THE RIGHTS OF CITIZENS AND THE LIMITS OF ADMINISTRATIVE DISCRETION: THE CONTRIBUTION OF SIR ANTHONY MASON TO ADMINISTRATIVE LAW

*Margaret Allars**

INTRODUCTION

It seems natural, almost inevitable, that courts should perceive their role in judicial review as protection of the rights of citizens.[1] Presented with litigation between citizens, the court protects the rights of the party entitled to win. In the case of litigation between citizen and government, if there are any rights at all to protect, they will be rights of citizens. We can hardly speak of rights of government. Yet government, in exercising powers conferred by the parliament which represents the people in accordance with the will of the majority, claims a mandate to make policy and implement it. Perhaps this mandate is also a right deserving of the protection of the courts. It could be argued, after all, that the public interest consists in the collective rights of the majority.

The response to the counter-majoritarian argument is well known. Even if we accept that the legislature's will expressed by conferral of power upon the executive branch reflects the majority's interests, any representative nexus is interrupted by the exercise of administrative discretion to choose and interpret policy. The assumption that discretionary decisions of the executive branch simply reflect a pursuit of the public interest in accordance with the will of the legislature is misconceived. Public law academics have sought to dispel the notion that there is one public interest pursued by government; and to identify the competing interests of sectors of the community which are affected by discretionary decision-making.[2] Acceptance of this pluralist argument has important implications for reform of administrative processes and the principles applied in judicial review, such as rules of standing. Yet if

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1 The term "citizen" is employed in this essay, not with the technical meaning found in migration and citizenship laws, but rather in the wider and jurisprudential sense of a person in a reciprocal relationship with government defined by political and civil rights and duties. See T H Marshall, *Citizenship and Social Class and Other Essays* (1950) at 8; W Kymlicka and W Norman, "Return of the Citizen: A Survey of Recent Work on Citizenship Theory" in R Beiner (ed), *Theorizing Citizenship* (1995) at 283.

2 See generally P P Craig, *Public Law and Democracy in the United Kingdom and the United States of America* (1990) at 159-162.

participative processes were introduced to structure discretionary decision-making in a manner conducive to achieving an accommodation of competing interests of groups of citizens, it would still be contestable whether the executive branch of government has a right to pursue the policies selected through the process.

In the context of judicial review the group interests at stake are often easily discerned by reason of the representative role of the applicant, which may be federal or state government, a department, agency, trade union, local council or public interest group. More frequently the applicant is an individual and group interests are subdued, perhaps attracting attention only as a matter of indirect consequence. The issue before the court is blatantly a conflict between the rights of a citizen and the claimed "right" of government to act in the public interest. To safeguard the rights of the citizen, whether represented or not, the court must identify the limits of the discretion of the executive branch.

This paper seeks to develop an understanding of the background theory which might explain Sir Anthony Mason's conception of the relationship between the citizen and the state. That relationship is defined by the limits placed upon administrative discretion, limits which may be defined by reference to rights of citizens. Sir Anthony has demonstrated a clear conception of the role of the High Court as an institution operating within a particular social and historical context, influencing and responding to community values. In his extra-judicial writings Sir Anthony has expressed the view that although judges are appointed indirectly by the elected representatives of the people, they should not expect to function as representatives of the people themselves:

> [J]udicial independence is an essential element of modern democracy in which the citizen's rights and interests, enforceable against government, are of vital importance.[3]

What then is the function of the courts? This enterprise cannot hope to identify with precision a particular version of democratic theory which one might attribute to Sir Anthony. But it will be argued that the general parameters of such a theory encompass a strengthening of citizenship, tempering the claim that the doctrine of parliamentary sovereignty sanctions the exercise of unlimited administrative discretion. Sir Anthony has long cherished a vision of a responsive and deliberative form of democratic government.[4] During the period from the early 1970s to the mid 1990s, as formal reasons for adherence to English precedent were removed and shy judicial confessions to a role of making new law in hard cases were first uttered,[5] Sir Anthony played a central role in the transformation of administrative law to distinctively Australian principles which could nurture that vision. In the course of extra-judicial comment since his retirement he asserted that "[t]here is no place in the modern democratic world for a supine judiciary."[6] This was not, however, a jurisprudence of rights run

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3 Retirement of Chief Justice Sir Anthony Mason (1995) 183 CLR v at vi. See also Sir Anthony Mason, "The Future of the High Court of Australia" (1996) 12 *QUTLJ* 1 at 3.

4 Sir Anthony Mason, "The Wilfred Fullagar Lecture: Future Directions in Australian Law" (1987) 13 *Monash ULR* 149 at 158; "The Future of the High Court of Australia" (1996) 12 *QUTLJ* 1 at 5.

5 Justice M Kirby, "Sir Anthony Mason Lecture 1996: A F Mason—From *Trigwell* to *Teoh*" (1996) 20 *MULR* 1087 at 1095-1097 and 1098-1099. For Sir Anthony's views, see Sir Anthony Mason, "The Role of the Courts and the Turn of the Century" (1993) 3 *JJA* 156 at 163-166.

6 Sir Anthony Mason, "The Judges. The Community and the Media" (1997) 12 *Commonwealth Judicial Journal* 4 at 5; "No Place in a Modern Democratic Society for a Supine Judiciary" (1997) 50 *Law Soc Jo* 51.

rampant in trumping governmental discretion. To characterise Sir Anthony as an uncompromising champion of rights of citizens unmindful of the representative role of government would be a crude analysis, portraying a role which is not open to any judge of the High Court and which is inconsistent with his judgments in the very constitutional cases which have triggered such commentary.[7] Journalistic perceptions of excessive judicial activism in asserting the rights of citizens owe much to a preoccupation with constitutional decisions of the Mason Court affecting the relationship between the judicial and legislative branches of government.[8] Had more attention been given to decisions deemed less newsworthy, such as Sir Anthony's administrative law judgments carefully defining the different functions of the judicial and executive branches of government, the commentators may have hesitated.

This essay focuses upon leading administrative law judgments of Sir Anthony. It makes no attempt to survey his extensive extra-judicial contribution to public law scholarship. From the 23 years of Sir Anthony's membership of the High Court the discussion which follows selects three areas which highlight the complementary themes of the limits of discretion and the rights of citizens. These are: the limits of secrecy of government information; the limits imposed upon judicial review by principles relating to justiciability and privative clauses; and the rights of citizens to a fair hearing pursuant to procedural fairness. Each is an area which Sir Anthony has approached with a keen awareness that his decision implicates him in taking a stance on the key conundrum of democratic theory. How may the rights asserted by citizens be reconciled with the discretion of government which claims to represent the pubic interest?

As a preliminary point it should be noted that these were not new themes for Sir Anthony. Both themes dominated the Kerr Committee Report[9] which in 1971 made recommendations which resulted, among other things, in the enactment of the Administrative Decisions (Judicial Review) Act 1977 (Cth) (ADJR Act) and the establishment of the Administrative Appeals Tribunal (AAT). As Solicitor-General of the Commonwealth, Sir Anthony persuaded the then federal Attorney-General Sir Nigel Bowen to establish the Kerr Committee. As a member of the Committee Sir Anthony contributed to writing those parts of the report which set out the state of administrative review in Australia and the United Kingdom.[10] That description included recognition of the increasing conferral of broad discretionary power, and the inadequacy of existing means by which citizens whose rights were affected might seek

7 See *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 where Mason CJ elaborated the principle of representative government. For an example of commentary which eschews this popular argument see The Hon Justice G F K Santow, "Aspects of Judicial Restraint" (1995) *Aus Bar Rev* 116.

8 These political perceptions have themselves been distorted by their neglect of decisions other than *Mabo v Queensland (No 2)* (1992) 175 CLR 1 and the free speech cases, noted at n 27 below. For a variety of views regarding the contribution of the Mason Court, see C Saunders (ed), *Courts of Final Jurisdiction: The Mason Court in Australia* (1996).

9 Commonwealth Administrative Review Committee, *Report* (PP No 144 of 1971).

10 Personal communication by Sir Anthony, 29 September 1999, which included the observation that the largest share of the writing of the report was carried out by another member of the Committee, Professor H Whitmore.

redress, including the decline of the doctrine of ministerial responsibility.[11] The first legislative response to the Committee's recommendations was greeted by Sir Anthony as a welcome step towards "affording protection to citizens against the Executive".[12]

THE LIMITS OF SECRECY

The limits on executive discretion to maintain secrecy in decision-making are located on the one hand in freedom of information legislation, statutory duties to give reasons for decisions and furnish reports; and on the other hand in statutory duties of secrecy and principles relating to Crown privilege or public interest immunity. In three key judgments Sir Anthony defined the limits of the discretion to maintain the secrecy of information. The first two are concerned with public interest immunity, the third with the right of government to bring an action for breach of confidence.

At an early stage of his career as a judge of the High Court, Mason J displayed a healthy scepticism towards ambit claims made by government for the need to maintain secrecy. In *Sankey v Whitlam*[13] the High Court set out the test of balancing of public interests to be applied by the courts in assessing claims to Crown privilege in respect of Cabinet documents. Mason J required affidavit evidence by ministers in support of such claims to be informative rather than "amorphous".[14] Documents of purely historical interest could not attract the privilege, nor could it be argued that disclosure would result in lack of candour in Cabinet discussions or advice given by public servants.[15] Nonetheless Mason J accepted that Cabinet proceedings have always been regarded as secret and confidential, that Crown privilege should be available to protect high level deliberations on important matters of policy and that the efficiency of government would be seriously compromised if Cabinet papers were disclosed while they are still current or controversial.[16]

These views were maintained by Mason CJ later in the joint majority judgment in *Commonwealth v Northern Land Council*.[17] The High Court held that the Commonwealth should not have been ordered to produce documents in an action by the Northern Land Council against the Commonwealth for breach of contract. The documents were books recording Cabinet deliberations on the current and controversial subject of uranium mining. The public interest in the confidentiality of the Cabinet documents, to enable decision-making and policy development by Cabinet to be uninhibited, was not outweighed by the public interest in the proper administration of justice.[18] Collective Cabinet responsibility would be undermined if Cabinet deliberations were not kept

11 Commonwealth Administrative Review Committee, *Report* (PP No 144 of 1971) paras 5, 11, 12, 16, 58 and 105. See also Sir Anthony Mason, "Administrative Review: The Experience of the First Twelve Years" (1989) 18 *F L Rev* 122 at 128-130; "Twelve Years of Administrative Review in Australia" (1990) *Commonwealth Law Bulletin* 1011 at 1015-1018.

12 Sir Anthony Mason, "Where to Now?" (1975) 49 *ALJ* 570 at 572.

13 (1978) 142 CLR 1.

14 Ibid at 96.

15 Ibid at 97-98.

16 Ibid.

17 (1992) 176 CLR 604.

18 Ibid at 619.

confidential. Collective ministerial responsibility remained an important element of the system of government.[19]

The decline of the doctrine of ministerial responsibility was not regarded by Mason J as an invitation to judges to disregard the common law principles supporting it and thereby hasten its further demise. While the decline heightens the vigilance of judges to ensure that rights of citizens may be vindicated through other avenues, in particular judicial review, judges may also play a part in the resuscitation of this fundamental means for securing accountability in our system of government. Indeed the doctrine of responsible government has recently been judicially affirmed and recognised as a supporting rationale for principles of open government, without derogation from the principle that there is a public interest in maintaining the confidentiality of Cabinet documents.[20]

Mason J's brisk approach to governmental claims to secrecy was again evident in *Commonwealth v John Fairfax & Sons Ltd*[21] where he rejected the Commonwealth's submission that interlocutory relief should be granted to restrain the publication of a book containing an account of events in East Timor.[22] Government secrets are to be treated differently from secrets of citizens, indeed looked at "through different spectacles".[23] Certainly where government seeks to invoke the equitable principles relating to breach of confidence, equity protects the public interest rather than private interests of the citizen. However, a government seeking to invoke breach of confidence bears the onus of showing that it is in the public interest that the documents remain confidential. The public interest is not to be understood simply as the interests of the government of the day:

> [I]t can scarcely be a relevant detriment to the government that publication of material concerning its actions will merely expose it to public discussion and criticism. It is unacceptable in our democratic society that there should be a restraint on the publication of information relating to government when the only vice of that information is that it enables the public to discuss, review and criticize government action.[24]

Mason J's pithy statement expressing his scant regard for the desire of a government to invoke the public interest to protect itself from potentially damaging criticism continues to be of central importance in the area of breach of confidence and in the application of public interest tests under freedom of information legislation.[25] It has bolstered judicial responses to legal issues pertaining to open government in a variety of jurisdictions.[26] And that pithy statement is almost identical with the key link

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19 Ibid at 615.

20 *Egan v Willis* (1998) 195 CLR 424 at 448-453 per Gaudron, Gummow and Hayne JJ.

21 (1980) 147 CLR 39.

22 Interlocutory injunctions were, however, granted to restrain the publishers from a threatened infringement of copyright.

23 (1980) 147 CLR 39 at 51.

24 Ibid at 52. See also *Attorney-General (UK) v Heinemann Publishers Australia Pty* (1988) 78 ALR 449 at 458.

25 See *Re Eccleston and Department of Family Services and Aboriginal and Islander Affairs* (1993) 1 QAR 60 at 75; *Hamilton v Environment Protection Authority* (District Court of New South Wales, Ainslie-Wallace J, 5 August 1998, unreported).

26 See, for example, the United Kingdom decisions of *Derbyshire County Council v Times Newspapers Ltd* [1992] 1 QB 770; *Attorney-General v Guardian Newspapers* [1990] AC 109; *Lord*

in the High Court's reasoning in the free speech cases. This is that representative government cannot operate in the absence of free public discussion in the media of the views of all interested citizens and public participation in that discussion.[27]

Limited only by the broad notion of the public interest, the discretion to maintain secrecy is nonetheless a narrow one. For there is a public interest in protecting the rights of citizens to discuss the performance of government. Secrecy may be maintained at the cost of rights of citizens where that is necessary to support the doctrine of ministerial responsibility. But the idea of Cabinet secrecy serving the public interest cannot be employed to limit the rights of citizens beyond that limited arena, as illustrated by Mason J's judgments in *R v Toohey (Aboriginal Land Commissioner); Ex parte Northern Land Council,*[28] *FAI Insurances Ltd v Winneke*[29] and *South Australia v O'Shea,*[30] discussed in the next section.

LIMITS OF JUDICIAL REVIEW

Justiciability

In five major cases concerning justiciability Sir Anthony's judgments have interrogated the scope for citizens to invoke judicial review as a means for challenging administrative discretion. Four concern the test of justiciability at general law: *Barton v The Queen,*[31] *R v Toohey (Aboriginal Land Commissioner); Ex parte Northern Land Council,*[32] *Church of Scientology v Woodward*[33] and *Coutts v Commonwealth.*[34] The fifth, *Australian Broadcasting Tribunal v Bond,*[35] concerns the different test of justiciability under the ADJR Act. While *Barton* and *Bond* reflect restraint in holding certain exercises of power not justiciable, *Toohey, Church of Scientology* and *Coutts* suggest an expansionary test of justiciability. The judgment in *O'Shea* contains elements of restraint and expansion. On closer examination these cases reflect a consistent approach to the problem of the competing demands of protection of the rights of citizens and freedom of government to exercise power unchecked by the courts.

Advocate v Scotsman Publications Ltd [1990] AC 812; *Hyde Park Residence Ltd v Yelland* [1999] RPC 655.

27 *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 at 139 per Mason CJ in relation to representative government: "the elected representatives have a responsibility not only to ascertain the views of the electorate but also to explain and account for their decisions and action in government and to inform the people so that they may make informed judgment on relevant matters"; *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 34 per Mason CJ: "In deciding an issue of proportionality...the Court must take account of and scrutinize with anxiety the adverse impact, if any, of the impugned law on such a fundamental freedom as freedom of expression, particularly when that impact impairs freedom of expression in relation to public affairs and freedom to criticize public institutions."

28 (1981) 151 CLR 170.

29 (1982) 151 CLR 342.

30 (1987) 163 CLR 378.

31 (1980) 147 CLR 75.

32 (1981) 151 CLR 170.

33 (1982) 154 CLR 25.

34 (1985) 157 CLR 91.

35 (1990) 170 CLR 321.

Barton's case

Barton v The Queen is generally cited for the bland proposition that an exercise by the Attorney-General of the power to present an *ex officio* indictment is not justiciable. Committal proceedings, by-passed when an *ex officio* indictment is filed, protect the accused against wanton or misconceived prosecutions, ensuring that the accused knows the evidence of Crown witnesses given on oath, has an opportunity to cross-examine them and call evidence in rebuttal. The filing of an *ex officio* indictment also deprives a citizen of the right to a decision from a magistrate as to whether on the evidence he or she ought to be put on trial at all. In *Barton* counsel for the accused submitted that since the power was statutory it should be justiciable. Gibbs ACJ and Mason J held that the power was statutory only because it was thought inappropriate to introduce the grand jury in the early days of the colony.[36] Instead the Attorney-General was given a power which was in all respects similar to that exercised by the Attorney-General in England.[37] There was well-established English authority that the prerogative powers to enter a *nolle prosequi*, and to grant or refuse a fiat in connection with a relator action, are not justiciable.[38]

The rights of citizens were not, however, discounted. Gibbs ACJ and Mason J acknowledged that, where a statute confers an apparently unlimited administrative discretion, it is in fact limited by the scope and object of the statute. The Attorney-General had no duty to consider whether to exercise the power, which was self-contained with nothing else in the Australian Courts Act 1828 limiting it. This confirmed the view that the power was not justiciable, like the English Attorney-General's prerogative power. The policy considerations supported this view. It would be undesirable for the courts to become closely involved in the question whether a prosecution should be commenced, when it would ultimately be the court's function to determine the accused's guilt or innocence.

While the outcome in *Barton* turned upon historical analysis, statutory interpretation, the authority of old case law and policy considerations concerning the relationship between civil and criminal jurisdictions, the joint judgment had much to say about the rights of citizens. Gibbs ACJ and Mason J held that rare cases of abuse of process could provide an exception to the rule about non-justiciability, and the court would stay a prosecution brought without reasonable ground, at least until a preliminary examination took place, since any trial held without antecedent committal proceedings "unless justified on strong and powerful grounds, must necessarily be considered unfair".[39] The courts should not abdicate to the Attorney-General or the Crown prosecutor their function of deciding "where on balance the interests of justice lie".[40]

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36 (1980) 147 CLR 75 at 92-93.

37 Australian Courts Act 1828 (9 Geo IV c 83), s 5.

38 (1980) 147 CLR 75 at 90-91. There was also some indication in old New South Wales cases that the courts assumed the power to enter an *ex officio* indictment is not justiciable: at 93.

39 (1980) 147 CLR 75 at 100.

40 Ibid at 101. The rights of the accused to a fair trial were to be balanced against the Crown's interest in bringing them to trial quickly, after serious delay, on serious charges of conspiracy which would have to be proved by the testimony of overseas witnesses. It was for the Supreme Court to decide whether the trial should be stayed.

Toohey's case

Within the space of a year the landmark decision of *R v Toohey; Ex parte Northern Land Council*[41] expanded the test of justiciability in two respects. Firstly it established that an exercise of statutory power by the Queen's representative is justiciable on the ground of improper purpose or bad faith. This was a major renovation of the common law principle that the Queen's representative is not amenable to judicial review.[42] Secondly, by way of dicta, *R v Toohey* established that some prerogative powers may be justiciable.

Placed in its context, the seventeenth century "old rule" about immunity of the Crown from judicial review, protecting the "unbounded discretion" of the King's prerogatives,[43] was deprived of its force. Mason J rejected the principle, based on the old rule and accepted by Dixon J in *Australian Communist Party v Commonwealth*,[44] that "the counsels of the Crown are secret".[45] The only justification provided for the principle in previous decisions was the tautologous statement that the secrets of the Crown are secret; the generalised claim that the administrative process should not be exposed to unnecessary judicial intervention; and the faulty assumption that the doctrine of ministerial responsibility provides sufficient accountability.[46]

To understand how "the foundations of the old rule have been undermined" it was necessary to consider its impact upon the justiciability of prerogative powers.[47] The present case concerned a statutory power rather than a prerogative power and there were good reasons for taking a different approach to justiciability of statutory powers as compared with prerogative ones.[48] An exercise of statutory discretionary power "very often affects the right of the citizen".[49] It is also by definition limited, because, to use Mason J's words:

> there may be a duty to exercise the discretion one way or another; the discretion may be precisely limited in scope; it may be conferred for a specific or an ascertainable purpose; and it will be exercisable by reference to criteria or considerations express or implied.[50]

Mason J reasoned that because prerogative powers lack some or all of these qualities of statutory powers, it may not be appropriate that they be justiciable in some instances. The examples Mason J gave—the prerogative relating to war and the armed services—suggest that he had in mind situations where national security is at stake.

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41 (1981) 151 CLR 170.

42 As a result, in *Toohey* itself an exercise of delegated law-making power by the Administrator of the Northern Territory to make a regulation specifying a large area of land near Darwin as "town land" was in principle justiciable. The Northern Land Council argued that the regulation was made in order to defeat a land claim which was known to be pending and which by virtue of the regulation now fell outside the jurisdiction of the Aboriginal Land Commissioner. It was therefore permissible for the Aboriginal Land Commissioner to inquire into the motives of the Administrator in exercising the power.

43 (1981) 151 CLR 170 at 218 per Mason J quoting from W Blackstone, *Commentaries on the Laws of England* (1809) Bk 1 at 251.

44 (1951) 83 CLR 1.

45 Ibid at 179.

46 *Toohey* (1981) 151 CLR 170 at 219.

47 Ibid at 220.

48 Ibid at 219.

49 Ibid.

50 Ibid.

However he added to this category the non-justiciable powers of the Attorney-General considered in *Barton*.

The principle that "the King can do no wrong" may be applicable to personal acts of the sovereign but it was questionable whether it could apply when the act was one "affecting the rights of citizens" and actually done on the advice of government ministers.[51] This was true of prerogative power as well as statutory power, exercised on the advice of ministers. According to Mason J, non-justiciability of prerogative power must be justified by reference to the nature and subject matter of the prerogative power.[52] This test would be more apt to achieving the aim of excluding review which unnecessarily interferes with government processes. It would at the same time achieve "greater fairness to the citizen".[53]

Mason J justified this new common law principle on four grounds. Firstly, erosion of the old rule had already commenced in *Sankey v Whitlam*[54] where the Court held that the courts may look behind a ministerial certificate claiming Crown privilege.[55] Secondly, in view of the many modern cases of judicial review of statutory discretions of government ministers, it was logical that prerogative power should be treated in the same way. There was no good argument for doing the reverse, namely, extending Crown immunity to some statutory powers of ministers because this doctrine is based on the old rule, which is itself a legal fiction whose foundations have crumbled. Moreover there was no substance in the argument that government would grind to a halt if decisions were open to review on the ground of bad faith.

Thirdly, the old rule did "not conform to modern notions of freedom of information and secrecy".[56] Fourthly, it was now generally accepted that the doctrine of ministerial responsibility provides no answer to the problem of accountability:

> [T]he doctrine of ministerial responsibility is not in itself an adequate safeguard for the citizen whose rights are affected. This is now clearly accepted and its acceptance underlies the comprehensive system of judicial review of administrative action which now prevails in Australia.[57]

Having challenged the old rule as a faulty basis for the distinction between statutory and prerogative powers for the purpose of a justiciability test, Mason J turned to its use to protect the Queen's representative from judicial review. The main authority was the *Australian Communist Party Case* which was decided in the context of national security and which was open to the criticism of having treated statutory and prerogative powers of the Queen's representative in the same way. Statutory powers exercised by ministers were justiciable. Statutory powers exercised by the Queen's representative should also be justiciable. Some prerogative powers of ministers should be justiciable because of their capacity to affect the rights of citizens. Some prerogative powers of the Queen's representative should be also be justiciable, for the same reason.

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51 Ibid at 220.
52 Ibid.
53 Ibid at 222. Wilson J reached a similar view, pointing out that the views of Dixon and Fullagar JJ in the *Australian Communist Party Case* were influenced by the context of national security: at 280-281 and at 283.
54 (1978) 142 CLR 1.
55 (1981) 151 CLR 170 at 220.
56 Ibid at 222.
57 Ibid.

In this way a fiction associated with Crown immunity was banished from administrative law. The assumption that questions of justiciability could be answered on the basis of simple distinctions between statutory powers and prerogative powers, or between the status of the Queen's representative and that of a minister, were exploded. Four years later the House of Lords reached a similar conclusion, extending justiciability to certain prerogative powers by reason of their subject matter.[58]

After Toohey's case

The reasoning of Mason J in *Toohey* provided a powerful foundation for further evolution of the principles governing justiciability at general law. In *FAI Insurances Ltd v Winneke*[59] Mason J held that an exercise of statutory power by the Governor in Council was justiciable on the ground of denial of procedural fairness.[60] The doctrine of ministerial responsibility had failed and judicial review should provide the avenue for redress of citizens' grievances in its place. The reasoning of Mason J does not depend purely upon exposition of the workings of government, the relationship between the branches of government and a certain understanding of democratic values. It is also built on the logic of the common law. The discretionary power of the Governor in Council to approve an application for renewal of workers' compensation insurance was structured by criteria relating to the financial position and compliance record of the applicant insurance company. If ministers' decisions are justiciable because the excess of power doctrine is engaged by the limitations imposed by statute, then this is also true of an exercise by the Governor in Council of the same kind of statutory power.[61]

Barton suggests that powers which are statutory may be prerogative in their nature where, according to English history, they were prerogative and the Australian statute provides no limitations upon the power. Nonetheless in *Church of Scientology Inc v Woodward*,[62] decided soon after *Barton*, the High Court held that an agency, established in exercise of prerogative power but later continued in existence by statute, was subject to judicial review.[63] The agency was the Australian Security Intelligence Organisation (ASIO). Had the power been prerogative, by its nature and subject matter it would most likely have been treated as not justiciable on the *Toohey* test. The Court rejected the Commonwealth's submission that ASIO retained some extended prerogative power for "ASIO cannot exceed that statutory limitation, though the Commonwealth in its other capacities may act free from that limitation".[64] Mason J observed:

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58 *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 (*GCHQ*).

59 (1981) 151 CLR 342 at 364-365.

60 While the duty to afford a fair hearing rested upon the Governor in Council, in practice this could be delegated to the relevant minister or a committee of the Executive Council.

61 (1981) 151 CLR 342 at 365.

62 (1982) 154 CLR 25.

63 Mason, Murphy and Brennan J. Gibbs CJ in dissent held that the question whether ASIO obtained intelligence that was not relevant to security was not justiciable because ASIO's statutory function of obtaining intelligence was neither a power nor a duty: ibid at 52.

64 *Church of Scientology Inc v Woodward* (1982) 154 CLR 25 at 62.

> Surveillance in association with the obtaining, storage and dissemination by a government organization of information relating to private citizens can only be justified in a democratic society by the need to protect that society, ie, on security grounds.[65]

Any argument that judicial review is impliedly excluded by statute "should be viewed with extreme caution, indeed with healthy scepticism".[66] If parliament wishes to exclude judicial review, its language should be direct and clear. And the constitutional limits to such exclusion are found in the definition of the original jurisdiction of the High Court under s 75(v) of the Commonwealth Constitution.[67] The availability of a claim of Crown privilege did not detract from the fact that the test of justiciability was met. The two issues are different.[68]

Some doubt may remain as to whether the approaches of Mason J in *Barton* and *Church of Scientology* may be reconciled. *Barton* suggests that a statutory power may remain prerogative in nature due to its historical origins, and hence be non-justiciable, while *Church of Scientology* appears to reject such a proposition. The position is clarified by Mason J's concurrence with the strong dissent of Deane J in *Coutts v Commonwealth*.[69] Deane J held that interpretation of regulations, governing termination of an office held at pleasure in the armed services, should not be overridden or distorted because of assumed conformity with traditional common law principles reflecting assumptions that this was an exercise of prerogative power.[70] The dissenting view—that procedural fairness was implied in a case such as this where livelihood was affected—allowed the rights of citizens to prevail over an unsupported assumption that discretion was unlimited.

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65 Ibid at 59.

66 Ibid at 55.

67 Ibid at 56.

68 The courts may determine whether intelligence is relevant to security and whether a communication of intelligence is for purposes relevant to security, and therefore within the purposes of the ASIO's empowering statute. Claims of Crown privilege would almost certainly exclude some evidence from consideration in making this assessment. A claim of privilege would make the task of ascertaining whether an excess of power occurred more difficult and make the onus resting upon a plaintiff a heavier one: *Church of Scientology Inc v Woodward* (1982) 154 CLR 25 at 61. See also at 74-75 per Brennan J. The result was that the appellant organisation failed to show that intelligence initially obtained by ASIO established that it was not a security risk; or that intelligence about the organisation was not relevant to security.

69 (1985) 157 CLR 91. The concurrence was with the caveat that no duty to afford procedural fairness arose only when the power to dismiss was exercised for discretionary reasons independently of the regulation which specified the basis of termination on medical grounds: at 94.

70 (1985) 157 CLR 91 at 115. According to Deane J the common law rules developed long ago to apply to military forces of the Crown or the East India Company and "reflected notions of the Royal prerogative of the command of the army which are of little or no contemporary relevance in this country": at 108-109. In the leading judgment for the majority, Wilson J held that at common law an office such as this, held at the pleasure of the Governor-General, could be terminated at any time, and without having a reason or giving a reason. He drew attention to the "heavily entrenched principles, supported by tradition, authority and public policy, attaching to the concept of an appointment in the armed services being held at the pleasure of the Crown": at 105.

The question whether decisions of Cabinet were justiciable had not yet been raised for the High Court. Nor had the Court had occasion to consider whether an exercise of statutory power by the Queen's representative acting on the advice of Cabinet rather than a single responsible minister, was justiciable. This issue was raised by *South Australia v O'Shea*,[71] but the justiciability of an exercise of statutory power by the South Australian Governor in Council appears to have been assumed. The decision challenged was that a sex offender should be detained in an institution at her Majesty's pleasure, on the ground that he was incapable of controlling his sexual desires. The focus was upon procedural fairness in relation to the Governor in Council's decision. *FAI Insurances* was silently applied with regard to the issue of justiciability, but distinguished by the majority judges[72] with regard to the issue of implication of procedural fairness. While Mason CJ ultimately agreed with the majority judges that procedural fairness was not implied in relation to this decision on account of the particular statutory scheme, he did not join them in distinguishing *FAI Insurances* on this basis. Rather, Mason CJ placed decisions of the Governor in Council made on the advice of Cabinet in the same category as the Governor in Council's decisions made on ministerial advice. In *FAI Insurances* and in *Toohey* the idea that a Governor acting on ministerial advice should not be treated differently from a minister was the rationale for the conclusion with regard to justiciability. Indeed Mason CJ's judgment in *O'Shea* provides support for the argument that Cabinet decisions are directly justiciable on the ground of denial of procedural fairness.[73]

Bond's case

The test of justiciability under the ADJR Act has been much more difficult than the issue of justiciability at general law. In *Australian Broadcasting Tribunal v Bond*,[74] Mason CJ restricted the interpretation of the expression "decision", thereby narrowing the ambit of judicial review of administrative action under the Act.[75] In the leading judgment Mason CJ held that a "decision" is generally, but not always, a decision which is final or operative and determinative, at least in a practical sense, of the issue of fact falling for consideration. Although findings for which specific statutory provision is made are justiciable, a conclusion reached as a step along the way in a course of reasoning leading to an ultimate decision would not ordinarily amount to a

71 (1987) 163 CLR 379.

72 Ibid at 404 per Wilson and Toohey JJ, at 412 per Brennan JJ.

73 For further discussion of *O'Shea* see text accompanying nn 136-141 below. That larger question was addressed directly a week after *O'Shea* was decided, in *Minister for Arts, Heritage and Environment v Peko-Wallsend Ltd* (1987) 75 ALR 218, where the Full Federal Court held, for varying reasons, that a Cabinet decision to list Kakadu Stage 2 on the World Heritage list was not justiciable at general law.

74 (1990) 170 CLR 321.

75 Brennan J concurred, Deane J agreed with this aspect of the judgment and Toohey and Gaudron JJ reached a similar conclusion, placing greater emphasis upon another requirement which forms part of the test of justiciability under the ADJR Act, namely whether the decision was made "under an enactment". *Bond* reversed the jurisprudence of the Federal Court, established since *Lamb v Moss* (1983) 49 ALR 533, of treating the expression "decision" as not requiring a final or operative decision.

justiciable decision and if it amounted to "conduct engaged in for the purpose of making a decision" would be reviewable only on procedural grounds.[76]

As one of the reforms recommended by the Kerr Committee, the ADJR Act is, as Mason CJ acknowledged in *Bond*, a remedial statute of which "no narrow view" should be taken.[77] Mason CJ adverted to the policy considerations at stake. On one hand there were the rights of citizens aggrieved by decisions to "a convenient and effective means of redress and to enhance those processes".[78] On the other hand a broad conception of justiciability brings "a greater risk that the efficient administration of government will be impaired" and possibly "a fragmentation of the processes of administrative decision-making and [setting] at risk the efficiency of the administrative process".[79]

The rights of citizens to pursue grievances by way of judicial review may be limited not only by narrowing the test of justiciability but also by restricting one or more of the other aspects of review. These include the test of standing, the requirement for establishing grounds of review, the availability of remedies and the discretion to grant relief. Of these aspects of review, the ADJR Act contains most definitional detail in relation to justiciability and remedies. The Act provides less guidance with regard to the test of standing and even less with regard to the grounds of review and discretion to grant relief, aspects of review left almost entirely to the operation of common law principles. In *Bond* Mason CJ approved existing authority that the discretion to grant relief should be exercised with respect to committal proceedings only in exceptional cases,[80] and carefully defined the limits of those grounds of review which permit review of findings of fact.[81]

It was in relation to review of factual findings that the narrowing of the test of justiciability was intended to have greatest impact, as in *Bond* itself.[82] In this context Mason CJ articulated other policy considerations. The restriction of judicial review to review of the legality of administrative decisions, combined with careful definition of the grounds available for review of factual findings, is balanced by the creation of the AAT whose role is to review their merits.[83] However, this policy consideration expresses the balancing of institutional roles at a very general level. Of course, the AAT does not have a general jurisdiction to review all federal administrative action. Some administrative decisions are not reviewable on the merits, such as the very decision which was before the Court in *Bond*. As argued later, Mason CJ has acknowledged the political doctrine of separation of powers underlying the legality/merits distinction, a doctrine which operates to protect citizens from potential tyranny by concentration of discretionary powers in one branch of government.

In the aftermath of the redefinition of the expression "decision" in *Bond*, the issue of justiciability under the ADJR Act has often turned upon technical distinctions. Judges have applied the requirement that the decision be final or operative and determinative

76 (1990) 170 CLR 321 at 337-338 and 340-342.
77 Ibid at 335.
78 Ibid at 336.
79 Ibid at 336-337.
80 Ibid at 338-339.
81 Ibid at 355-365. See ADJR Act, ss 5(1)(f),(h), 5(3).
82 Sir Anthony Mason, "Administrative Law—Form Versus Substance" (1996) 79 *Canb Bull Pub Admin* 15 at 15, 17-18.
83 (1990) 170 CLR 321 at 341 and 357.

as if it has statutory force, together with elaborations of that test, expressed in the requirement that the decision be substantive,[84] and that it be "required or authorised" by the empowering statute.[85] The "required or authorised" gloss introduces overlap between the meaning of "decision" and the meaning of "under an enactment" which had hitherto been interpreted as quite distinct elements of the test of justiciability.

The practical impact has been that a citizen's right to seek review has been removed in limited areas. Most of these cases are challenges to the giving of advice or early steps taken in an investigative process, such as the issue of a notice for production of documents. The loss of review rights may be temporary in that postponement of the challenge until a later stage in the process may indeed enable the test of "decision" to be satisfied. That review will "expose for consideration" the entire decision-making process,[86] including the earlier steps which may have contributed to an error, such as a failure to take into account a relevant consideration.[87] Many of the excluded areas were excluded prior to *Bond*, or involve cases where review would be premature, or cases where the administrative action is of an advisory nature proposing questions as to the constitutionality of review and the availability of a declaratory order. Nonetheless *Bond* has had an impact, most noticeably in the volume of cases which have focussed upon technical issues of justiciability rather than upon the question whether the decision-maker has exceeded the limits of discretion.

Restricting review through the test of justiciability achieves an effect which is not achievable through adjustment of other aspects of judicial review. The administrator is not put to the trouble of defending an action, at least beyond defending the issue of justiciability. Once a narrow interpretation of the test is settled, its application reduces disruption of administrative processes. But that is also achievable by strengthening the discretionary power of the court to decline to grant interlocutory relief to stay the operation of the decision under review,[88] or to decline jurisdiction where other more appropriate avenues of review have not yet been utilised.[89]

Privative clauses

In the 1980s Mason J and other members of the High Court applied the traditional principles relating to statutory provisions which attempt to oust judicial review. Thus,

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84 Ibid at 337 per Mason CJ (Brennan and Deane JJ agreeing), contra at 379 per Toohey and Gaudron JJ, rejecting the substance/procedure distinction.

85 Ibid at 377 per Toohey and Gaudron JJ

86 An eventuality contemplated by Mason CJ: ibid at 338.

87 There may be something to be said for recent *dicta* of the Federal Court that review of "conduct" is restricted to situations where a "decision" has not yet been made. Once a decision as understood in *Bond* has been made, then it subsumes conduct. Review of the decision exposes the conduct to review as part of the process which may have involved an error of law.

88 See Administrative Decisions (Judicial Review) Bills 1986, 1987 (Cth), cl 10 (2)(c),(d), discussed in M Allars, *Introduction to Australian Administrative Law* (1990) at 106 and 110.

89 ADJR Act, s 10(2)(b)(ii), which the Bills would have strengthened. The point of the last mentioned mechanism is that the administrative review avenue may only become available when a final decision has been reached. A parallel is found in the Migration Act 1958 (Cth) Part 8, which excludes judicial review of primary decisions but permits review, on limited grounds, of those which have been reviewed on the merits by the Migration Review Tribunal or Refugee Review Tribunal.

a finality clause is ineffective to oust judicial review.[90] A comprehensive privative clause is ineffective to oust judicial review for jurisdictional error but is effective to oust review for non-jurisdictional error of law on the face of the record.[91]

From the 1990s a test for determining the effectiveness of privative clauses, set out by Dixon J in *R v Hickman; Ex parte Fox and Clinton*[92] (the *Hickman* principle) and originally applied in the context of a privative clause directed at the High Court's jurisdiction, enjoyed a revival. According to the *Hickman* principle, a comprehensive privative clause is effective to protect a decision from judicial review if three factors are satisfied. The decision must be a bona fide attempt to exercise the power given; it must relate to the subject matter of the legislation; and it must not on its face exceed the power given.[93] Where there is an inconsistency between a statutory provision which seems to limit the powers of the decision-maker and the privative clause, which seems to contemplate that the decision shall operate free from any restriction, the *Hickman* principle requires that the provisions be read together and effect given to each.[94] A privative clause can therefore protect against errors by altering the substantive law to ensure that the impugned decision, conduct, refusal or failure to exercise power is valid although it would otherwise result in invalidity.

Endorsing the revival of the principle, Mason CJ took the view that provisions which validate decisions affected by procedural error or which describe a document as conclusive evidence that proper procedures have been observed, are to be distinguished from privative clauses.[95] Validating and conclusive provisions merely attach definitive legal consequences to an act, transaction or instrument and do not attempt to oust jurisdiction or interfere with the exercise of judicial power.[96]

In subsequent decisions other judges of the High Court, like Mason CJ, have held that the *Hickman* principle is no more than a principle of statutory interpretation.[97] However, application of the principle has amounted to acceptance that a comprehensive privative clause protects a tribunal or other administrator from all

90 *Hockey v Yelland* (1984) 157 CLR 124 at 130 per Gibbs CJ, Mason J concurring; *Darling Casino Ltd v New South Wales Casino Control Authority* (1997) 191 CLR 602 at 633 per Gaudron and Gummow JJ.

91 *Hockey v Yelland* (1984) 157 CLR 124 at 130 per Gibbs CJ, Mason J concurring; *Houssein v Under Secretary Department of Industrial Relations and Technology* (1982) 148 CLR 88 where Mason J joined in a joint judgment. It was held further in *Houssein* that the coupling of the comprehensively expressed privative clause with another privative clause limited as to subject matter did not operate so as to limit the comprehensive one.

92 (1945) 70 CLR 598 at 615. A hint of this revival in found in *Houssein v Under Secretary Department of Industrial Relations and Technology* (1982) 148 CLR 88 at 95 where the joint judgment observed that the "elucidation of established doctrine" contained in *Hickman* may have brought the comprehensive privative clause and the privative clause limited as to subject matter closer together in their effect.

93 *R v Hickman; Ex parte Fox and Clinton* (1945) 70 CLR 598 at 616-617.

94 *O'Toole v Charles David Pty Ltd* (1990) 171 CLR 232 at 248-249 per Mason CJ, at 275 per Brennan J, at 287 per Deane, Gaudron and McHugh JJ; *Darling Casino Ltd v New South Wales Casino Control Authority* (1997) 191 CLR 602 at 631, 634 per Gaudron and Gummow JJ.

95 *O'Toole v Charles David Pty Ltd* (1991) 171 CLR 232; *Deputy Commissioner of Taxation (Cth) v Richard Walter Pty Ltd* (1995) 183 CLR 168.

96 *Deputy Commissioner of Taxation (Cth) v Richard Walter Pty Ltd* (1995) 183 CLR 168 at 194.

97 Ibid at 195 per Brennan J; *Darling Casino Ltd v New South Wales Casino Control Authority* (1997) 191 CLR 602 at 631 per Gaudron and Gummow JJ.

procedural defects, even those which amount to an excess of the limits of power or jurisdiction.[98] This result is an absolute inversion of the traditional principle that such a clause does not protect against jurisdictional error. In an intriguing aside, the leading judgment of the High Court suggests that perhaps, irrespective of the *Hickman* principle, the courts retain power to intervene by way of judicial review where the decision-maker had no authority to make the decision or entertain it.[99] Much may depend upon whether the statutory provision is one which validates action taken in purported exercise of power but without compliance with statutory procedure, thus requiring some reconciliation with the provisions setting out the procedure, or whether the statutory provision is one which simply purports to oust judicial review. In the former case, where there is a need to reconcile an exercise of statutory power with a provision which purports to validate an invalid exercise of that power, then the *Hickman* test may be applied.[100] Deciding which category of privative clause is in issue will be a delicate task of interpretation.[101]

The revival of the *Hickman* principle has probably travelled well beyond the role Mason CJ envisaged for it. The principle now appears to protect the executive branch from the scrutiny of the courts in a way which was not previously possible, thus diminishing the rights of citizens.

RIGHT TO A FAIR HEARING

Just as the time came to jettison the adage of "The King can do no wrong", so the time came to jettison the fairy tale that legislative silence on some aspects of administrative procedure indicates that parliament intends the citizen to have no right to a fair hearing other than as expressly stated.[102] This change in the principles governing the implication of procedural fairness was evolutionary rather than dramatic.

During Sir Anthony's time as a judge of the High Court the principles of procedural fairness evolved from the former state of affairs (characterised by *Twist*) to the position in *Annetts v McCann*[103] and *Ainsworth v Criminal Justice Commission*[104] where the Court boldly stated that procedural fairness was implied unless parliament expressly and

98 *Darling Casino Ltd v New South Wales Casino Control Authority* (1997) 191 CLR 602.

99 Ibid at 635 per Gaudron and Gummow JJ; *Flight West Airlines Pty Ltd v Ross* (Full Federal Court, O'Connor, Kiefel and Dowsett JJ, 4 May 1999, unreported).

100 *Deputy Commissioner of Taxation (Cth) v Richard Walter Pty Ltd* (1995) 183 CLR 168 at 233 per Toohey J. The availability of judicial review also depends upon whether a provision in a statute which limits the scope of judicial review is characterised not as a privative clause but as a provision limiting the jurisdiction of a superior court of limited jurisdiction: *Abebe v Commonwealth* (1999) 162 ALR 1 at 44 per Gummow and Hayne JJ. In the case of a federal court, statutory limitation of the grounds of review which may be argued does not render the jurisdiction constitutionally invalid for lack of a "matter": *Abebe* per Gleeson CJ, McHugh, Kirby and Callinan JJ.

101 Yet in *Darling Casino* the very typical privative clause hitherto treated as ineffective to protect against jurisdictional error has been accepted as falling within the former category, where the *Hickman* test is available.

102 *Twist v Randwick Municipal Council* (1976) 136 CLR 106 (although the judgment of Mason J in that case is not to be characterised in that way).

103 (1990) 170 CLR 596.

104 (1992) 175 CLR 564.

unambiguously placed a limit on such rights of the citizen. Citizens' rights were protected by the common law, but within the framework outlined by parliament.

The 1970s

Sir Anthony's contribution to this evolution of principle was no small one. When he was appointed to the High Court in 1972 the scope for implication of procedural fairness was limited. However, the innovations of Lord Denning from the late 1960s provoked thought.[105] Could citizens whose rights were not affected, but who had merely a legitimate expectation, argue that they had a right to procedural fairness? Why should it be unacceptable for the court to impose a duty to give a hearing upon an administrator who enjoyed a statutory discretion conferred in unlimited terms? In 1977, by a statutory majority, the view of Barwick CJ prevailed that, irrespective of the developments in the common law in the United Kingdom, procedural fairness is not implied in relation to a power conferred unconditionally, even though its exercise may deprive an individual of liberty.[106] Barwick CJ dismissed the concept of legitimate expectation as "add[ing] little, if anything, to the concept of a right".[107]

As a member of the Court which decided *R v MacKellar; Ex parte Ratu*[108] in the same year, Mason J accepted the authority of *Salemi v MacKellar*. However, later that year he was a member of the majority in *Heatley v Tasmanian Racing and Gaming Commission*,[109] when the direction of the Court changed. With Aickin J delivering the leading judgment and Barwick CJ dissenting, the Court held that a racegoer had a legitimate expectation of being given notice before a racing commission issued him with a warning off notice. The presence in the empowering statute of provision for a hearing in relation to certain licensing decisions made by the commission and the silence of the statute with regard to warning off notices did not prevent the implication of procedural fairness in the latter situation.[110]

As the High Court moved beyond the era of *Salemi* and *Ratu*, Mason J regarded the question of implication as a matter of statutory interpretation. Implication depended upon the nature, width and subject matter of the discretion and the status of the decision-maker.[111] Yet Mason J did not readily find a discretionary power "absolute or unlimited".[112] Limited power is compatible with the decisions involving policy issues. The status of the decision-maker should only affect the content of the hearing and how it is afforded.[113] On the basis of High Court authority that a licence is a property right,[114] and the English case-law on legitimate expectations, in *FAI Insurances* Mason J accepted that an applicant for renewal of a licence has a legitimate expectation of renewal and therefore the decision-maker, the Governor in Council, in that case had a

105 See, for example, *Schmidt v Secretary of State for Home Affairs* [1969] 2 Ch 149.
106 *Salemi v MacKellar (No 2)* (1977) 137 CLR 396 at 402-403.
107 (1977) 137 CLR 396 at 404.
108 (1977) 137 CLR 461. The Court was unanimous in *Ratu* although they differed in their reasons, with Mason J joining a joint judgment holding that the statute left no room for implication of procedural fairness.
109 (1977) 137 CLR 487 at 494.
110 *Heatley v Tasmanian Racing and Gaming Commission* (1977) 137 CLR 487 at 513 per Aickin J.
111 *FAI Insurances Ltd v Winneke* (1981) 151 CLR 342 at 366.
112 (1981) 151 CLR 342 at 368-369.
113 Ibid at 370.
114 *Banks v Transport Regulation Board (Vic)* (1968) 119 CLR 222.

duty to afford procedural fairness. Mason J expressed satisfaction as to the relationship this defined between the rights of citizens and the limits of discretion:

> It is a conclusion which offers some protection to the citizen against the legislative practice of conferring statutory discretions on a Governor in Council instead of the minister or a statutory officer in the hope of thereby avoiding judicial review, particularly for want of compliance with the rules of natural justice, in circumstances where the legislature does not directly dispense with the duty to accord natural justice.[115]

From *Kioa* to *Ainsworth*

The major turning point came in 1985 when in *Kioa v West*[116] the High Court shook off entirely the constraints of *Salemi* and *Ratu*, redefining the limits of administrative discretion and the rights of citizens.[117] The rationale presented by Mason J for rejecting the assumption as to legislative intention in conferring unlimited discretion was the coming into force of the ADJR Act which imposed a duty on administrators, such as the Minister for Immigration, to give reasons on request for their decisions. This structuring of the hitherto unlimited discretion to deport "strengthen[ed] the case" for implication of procedural fairness.[118] On the basis of this argument, a wide range of discretionary powers of federal administrators were structured, and subject to procedural fairness, given the liberal ambit of application of the duty to give reasons.[119]

Kioa embraced an implication test in which the common law right to a fair hearing protects not only legal rights but also legitimate expectations and a wide range of interests of citizens. Citizenship as a political concept should be understood in a no less generous way, as encompassing rights, expectations and interests.

It is clear from Mason J's reasoning in *FAI Insurances* that in *Kioa* he would have implied procedural fairness in relation to an apparently unlimited discretion to deport, irrespective of these legislative changes. Even prior to the amendments, the objects of the Migration Act placed limits on the deportation power. Conferring a broad discretion is not sufficient to exclude procedural fairness.[120] Mason J held that if

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115 (1981) 151 CLR 342 at 372.

116 (1985) 159 CLR 550.

117 Mason J rejected a submission that the delegate had failed to take into account relevant consideration of the status of the Kioa's young daughter, who was an Australian citizen. Mason and Deane JJ held that on the facts the delegate had taken this into account and the daughter had no separate right to be heard: ibid at 588, 634. Mason J did not consider the fuller version of this submission, namely that the delegate failed to take into account the relevant consideration of the Declaration of the Rights of the Child. Wilson J rejected this submission on the facts: ibid at 604. Brennan J held that it was permissible for the delegate to take the Declaration into account but it was not a relevant consideration the delegate was bound to take into account: ibid at 630. Gibbs CJ, who dissented, held in relation to this issue that the Declaration and the International Covenant on Civil and Political Rights were not part of domestic law in Australia and in any event there was no breach of its provisions: ibid at 570-571.

118 (1985) 159 CLR 550 at 579. Amendments to the Migration Act 1958 (Cth) itself were also held to be relevant: at 579-82.

119 Later restricted by the decision in *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321, discussed at text accompanying nn 74-89 above.

120 In this respect *Kioa* re-affirmed the approach in *Commissioner of Police v Tanos* (1958) 98 CLR 383.

parliament intended to exclude procedural fairness it would need to do so in express terms:

> The law has now developed to a point where it may be accepted that there is a common law duty to act fairly, in the sense of according procedural fairness, in the making of administrative decision which affect rights, interests and legitimate expectations, subject only to the clear manifestation of a contrary statutory intention.[121]

The manner in which Mason J stated the test of implication in *Kioa* reverses the interpretive task of the court from what it was in *Salemi*. There the court asked whether procedural fairness could be implied consistently with the provisions of the statute, and made assumptions about legislative intention. Now the court looks only for an express contrary statutory intention. This approach was re-asserted by Mason CJ, Deane and McHugh JJ in *Annetts v McCann*[122] where the Court rejected another false assumption: the idea that, of its nature, preliminary decision-making cannot affect the rights or interests of citizens and hence cannot be subject to procedural fairness:[123]

> It can now be taken as settled that, when a statute confers power upon a public official to destroy, defeat or prejudice a person's rights, interests or legitimate expectations, the rules of natural justice regulate the exercise of that power unless they are excluded by plain words of necessary intendment.[124]

The limitation of discretion and the enhancement of the conception of citizen's rights were mutually reinforcing. Now that procedural fairness was accepted as protecting the positions of citizens who did not have legal rights at stake, the old reasoning leaving decisions of investigative bodies immune from procedural fairness was deprived of its logical basis. The fact that interests were affected by an exercise of apparently unfettered discretion conferred by the empowering statute of the body provided no answer. Thus, in *Ainsworth v Criminal Justice Commission*[125] Mason CJ held in a joint judgment that, to the extent that the Criminal Justice Commission's empowering statute did not otherwise provide, procedural fairness was necessarily implied in all areas of its decision-making.[126]

Common Law or *Vires* as the Basis for Procedural Fairness

Brennan J posed the test differently in *Annetts* and *Ainsworth*, treating procedural fairness as a matter of implication of a term into the empowering statute rather than a free-standing common law right.[127] In his view the *ultra vires* doctrine is fundamental and procedural fairness may be subsumed under it. Once procedural fairness is implied as a condition of the exercise of power, then failure to comply is a matter which falls within the court's function. For Brennan J the courts would go too far if they reviewed a decision otherwise than for its conformity to a statute. The Court's function of protecting the rights of citizens is limited to ensuring the citizen is not subjected to an exercise of power which exceeds the limits of the statute. By contrast,

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121 (1985) 159 CLR 550 at 584.
122 (1990) 170 CLR 596.
123 The Court held that this view, for which *Testro Bros Pty Ltd v Tait* (1963) 109 CLR 353 was authority, would no longer prevail: (1990) 170 CLR 596 at 600.
124 (1990) 170 CLR 596 at 598 per Mason CJ, Deane and McHugh JJ.
125 (1992) 175 CLR 564.
126 *Testro Bros Inc v Tait* (1963) 109 CLR 353 was confined to its own facts: ibid at 577.
127 *Annetts v McCann* (1990) 170 CLR 596 at 604; *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564 at 584-585.

the view which Mason J has espoused places the right to procedural fairness in the same category as other fundamental common law rights such as the privilege against self incrimination, the right to a fair trial, liberty and freedom of expression. In the case of an ambiguous or uncertain statutory provision, the courts adopt an interpretation which accords with international law, including international human rights instruments.[128]

It might be argued that there is little difference between the two approaches.[129] In either case it is ultimately a matter of statutory interpretation. This is not, however, just a cosmetic difference. The fundamental common law right conception is distinct and preferable, for four reasons. Firstly, it accords with legal principles permitting the implication of procedural fairness where there is no statute. It is well established that procedural fairness may be implied in relation to those prerogative powers which are justiciable[130] and to decisions of domestic bodies.[131] Secondly, it accords more readily with the historical origins of procedural fairness in cases which implied procedural fairness on the basis that "the common law supplies the omission of the legislature".[132] Thirdly, the relevant interpretive principle places a heavier burden on the case for overriding a fundamental common law principle than do the principles of statutory interpretation which would otherwise apply.

The fourth reason, providing the political justification for the third, goes to the heart of the question of rights of citizens and the limits of discretion. Procedural fairness ought not to operate as the handmaiden of parliamentary sovereignty, summoned and dismissed by casual language. As T R S Allen has argued, it is entirely fictional to suppose that parliament in enacting legislation intended standards of fairness to be met.[133] As a fundamental common law right procedural fairness is recognised as a key element of the rule of law which mediates the relationship between the judicial and executive branches. Laws should not only be open, prospective and clear, they should also be applied by a process which is fair.[134] Courts which enforce that process should be independent. Here the doctrine of separation of powers buttresses the rule of law. To give maximum scope to the rule of law, the rule of parliamentary sovereignty must be pushed to the limits, where a clear and unambiguous expression of legislative will is required to exclude these common law rights. For it is only through the common law

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128 *Coco v R* (1994) 179 CLR 427 at 437; *Re Bolton; Ex parte Beane* (1987) 162 CLR 514; *Balog v Independent Commission Against Corruption* (1990) 169 CLR 625; *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 287.

129 This has been the subject of debate in the United Kingdom. See, for example, D Oliver, "Is the Ultra Vires Rule the Basis of Judicial Review?" [1987] *PL* 543; C Forsyth, "Of Fig Leaves and Fairy Tales: The Ultra Vires Doctrine, The Sovereignty of Parliament and Judicial Review" (1996) 55 *CLJ* 122; P P Craig, "Competing Models of Judicial Review" [1999] *PL* 428; J Jowell, "Of Vires and Vacuums: The Constitutional Context of Judicial Review" [1999] *PL* 448.

130 *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 *(GCHQ)*; *Minister for Arts, Heritage and the Environment v Peko-Wallsend Ltd* (1987) 75 ALR 218.

131 For example, *Forbes v New South Wales Trotting Club Ltd* (1979) 143 CLR 242.

132 *Cooper v Wandsworth Board of Works* (1863) 14 CBNS 180; 143 ER 414.

133 T R S Allen, "Fairness, Equality, Rationality: Constitutional Theory and Judicial Review" in C Forsyth and I Hare (eds), *The Golden Metwand and the Crooked Cord* (1998) 15 at 20.

134 J Raz, *The Authority of Law* (1979) at 211-223; J Jowell, "The Rule of Law Today" in J Jowell and D Olvier (eds), *The Changing Constitution* (3rd ed 1994) at 57.

that we ensure compliance with these essential elements of the rule of law. To take this position is to assert that it is the proper function of courts to articulate the common law constitutional foundations of judicial review in a way which respects the rights of citizens in the face of administrative discretion, without paying lip service to unlikely assumptions about legislative intention.

Limits to Rights

Applying this approach, the rights of citizens to fair hearings have not triumphed in every instance. The decisions of Mason CJ in *South Australia v O'Shea*[135] and *Attorney-General (NSW) v Quin*[136] are reminders of the point where rights end and discretion begins.

In *O'Shea* Mason CJ joined the majority in holding that, in a two stage decision-making scheme, procedural fairness may be afforded if a full hearing is given only at the first stage, provided no fresh factual material is taken into account at the second stage. The requirement of plain words of necessary intendment to exclude procedural fairness was satisfied more readily in the context of a statutory decision-making process which, "viewed in its entirety",[137] was fair. Since the plaintiff had received a full hearing from the parole board, he was not entitled to a second hearing by the South Australian Cabinet on whose advice the Governor in Council decided to refuse to release him from indefinite detention.

While apparently accepting that Cabinet decisions are not subject to procedural fairness when they are concerned with their usual political, social and economic subject matter, in *O'Shea* Mason CJ took the view that their decisions are subject to the duty when the matter turns "on considerations peculiar to the individual".[138] The political aspects of a Cabinet decision should not be a bar to implication of procedural fairness since the decisions of ministers also have political aspects.[139] In the case of

135 (1987) 163 CLR 378.

136 (1990) 170 CLR 1.

137 *South Australia v O'Shea* (1987) 163 CLR 378 at 389.

138 Ibid at 387. However Sir Anthony has elsewhere acknowledged the evidentiary difficulties to be surmounted in any attempt to mount such an action: Sir Anthony Mason, "Judicial Independence and the Separation of Powers—Some Problems Old and New" (1990) 13 *UNSWLJ* 173 at 183-184. Sir Anthony has also pointed out, referring to the High Court's refusal to grant leave to appeal from the Full Federal Court decision in *Minister for Arts Heritage and Environment v Peko-Wallsend Ltd* (1987) 15 FCR 274, that irrespective of *O'Shea* the issue of justiciability of Cabinet decisions has not yet been determined by the High Court: "Administrative Review: The Experience of the First Twelve Years" (1989) 18 *F L Rev* 122 at 124-125; "Twelve Years of Administrative Review in Australia" (1990) *Commonwealth Law Bulletin* 1011 at 1012-1013.

139 (1987) 163 CLR 378 at 387. Wilson and Toohey JJ held the decision not subject to procedural fairness, distinguishing *FAI Insurances* as a case where the power of the Governor in Council was more analogous to a ministerial power: at 404. The close structuring of the discretion by reference to criteria removed any general discretion relating to the public interest. The power of detention in the present case was not structured by reference to criteria and was more in the nature of a political decision. Wilson and Toohey JJ distinguished *FAI Insurances* on the additional basis that in that case the insurance company had been given no hearing at all, while in *O'Shea* a full hearing had been given by the parole board which made the recommendation to the Governor in Council, whose decision was not influenced by any fresh material.

O'Shea the rights of citizens were pitted against the discretion of Cabinet to develop a policy in the public interest on release of sex offenders. This is consistent with maintaining respect for the integrity of Cabinet discussions, evident in *Sankey v Whitlam* and *Northern Land Council*.[140] *O'Shea* was exceptional because the Cabinet decision was directly concerned with the rights of a citizen. In the view of Mason CJ, the common law right to a fair hearing, invoked in aid of the common law right to liberty, should have precedence, unless the statutory scheme indicates otherwise:

> There is of course an obvious tension between protection of individual liberty, which is deeply rooted in common law tradition and democratic ideals, and the need to protect the community from offenders who, because they are unable to control their sexual impulses, are likely to constitute a menace or a risk to society.[141]

While the limits of discretion were defined by statute in *O'Shea*, in *Quin* they were defined by the common law, in a resolution of competing principles that was perplexing, partly because of the odd nature of the task before the Court. The issue for decision was the framing of a declaration in respect of a denial of procedural fairness that had been established by litigation that culminated in a decision of the New South Wales Court of Appeal three years earlier.[142] In the leading judgment for the majority, Mason CJ declined to grant a declaration in the form sought by a former stipendiary magistrate who sought appointment as a magistrate under new local courts legislation, separately from the process for selection of magistrates under the then government policy. Such a declaration would have fettered the executive branch in exercising the discretion to adopt a policy about selection of magistrates.

While the central message of *Quin* is the principle that procedural fairness provides only procedural and not substantive protection to the rights of citizens, Mason CJ grappled with a closely-related question concerning the limits of discretion, a question that is yet to be resolved fully by the High Court. This is the problem of defining the exceptional circumstances where a representation made by a government decision-maker raises an estoppel limiting the discretionary power of that decision-maker. Any principle allowing an estoppel to be raised in the sphere of public sector decision-making qualifies the fundamental doctrine prohibiting the fettering of discretion in the future. Mason CJ took the view that a court may hold government to its representations when that would not significantly hinder the exercise of the discretion in the public interest. This articulation of the qualifying principle may not readily sanction disregard for the rights of citizens who rely to their detriment on promises which are not kept by government for "the public interest necessarily comprehends an element of justice to the individual".[143]

The conclusion that injustice to the individual may harm the public interest is consistent with the approach taken by Sir Anthony in the cases on government secrecy and justiciability. The public interest is comprised of private interests, presenting in a variety of groupings and understood according to multiple dimensions. It follows that the limits of the discretion to pursue the public interest may be defined by reference to rights of citizens.

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140 See text accompanying nn 13-20 above.

141 *South Australia v O'Shea* (1987) 163 CLR 378 at 385.

142 *Macrae v Attorney-General (NSW)* (1987) 9 NSWLR 268.

143 (1990) 170 CLR 1 at 18. Compare the test proposed by Gummow J in *Minister for Immigration, Local Government and Ethnic Affairs v Kurtovic* (1990) 92 ALR 93 at 115-116.

> Generally speaking, the judicial branch of government should be extremely reluctant to intervene in the Executive process of appointing judicial officers. Apart from [the statutory provision under which the new appointments were made] under the constitutional arrangements which prevail in New South Wales and the doctrine of separation of powers, to the extent to which it applies in that state, the function of making appointments to the Judiciary, lies within the exclusive province of the Executive. According to tradition it is not a function over which the courts exercise supervisory control.[144]

In tracing the limits of the constraints placed upon administrative discretion by the common law principles of procedural fairness and estoppel, the judgment of Mason CJ in *Quin* uniquely acknowledges that the limits to the role of the courts in protecting the rights of citizens is explained by the doctrine of separation of powers, which underlies the well-known common law doctrine of the legality/merits distinction.[145]

The legality/merits distinction normally arises for consideration in the context of the ground of abuse of power, where the courts are invited to review the exercise of broad discretionary powers. The classic encapsulation by Mason J in *Minister for Aboriginal Affairs v Peko-Wallsend Ltd*[146] of the principles governing the relevant considerations ground of review provides a frequent point of departure for judges sounding a caution regarding "the limited role of the court".[147] The legality/merits distinction has also proved important with regard to the limits of the courts' powers to grant remedies. Too intrusive a remedy infringes an administrator's exercise of residual discretion.[148] While the legality/merits distinction receives little or no attention in the areas of justiciability, standing and procedural fairness, the political doctrine of separation of powers which it reflects remains of fundamental importance, signalling the point at which the legislature's empowerment of the executive branch leaves the rights of citizens vulnerable to an exercise of administrative discretion.[149]

International dimension of rights

Finally, the limits of discretion are defined by reference to the rights, and interests, of citizens in *Minister for Immigration and Ethnic Affairs v Teoh*[150] where the High Court held by a majority that ratification of an international convention generates a legitimate expectation that administrative decision-makers will act in conformity with the convention. Rights of citizens, and indeed interests of citizens, as conveyed by the idea of the legitimate expectation are not to be trifled with by government:

> Ratification by Australia of an international convention is not to be dismissed as a merely platitudinous or ineffectual act, particularly when the instrument evidences

144 (1990) 170 CLR 1 at 18.

145 See also Sir Anthony Mason "Administrative Law—Form Versus Substance" (1996) 79 *Canb Bull Pub Admin* 15 at 15-16.

146 (1986) 162 CLR 24.

147 Ibid at 40.

148 *Minister for Immigration and Ethnic Affairs v Conyngham* (1986) 68 ALR 441.

149 See also discussion of *Bond* in text accompanying nn 82-83 above; Sir Anthony Mason "Twelve Years of Administrative Review in Australia" (1990) *Commonwealth Law Bulletin* 1011 at 1013-5.

150 (1995) 183 CLR 273.

internationally accepted standards to be applied by courts and administrative authorities in dealing with basic human rights affecting the family and children.[151]

The judgment of Mason CJ and Deane J in *Teoh* has been greeted with greater enthusiasm by the English Court of Appeal than it has by the Australian government.[152] Lord Woolf MR has described the reasoning as "wholly convincing".[153] While the reception of *Teoh* in the United Kingdom has nonetheless been mixed,[154] in Australia the decision is gradually proving to be a catalyst for fresh thinking about how other grounds of review may be developed in a manner sympathetic to the rights of citizens as reflected in international human rights norms.[155]

CONCLUSION

The contribution of Sir Anthony to administrative law in Australia is found in the intellect and care he has brought to delineating how rights of citizens may limit government's discretionary power. In adjudicating upon issues of government secrecy, justiciability of decisions and the scope of procedural fairness, he has had the courage to insist that the application and evolution of legal principles be justified by reference to fundamental values of democratic government, such as ministerial responsibility, separation of powers and participation by citizens in political and administrative processes. A judicial honesty in identifying distortion, fiction and inconsistency in common law principles which can no longer claim such justification has reflected a conception of a more sophisticated function of the High Court than mere interpretation of the will of the legislature. The discretion of the executive branch defines the impact of legislative will upon the citizen and the Court has an independent constitutional duty to identify the basis upon which the rights of citizens may limit that discretion. The result has been an adjustment of the relationship between the judicial and executive branches of government which gives appropriate recognition to the rights of

151 Ibid at 291.

152 The governmental response consisted of attempts to reverse the effect of *Teoh* by the issue of policy statements and Bills directed to destroying the generation of legitimate expectations, culminating in the introduction into Commonwealth Parliament of the Administrative Decisions (Effect of International Instruments) Bill 1999 (Cth).

153 *R v Secretary of State for the Home Department; Ex parte Ahmed* [1998] INLR 570. However, public policies which were already in place prevented any legitimate expectation inconsistent with them from arising. Cf *R v Director of Public Prosecutions; Ex parte Kebline; R v Same; Ex parte Rechachi* [1999] 3 WLR 175; *R v Uxbridge Magistrates' Court; Ex parte Adimi* (Queen's Bench Division, *The Times*, 12 August 1999).

154 See, for example, the decision of Sedley J in *R v Secretary of State for the Home Department; Ex parte Singh (Balwant)* [1997] Imm A R 331, accepting that *Teoh*, "that highly controversial decision", provided a "respectable argument" and that "any argument accepted by the High Court of Australia must be respectable", but not applying it because it had been "effectively pre-empted" by the House of Lords decision in *R v Secretary of State for the Home Department; Ex parte Brind* [1991] 1 AC 696.

155 *Department of Immigration and Ethnic Affairs v Ram* (1996) 41 ALD 517; *Fang v Minister for Immigration and Ethnic Affairs* (1996) 135 ALR 583 at 603-605; *Vaitaiki v Minister for Immigration and Ethnic Affairs* (1998) 50 ALD 690; *Tien v Minister for Immigration and Multicultural Affairs* (1998) 159 ALR 405; *Browne v Minister for Immigration and Multicultural Affairs* (1998) 52 ALD 550.

citizens and tightens the limits upon executive discretion, without damage to the doctrine of parliamentary sovereignty.