such inquiries are also a commonplace of Australian companies legislation. Recognition of the importance of the reports came in 1961 when it was provided that the report of an inspector that he holds an opinion as to certain facts could be *of itself* sufficient grounds for the court to wind up the company.[47] In *R.* v. *Coppel; ex parte Viney Industries Ltd.*[48] the Full Court of Victoria refused prohibition on the grounds that a "judicial proceeding" had not been intended by Parliament and that rights were only affected by the winding up order made by the Court which could take into account materials not referred to in the report. The English authorities abovementioned were applied and the Court failed to see how the addition of s.221(1)(g) made the report a document "prejudicially affecting the legal rights of the company". The fact that the report might also lead to criminal prosecutions was also dismissed as irrelevant.

In *Testro Bros. Pty. Ltd.* v. *Tait*[49] the majority of the High Court of Australia applied this decision despite the fact that the report was now evidence of the *facts* upon which the inspector's opinion was based as well as his opinion, and as such was admissible in any legal proceedings as evidence of these facts.[50] The reasoning of the two dissenting judges (Kitto and Menzies, JJ.) is refreshing for the realistic approach it adopts. To Kitto, J. the legal and practical consequences of the report were considered to be such that the investigation was in reality "a proceeding the outcome of which may seriously prejudice the legal situation of the company".[51]

Although this case and its possible consequences have been soundly criticised[52] it seems that it has set the pattern in Australia for judicial dealings with company inspectors. However, it is submitted that the broader issues raised by the minority judgments will be weighed heavily in other fields.[53] The split decision of the High Court in *Testro Bros. Pty. Ltd.* v. *Tait* indicates

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[40] *Id.* at 339 (Lord Esher, M.R.).
[41] See esp. Chitty, L.J. at 339.
[42] (1932) A.C. 392.
[43] (1935) A.C. 76.
[44] (1873) L.R. 8 Q.B. 255; (1875) L.R. 7 H.L. 744.
[45] (1905) 1 K.B. 504.
[46] (1935) A.C. at 82.
[47] Uniform Companies Act, s.221(1)(g).
[48] (1962) V.R. 630.
[49] (1963) 109 C.L.R. 353.
[50] Uniform Companies Act, s.171(10) (all states except Tasmania, where it is sub-s. (11)).
[51] (1963) 109 C.L.R. at 367.
[52] See G. Nash, "The Judicial Function and Inspectors Appointed Under the Companies Act, 1961" (1964) 38 *A.L.J.* 111; G. Wallace and J. McI. Young, *Australian Company Law and Practice* (1965) 512.
[53] *Cf. Banks' Case, supra* n. 1 at 72.

that company inspectors are near the centre of a spectrum on one side of which are those administrative inquiries whose activities are clearly justiciable and on the other side of which are those upon whose deliberations and findings the court will not tread.

A case more clearly on the other side of the line was *Ex parte the Newcastle Coal Co.*[54] In that case the Industrial Court on the application of a trade union made a recommendation to the Minister that a board be set up to inquire into certain facts in dispute. Prohibition was sought on the ground that the Industrial Court had no jurisdiction to make such a recommendation. Both the New South Wales Full Court and the High Court declined jurisdiction on the ground that the recommendation could not be regarded as a judicial proceeding. Griffith, C.J. suggested that if the board was appointed the applicant could then challenge by way of quo warranto.[55] Similarly in *R.* v. *Macfarlane; ex parte O'Flanagan & O'Kelly*[56] a preliminary objection as to jurisdiction was sustained when the applicants sought certiorari, prohibition and quo warranto on the grounds that a Board set up under the Immigration Act did not on the facts have jurisdiction. The Court held that none of these remedies was appropriate because they only issued to a judicial tribunal.[57] It was stressed that the sole function of the Board was to advise the Minister who had referred the matter to it after he had formed an initial decision that deportation was merited. Isaacs, J. considered that the purpose of the Board was to provide "a necessary safeguard against either the undue use of ministerial power or even a mistaken opinion of a minister when all the facts are known. It is a guarantee provided by Parliament to the individual that he has a non-political and unprejudiced opinion on the merits before an adverse decision by the Executive is possible."[58]

Another interesting line of cases concerns the attitude of the courts to Royal Commissions set up to inquire into specific charges of mismanagement, dishonesty or neglect of duty made against public servants, parliamentarians and the like or to ascertain the causes of a particular disaster, as with the "Voyager" Commission. The findings of such Commissions may often lead to civil or criminal action being taken against persons whom the report implicates. Royal Commissioners in New South Wales can compel witnesses to answer questions or produce documents and, although the evidence thus obtained is not admissible in any civil or criminal proceedings against the person giving it, such evidence may vitally affect that person's interests.[59] Furthermore, for the purposes of the law of defamation, absolute privilege has been granted to the Commissioner and his findings as well as a qualified privilege to fair reports of the proceedings.[60] Many of the trappings of the courts are adapted and the rules of evidence are generally, but not invariably, adhered to.[61]

It is clear that a Royal Commission exercising such functions and powers could vitally affect the interests of individuals whose actions fall under its scrutiny. Will a court intervene on the grounds that an interested party did not get adequate opportunity to state his case, or that the Commission exceeded its "jurisdiction" or produced a report vitiated by some error of law on its

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[54] (1908) 8 S.R. (N.S.W.) 335; (1908) 6 C.L.R. 466.

[55] *Id.* at 467.

[56] (1923) 32 C.L.R. 518.

[57] But see now *Board of Trustees of Maradana Mosque* v. *Mahmud* (1967) A.C. 13; *Durayappah* v. *Fernando, supra* n. 10.

[58] (1923) 32 C.L.R. at 536-37.

[59] N.S.W. Royal Commissions Acts, 1923-1934, s. 17, considered in *R.* v. *S.* (1953) 53 S.R. (N.S.W.) 460.

[60] N.S.W. Defamation Act, 1958, ss. 13, 14(1)(f), 15(a).

[61] See M. V. McInerney, "Procedural Aspects of a Royal Commission" (1951) 24 *A.L.J.* 386, 438; Mr. Justice McClemens, "The Legal Position and Procedure Before a Royal Commissioner" (1961) 35 *A.L.J.* 271.

face? The general rule is that the proceedings and report of a Royal Commission are not justiciable. "Can the mere discovery of a crime by the Crown be a legal wrong to anybody, particularly to the criminal?" asked Griffith, C.J. in *Clough* v. *Leahy*.[62] The courts have held that the Crown's right to conduct inquiries is based on the prerogative[63] and the report which follows, even if obtained at proceedings where witnesses could be compelled to give evidence, cannot be questioned by the courts.[64] According to McClemens, J.:

> It cannot be too strongly stressed that where a Supreme Court judge has issued to him a Royal Commission he exercises those powers as a person holding an Executive Commission of Inquiry and not as performing judicial duties in any sense, because, though the activities and reports of a Royal Commission may, in a loose sense, affect subjects detrimentally, they have no effect on their legal rights and duties.[65]

This general rule is subject to two exceptions. It seems that a court will prohibit a Royal Commission (a) when it seeks to invoke its coercive powers in the course of an inquiry into matters beyond the constitutional competence of the government that created it;[66] and (b) where it interferes with "the administration of the course of justice", for instance by dealing with a matter *pendente lite*.[67]

Of course, many other cases could be cited that deal with inquiries in all their shapes and forms. Where the practitioner is dealing with a body about which the courts have already decided, the general principles to be drawn from all of these cases may often be disregarded, unless of course the earlier decisions relating to that particular inquiry are being impugned. Faced with a novel situation the cases as a whole will need consideration.

It is submitted that often a reading of the reasoning given by the judges will not be of great assistance. The cases display a marked tendency towards judgment by labelling, where what purport to be reasons for a decision are merely tags attached as an explanation for a decision reached on other, undisclosed grounds. Looking at it from the negative side, where the court has declined jurisdiction to review it has usually done so either by deciding that the inquiry would result in a "mere report" or "recommendation" as distinct from a decision subject to confirmation (this alone being considered sufficient to preclude review)[68] or by holding that the inquiry was not of a judicial nature.[69] Often the two were dealt with as if they were two sides of the one coin. According to Isaacs and Rich, JJ. in *Waterside Workers' Federation of Australia* v. *Gilchrist, Watt & Sanderson Ltd.*:

> We may summarize the position as to prohibition thus:—
> (a) The function of a tribunal amenable to certiorari must be judicial in the same sense that the function of a strict Court is judicial, whatever the constitution or the appropriate procedure of the tribunal may be.
> (b) That sense is that the determination of the tribunal must itself, and of its own direct force, instantly impose an obligation or affect the rights of the parties concerned.[70]

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[62] (1904) 2 C.L.R. 139 at 151.

[63] *McGuinness* v. *A.-G.* (1940) 63 C.L.R. 73 at 92-93 (Dixon, J.); see *contra* Griffith, C.J., in *Clough* v. *Leahy*, *supra* last n. at 156.

[64] In addition to the *Clough* and *McGuinness Cases* see *Ex p. Walker* (1924) 24 S.R. (N.S.W.) 604.

[65] *Supra* n. 61 at 271.

[66] *A.-G.* v. *Colonial Sugar Refining Co. Ltd.* (1913) 17 C.L.R. 644.

[67] *Clough* v. *Leahy*, *supra* n. 62 at 155. See also A. I. Clark, *Studies in Australian Constitutional Law* (2 ed. 1905) 227ff.

[68] E.g., the *Grosvenor Case*, *supra* n. 39; *Ex p. Walker*, *supra* n. 64; *O'Connor* v. *Waldron*, *supra* n. 43; *Testro* v. *Tait*, *supra* n. 49 at 363.

[69] E.g., *Ex p. Walker*, *supra* n. 64; *Ex p. Newcastle Coal Co.*, *supra* n. 54 ("purely ministerial"); *R.* v. *Macfarlane*, *supra* n. 56 ("wholly ministerial, and not in any relevant sense judicial"); *Re Clifford*, *supra* n. 24 (not acting as a court "in any legal sense").

[70] (1924) 34 C.L.R. 482 at 515.

As a general statement of principle this is today clearly unsupportable.[71]

It is submitted that the mere label of "inquiry" or "recommendation" is insufficient to preclude judicial review.[72] In *Ex parte Hopkins; re Cronin & Ors.*[73] the New South Wales Full Court granted certiorari to quash a recommendation, recognising that the overworked Minister would in practice follow the recommendation and that it would be unrealistic for the Court to shut its eyes to this.

Although the courts have often spoken as if there is a logical dichotomy between an inquiry which results in a recommendation or report and one whose deliberations end with a provisional order subject to confirmation, modification or rejection, it is submitted that this is not so. The superior decision-making authority has a similar unfettered discretion in both cases. The difference, which is only one of degree, seems to be in a consideration of which body *in fact* is more important in the decision-making process. Naturally where the case is one of some particularity,[74] where policy factors are not important,[75] or where the report will be almost invariably acted upon ("rubber stamped"), the courts are more likely to consider that its importance in the administrative structure merits its being liable to review. A similar analysis may be applied to situations where the subsidiary body formulates a scheme or plan of a technical nature[76] which the superior body will tend to accept provided it does not conflict with policies of a more general nature.[77] On the other hand the report of a Royal Commission which is essentially a fact-presenting document, whose recommendations are merely to be one of several considerations upon which Parliament may or may not act, is much less potent in its immediate effect upon the individual. This is not to deny that it may indirectly lead to action which will affect his rights. However, it is deemed more important to allow the inquiry to range at will—at least so far as the courts are concerned—in order that it may effectively carry out its task.

I am not suggesting that the judicial semeiotics of inquiry, report, recommendation, provisional order, and so on are useless, but merely that they should not be used as a cover for *a priori* reasoning. It is submitted that the courts often assess the relative importance of the inquiry whose activities they are called upon to review.[78] However, the facile reasoning contained in the more obvious cases provides little assistance when the court must face the more borderline situations such as that in *Testro Bros. Pty. Ltd.* v. *Tait.*[79]

The frequent use of the overworked word "judicial" as a test by which to determine jurisdiction to review is also to be regretted. It has been said that "no concept can safely be accepted as a guide to future action unless: (i) it has an accurate meaning and (ii) the theory upon which it is based, if ever it was valid, still retains its validity".[80] On this basis the test of "judicial" as a criterion governing judicial review in this field should have been scrapped years ago. S. A. de Smith has spent nineteen pages of his *Judicial Review of Administrative Action*[81] merely trying to throw some light on this "highly

[71] See, e.g., *Lain's Case, supra* n. 24.

[72] See *Ex p. Thackery* (1877) 13 S.C.R. (N.S.W.) 1 at 80; *Smith* v. *R.* (1878) 3 App. Cas. 614 at 623; *Denby's Case, supra* n. 6.

[73] (1956) 74 W.N. (N.S.W.) 100.

[74] E.g., the inquiries in *Ex p. Hopkins, supra* last n., and *Ex p. Wilson, supra* n. 25.

[75] *Cf. R.* v. *Macfarlane, supra* n. 56.

[76] E.g., *R.* v. *Electricity Commissioners, supra* n. 7; *Ayr Town Council* v. *Lord Advocate* (1950) S.L.T. 257.

[77] Eg., the situation with the Tariff Board.

[78] See *Ex p. Mineral Deposits Pty. Ltd.; Re Claye & Lynch* (1957) 59 S.R. 167.

[79] *Supra* n. 49.

[80] J. Willis, "Three Approaches to Administrative Law: The Judicial, the Conceptual, and the Functional" (1935) 1 *Univ. of Toronto L.J.* 53 at 72.

[81] (2 ed. 1968) 61-80.

acrobatic part of the law" where "an aptitude for verbal gymnastics is obviously of advantage". It is his conclusion that "in deciding whether or not a function should be treated as 'judicial' the courts have plainly been influenced by the practical consequences of calling it 'judicial'."[82]

It is submitted that the two recent decisions of *Banks* v. *Transport Regulation Board* and *R.* v. *Criminal Injuries Compensation Board; ex parte Lain*[83] are indicative of a more realistic approach by the courts to the problems dealt with in this Comment. In both of them the courts seemed conscious of the practical effect of the "decision" of the inquiry. In the latter case Lord Parker, C.J. considered that rather than the narrower concept of "affecting the rights of subjects"[84] the test must now be whether the preliminary inquiry "has to determine matters affecting subjects".[85]

IV *Grounds of Review*

Assuming that the individual can get past first base and convince the court that it has jurisdiction to review the findings or recommendations of an inquiry, he must then establish grounds upon which the relief sought may be based.

First, the inquiry may be reviewed on the grounds that it has exceeded its statutory "jurisdiction" or has acted *ultra vires*. In other fields the very existence of any distinction between the doctrines of excess of jurisdiction and *ultra vires* has been questioned.[86] In this field where the inquiry may appear at one moment to resemble a court,[87] at another a subordinate legislative body, it is submitted that any such conceptual distinction is barren. Suffice it to say that where the inquiry submits a report or recommendation or draft order which was not within its statutory competence[89] or which was based on irrelevant considerations[90] then subject in some cases to the court's intervening before that body is *functus officio*,[91] this is a sufficient ground for judicial review.

Secondly, it has long been recognised that denial of natural justice is a ground for review of inquiries.[92] It is submitted that the recent decisions[93] of the Privy Council and the High Court remove all doubts as to whether this ground would only apply if the inquiry could be categorised as judicial.

Most of the reported cases deal with breaches of the *audi alteram partem* maxim. Recently the courts have stressed the flexible content of this rule, pointing out that in different situations the standard required may differ.[94] It is submitted that where the inquiry is concerned with proposed disciplinary action the standard may be higher than in other cases.[95] It is not clear whether

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[82] S. A. de Smith, "The Limits of Judicial Review" (1948) 11 *Mod. L.R.* 306 at 308.
[83] *Supra* nn. 1, 24.
[84] See Atkin, L.J., in the *Electricity* case, *supra* n. 7 at 205.
[85] (1967) 2 All E.R. at 778. Thus, inasmuch as reliance has been placed on a narrow reading of the Atkin formula as indicating exhaustively the bodies amenable to judicial review, the narrowness of the reading has been opened up by such cases as *Ridge* and *Durayappah* (*supra* n. 10) and *Banks* (*supra* n. 1); and the exhaustiveness of the formula itself, even on a broad reading, has been rejected by the Queen's Bench Division in *Lain's Case*.
[86] See D. G. Benjafield and H. Whitmore, *Principles of Australian Administrative Law* (3 ed. 1966) 191-92.
[87] E.g. the Ministerial appointee in *Ex p. Wilson*, *supra* n. 25.
[88] E.g. the Commissioners in *R.* v. *Electricity Commissioners*, *supra* n. 7.
[89] *Ibid.*
[90] *Estate & Trust Case*, *supra* n. 22; *Banks' Case*, *supra* n. 1.
[91] See *infra*, text accompanying nn. 108-114.
[92] *Smith* v. *R.*, *supra* n. 72, approving *Cooper* v. *Wandsworth Board of Works* (1863) 14 C.B. (N.S.) 180.
[93] *Durayappah* v. *Fernando*, *supra* n. 10; *Banks' Case*, *supra* n. 1.
[94] *Ridge* v. *Baldwin*, *supra* n. 10 at 71-73 (Lord Reid); *Banks' Case*, *supra* n. 1 at 67 (Barwick, C.J.).
[95] *Cf. Denby's Case*, *supra* n. 6 at 342-43 (Swift, J.).

legal representation will be allowed to a person who appears before an inquiry.[96]

On the other hand where the courts have been called upon to formulate the procedure that must be complied with where the inquiry is constituted to make a recommendation that will affect property rights (as in a town planning scheme) they have trod more warily. Realising that such inquiries are not intended by the legislature to have the nature of a court of law, but rather to be relatively speedy, informal proceedings before an expert possibly with considerable departmental bias, the full formalities of a judicial proceeding are not demanded. In *Smith* v. *R.*[97] the Privy Council was called upon to examine, *inter alia*, what sort of a hearing was required by a provision that read: "All questions shall be decided by the Commissioner who shall give his decision in open Court, subject to confirmation by the Governor in Council". The Commissioner argued that he was simply holding a "Court of Inquiry" and refused to state the evidence on which he reached his conclusion adverse to the plaintiff, but the Privy Council held that the inquiry was in the nature of a judicial inquiry and consequently there had not been a "hearing" in the sense required by the elementary principles of natural justice. Nevertheless their Lordships were at pains to stress that they did not "desire to be understood as laying it down that the Commissioner, in conducting such an inquiry, is bound by technical rules relating to the admission of evidence, or by any form of procedure, provided the inquiry is conducted according to the requirements of substantial justice".[98] In the recent English Court of Appeal decision in *T. A. Miller Ltd.* v. *Minister of Housing and Local Government*,[99] it was held that hearsay evidence is admissible provided a fair opportunity of refuting it is granted. It is submitted that if the inquiry preliminary to the proposal of a scheme has as its main object the gathering of facts for the information and guidance of the confirming authority in its consideration of the proposed scheme, rather than the hearing of objections to the proposed scheme as in *Franklin's Case*,[100] the courts will require a closer approximation to the procedure of a court of law.[101] The court will also review for breach of the maxim *nemo debet esse judex in sua causa*.[102]

Lastly, it is now clear that where a body that is amenable to judicial review produces a report or recommendation or order that contains on its face an error of law that report, recommendation or order may be quashed or declared invalid.[103]

V *Remedies*

Owing to the tendency of the courts to discuss questions of jurisdiction to review in terms of the availability of remedies, a discussion about the principles the courts apply in considering the question whether an appropriate remedy has been sought would largely duplicate what was said in Part III of this Comment.[104] Furthermore there is no reason to believe that the general rules of administrative law relating to the availability of judicial remedies do not apply in this field. This being so, suffice it to say that as regards the prerogative writs of certiorari and prohibition, the litigant will be able to benefit from the general liberating effect of the recent decisions of *Ridge* v.

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[96] See *Reynolds* v. *A.-G.*, *supra* n. 5; *Whyte's Case*, *supra* n. 26; *R.* v. *Coppel*, *supra* n. 48; *Testro* v. *Tait*, *supra* n. 49.

[97] *Supra* n. 72.

[98] (1878) 3 App. Cas. at 623; and see *supra* n. 95.

[99] (1968) 1 W.L.R. 992.

[100] *Supra* n. 8.

[101] *Ayr* v. *Lord Advocate*, *supra* n. 76 at 263.

[102] *R.* v. *Hendon R.D.C.; ex p. Chorley* (1933) 2 K.B. 696.

[103] *Ex p. Hopkins*, *supra* n. 73; *Banks' Case*, *supra* n. 1; *Lain's Case*, *supra* n. 24.

[104] And see G. Nettheim, "The Place of the Declaratory Judgment in Certiorari Territory", *supra* p. 184.

Baldwin and *Durayappah* v. *Fernando*.[105] Indeed it may be that the tendency that was shown in those cases to avoid the "judicial" label may have the effect of ensuring more enlightening judgments in this field in the future.

I shall confine this part to a discussion of three problems which are peculiar to the question of remedies to challenge the proceedings of inquiries. These problems may be stated as follows:

(a) In what circumstances will the court intervene where the superior authority has already exercised its discretion with regard to the material contained in the report or recommendation?

(b) When will prohibition be available against an inquiry?

(c) To what extent are the equitable remedies of injunction and declaration available against inquiries?

(a) Since a determination by Parliament or by the Governor (-General) is not amenable to the prerogative writs[106] a decision by the courts that such a determination is vitiated by a defect in the inquiry which preceded the determination would be of little moment. Yet often the matter does not come before the courts before the final arbiter has made its decision in the light of the findings or recommendations of the inquiry. The court is in these circumstances faced with the problem of determining whose decision is being challenged. Is it the decision or recommendation of the inquiry which, although approved or acted upon by the superior authority, is being questioned? Or is it the determination of the superior authority which is based to a greater or lesser extent on the findings or recommendations of the inquiry, which is being impugned? These were the questions asked by the High Court in *Banks* v. *Transport Regulation Board*.[107] The Court, reversing the decision of the Victorian Full Court, held that a section which provided that "no decision of the Board . . . shall have any force or effect until such decision is reviewed by the Governor in Council" meant that certiorari would lie to quash a void decision of the Board notwithstanding the fact that the Governor in Council had already approved the decision. The Court asked questions similar to those set out above and held that the question was to be determined by construing the relevant section.

On the other hand in *Reynolds* v. *Attorney-General*[108] the section in question provided that the inquiry was to hear the case and then report to the Governor its opinion thereon. Certiorari and prohibition were sought to quash the report after it had been forwarded to the Governor. It was held that although the inquiry was amenable to certiorari and prohibition, its report being a condition precedent to the power of the Governor in Council to dismiss a civil servant, once that report had been forwarded to the Governor judicial review was barred.

(b) This problem is distinct from, although it appears similar to, that considered immediately above. Here for some reason (usually because the relevant Act so provides) certiorari is unavailable and the dissatisfied party may seek prohibition against the inquiry. The need for this remedy may be heightened by the fact that, by reason of the principles discussed in (a) above, the court may not be able to offer any remedy once the superior body is seized of the matter. The body making the inquiry may have completed its deliberations and forwarded its findings or recommendations to the superior authority which will make the ultimate decision. When is prohibition available in these circumstances?

It is a well-established principle that the courts will not issue orders that

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[105] Both cited *supra* n. 10.
[106] *Banks' Case*, *supra* n. 1 at 71 (Barwick, C.J.); *Barnett's Case*, *supra* n. 33.
[107] *Supra* n. 1. See also the *Electricity* and *Estate & Trust* cases, *supra* nn. 7, 22.
[108] *Supra* n. 5.

cannot possibly be enforced and that therefore prohibition will not lie to a tribunal if nothing remains to be done by it that can be prohibited.[109] However, the courts have frequently striven valiantly to seize upon some factor which can be prohibited where a holding that the body in question was *functus officio* would deprive the applicant of all remedies.[110] An example of this in the field under consideration is the Privy Council decision in *Estate & Trust Agencies (1927) Ltd.* v. *Singapore Improvement Trust*,[111] where Lord Maugham said:

> There must remain something to which prohibition can apply, some act which the respondents if not prohibited may do in excess of their jurisdiction, including any act, not merely ministerial, which may be done by them in carrying into effect any quasi judicial order which they have wrongly made.

And he quoted the views of R. S. Wright, J.[112] ("an application for prohibition is never too late so long as there is something left for it to operate upon") and of Scrutton, L.J.[113] ("when the sentence is unexecuted a statement of intention to execute it may be followed by a writ of prohibition, however long a time may have elapsed since the original sentence was pronounced"). It is not surprising that where the court construes the relevant determination to be that of the superior authority the dissatisfied individual will fail unless he can seize upon some activity which is required of the inquiry and which it alone can perform against which the court can order prohibition.[114]

(c) The traditional judicial discussion relating to the availability of the prerogative writs against inquiries has been marred by a tendency to decide by labelling, the labels serving as a kind of rosetta stone or key to all the problems in this field. If, as it is the theme of this Comment to suggest, it is statutory interpretation coupled with a policy decision as to the exact impact the inquiry has upon the administrative structure and the ultimate decision, that determines whether and to what extent the courts will review preliminary inquiries, there is no reason why similar factors should not determine the availability of the equitable remedies. The Scottish case *Ayr Town Council* v. *Lord Advocate*,[115] in which a declaration was awarded because the inquiry in question was *ultra vires* and offended natural justice, saw the Court weighing these factors before arriving at its decision.

Apart from stating that recent cases[116] should make it easier for a plaintiff to establish that some private right of his has been affected by irregular action that has been taken by an inquiry, there is no reason to believe that the ordinary and constantly expanding rules regarding the equitable remedies should not apply with full force to inquiries as to other forms of administrative procedure.[117]

VI *Conclusion*

In a field where the enunciation of general principles would be of great assistance to the practitioner, the decided cases, while helpful on particular

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[109] See de Smith, *op. cit. supra* n. 81 at 438.

[110] See, e.g.. *R.* v. *Australian Stevedoring Industry Board; Ex p. Melbourne Stevedoring Co. Ltd.* (1953) 88 C.L.R. 100

[111] *Supra* n. 22 at 917-18.

[112] *In re London Scottish Permanent Building Society* (1893) 63 L.J. (Q.B.) 112 at 113.

[113] *R.* v. *North; Ex p. Oakey* (1927) 1 K.B. 491 at 503.

[114] See *Reynolds* v. *A.-G., supra* n. 5; *Mineral Deposits Case, supra* n. 78 at 176-78.

[115] *Supra* n. 76; discussed by J. S. Campbell, "Public Inquiries into Proposed Administrative Action" (1952) *Scots Law Times* 193 at 196-99.

[116] E.g., the *Banks* and *Lain Cases, supra* nn. 1, 24.

[117] The attitude of Diplock, L.J. in *Anisminic* v. *Foreign Compensation Commission* (1967) 2 All E.R. 986 at 1007, seems an unduly restrictive one.

points, seem to indicate a lack of common ground. The relevant decisions are often reported and digested only under the particular statute to which they relate. It has been the aim of this Comment to try to focus upon the wood while perhaps "fading out" the trees.

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