delegation rule. If a trustee exercises a discretion capriciously, his decision is invalid, but his liability to account for breach of trust depends on different issues, namely whether his invalid decision depletes the trust fund and whether he has failed to exercise reasonable care. In view of these important differences between the duties, it is misleading to omit a discussion of the consequences and remedies in respect of each duty.

Finally, some comment must be made about the duties not to act for his own benefit, and to act equally and fairly, which are the central fiduciary duties in Finn's list. This reviewer prefers the analysis of Professor Cullity,[18] though Cullity's work is confined to trustees and attempts a synthesis of the fiduciary duty to act bona fide in the interests of the beneficiary and the doctrine of fraud on a power. In Cullity's analysis the duty not to act for the trustee's own or any third person's benefit becomes part of the doctrine of fraud on a power, which requires the trustee, broadly, to exercise his powers for proper purposes. This seems sensible and consistent with case law. The duties to act equally and fairly (or, compendiously, the "even-handed" principle) come to be seen as depending to a large extent on the scope of the discretion conferred on the trustee, upon its proper construction. The very fact that a decision is placed within the trustee's discretion may allow him within limits to prefer one class of beneficiaries to another (or, negatively, the court will not intervene to substitute its opinion for his). While a trustee who has no discretion to exercise must act even-handedly, there is no absolute rule that a court will intervene to ensure the even-handed exercise of discretionary powers — much depends on the particularity of the terms in which the discretion has been granted.

The above comments concentrate on the structure of the book. The author makes many useful contributions to particular judicial and academic controversies. Lack of space precludes further discussion here. This book is a scholarly contribution to legal literature. Undoubtedly, it merits careful attention from all lawyers interested in the doctrines of equity and company law.

R. P. AUSTIN.*

Review of Administrative Action, by H. Whitmore and M. Aronson, Australia, The Law Book Company Ltd., 1978, xlv and 519 pp. (inc. index). $28.50 (cloth), $24.50 (limp).

It is fitting that this book — the first detailed treatise on the subject of review of administrative action published in Australia — should appear at a time when a comprehensive and coherent system of administrative

[18] "Judicial Control of Trustees' Discretions" (1975) 25 *Univ. of Toronto L.J.* 99.

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law is beginning to emerge here — at least at the federal level, with the passing of the Administrative Appeals Tribunal Act, 1975, the Ombudsman Act, 1976 and the Administrative Decisions (Judicial Review) Act, 1977. And it is especially fitting that one of the authors is Harry Whitmore who, in his capacity as a member of the Commonwealth Administrative Review Committee (see *Parliamentary Paper* No. 144, 1971) and the Committee on Administrative Discretions (see *Parliamentary Paper* No. 53 and No. 316, 1973), was one of the architects of this new system. Professor Whitmore was also one of the original members of the Administrative Review Council, constituted by the Administrative Appeals Tribunal Act, 1975.

It is inevitable that comparisons will be made between this book and its English counterparts, de Smith's *Judicial Review of Administrative Action* (3rd ed., 1973) and Wade's *Administrative Law* (4th ed., 1977). In this reviewer's opinion, Whitmore and Aronson compares most favourably. In fact, it manages to combine the best features of both de Smith and Wade. There are the concise, lucid statements of principle, supported by citations of cases and authorities in footnotes copious enough to delight the most painstaking researcher; but these are leavened with discussions of important cases which illustrate the application of the principles. This happy combination makes the book not only essential for practitioners, but also eminently suitable for students, of administrative law.

The contents are divided into three parts. Part 1 consists of an introductory chapter containing a discussion of various extra-judicial avenues of review of administrative action (*viz.*, parliamentary control, the media, ombudsmen), classification of governmental powers, and the Administrative Decisions (Judicial Review) Act, 1977 (Cth.). There is also a valuable discussion of the void/voidable distinction which has bedevilled administrative law, especially in relation to the effect of a denial of natural justice (see below). Chapter 2 deals with the Administrative Appeals Tribunal and the Administrative Review Council.

Part 2, comprising chapters 3 to 7, is the most important part of the book, dealing with the grounds of judicial review. Chapter 3 deals with some important introductory matters, such as the question of how much judicial review is desirable, and the distinction between statutory appeals and supervisory review. Chapters 4 and 5 are devoted to the rules of natural justice, the former dealing with the principles governing their application, the latter covering their specific content in different situations, and the effect of their breach. Chapter 6 deals with Jurisdictional error and *Ultra Vires*, while Error of Law is discussed in Chapter 7.

Part 3, comprising chapters 8 to 15, deals with judicial remedies. After a brief chapter on evidence and procedure (ch. 8), the major remedies are discussed in turn: declarations (ch. 9), injunctions (ch. 10), orders to perform duties (ch. 11), *certiorari* and prohibition (ch. 12)

and *habeas corpus* (ch. 13). Chapter 14 is devoted to *locus standi*, while chapter 15 deals with statutory restriction of review.

It is unfortunate that the authors did not include a Part 4, containing chapters on the Crown, and the Liability of Public Authorities in Contract and in Tort. The addition of these important topics would have given the book a more comprehensive coverage of review of administrative action and, furthermore, would have made it more suitable to be prescribed for most undergraduate courses in administrative law offered in Australian law schools. It may be that a desire to keep the book within manageable proportions led the authors to omit these areas. This reviewer would suggest, however, that Part 3 could have been substantially briefer and the suggested additional material included, without making the book significantly longer than at present. More specific comments about Part 3 are made below.

Another topic which is not examined in detail is Delegated Legislation. Judicial review of delegated legislation on the ground of *ultra vires* is, however, discussed throughout chapter 6. It is desirable that the doctrine of *ultra vires* be simultaneously discussed in the context of both delegated legislation and administrative action generally, as occurs in chapter 6, for this avoids the repetition involved in discussing *ultra vires* separately in each context, and, furthermore, highlights any differences that may exist in the application of the *ultra vires* doctrine in each context. The disadvantage, however, is that the important topic of parliamentary review of delegated legislation is omitted except for a brief reference to the requirement of laying before Parliament in the context of procedural *ultra vires* (p. 193). Parliamentary review is, however, comprehensively covered in Dennis Pearce's recently-published monograph, *Delegated Legislation*, 1977, and the authors were, no doubt, influenced by this in deciding to omit it. In any event, their major concern is, of course, *judicial* review.

The authors' main thesis is that "the superior courts should play an ever increasing role in protecting the rights and interests of individual citizens against overbearing bureaucracy" (p. 41). Yet, at the same time, they advocate restraint on the part of the courts in the exercise of their supervisory jurisdiction: "Administrative decisions are having ever greater impact on our daily lives and the courts ought not to be too ready to assert their expert knowledge about everything" (p. 37). They are especially critical of the increasing tendency of the courts to review the decisions of skilled administrators on the merits under the guise of supervisory review. In this connection, they single out the doctrine of unreasonableness (p. 228) and the fact/law distinction (p. 274). The authors are also critical of the way in which the courts have manipulated various legal concepts in order to grant or deny review, as they deem desirable, thereby producing uncertainty, and contributing to a lessening of public confidence in, and respect for, the law, e.g., the classification of the power whose exercise is challenged (pp. 9-10), the void/voidable dis-

tinction (p. 14), the traditional distinction between jurisdictional error and *ultra vires* (p. 241), the fact/law distinction (pp. 273-274). These criticisms are, however, made constructively and with a view to achieving a rationalisation of the law relating to judicial review. The attitude of the authors towards the role played by the courts in safeguarding the rights of individuals in the face of governmental abuse of power is, on the whole, one of admiration.

Turning to the discussion of the grounds of judicial review contained in Part 2, the coverage of natural justice is especially strong, comprising chapters 4 and 5 and extending over one hundred pages of text. This is not surprising given that the authors regard denial of natural justice as "(b)y far the most important ground for (judicial) intervention" (p. 37). After thoroughly tracing the history of the "implication principle" culminating in its reaffirmation in *Ridge* v. *Baldwin*,[1] *Durayappah* v. *Fernando*[2] and *Banks* v. *Transport Regulation Board (Vic.)*,[3] the authors then consider the recently-developed concept of "fairness" or the "duty to act fairly". They do not, however, clearly define their own understanding of this concept. Does it mean a minimum standard of natural justice? (See, for example, *In re H.K. (an infant)*,[4] *R.* v. *Gaming Board for Great Britain; Ex parte Benaim*,[5] *In re Permagon Press Ltd.*[6]). Or is it synonymous with natural justice? (See, for example, *Wiseman* v. *Borneman*[7] and, more recently, *Heatley* v. *Tasmanian Racing and Gaming Commission.*[8]) Or is it distinct from natural justice? (See *Dunlop* v. *Woollahra Municipal Council.*[9]) The authors' own uncertainty here is merely a reflection of that of the courts. They do, however, criticise the doctrine of fairness, arguing that it has led to a "fudging" of the basic implication principle. They point out that in some cases in which the language of fairness has been used, the courts have been prepared to tolerate standards falling short of those normally required by natural justice: "The danger is that once the content is permitted to fall below a certain minimum the implication principle will either completely disappear or be meaningless" (p. 88).

The Australian case which does most damage to the revival of natural justice: *Dunlop*[10]— with its regression to the pre-*Ridge* v. *Baldwin*[11] importance of classification of power, and its distinguishing between the (lower) standards of fairness and the (higher) standards of natural justice — has, surprisingly, escaped specific criticism by the

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[1] [1964] A.C. 40.
[2] [1967] 2 A.C. 337.
[3] (1968) 119 C.L.R. 222.
[4] [1967] 2 Q.B. 617.
[5] [1970] 2 Q.B. 417.
[6] [1971] Ch. 388.
[7] [1971] A.C. 297.
[8] (1977) 51 A.L.J.R. 703.
[9] [1975] 2 N.S.W.L.R. 446.
[10] *Ibid.*
[11] See n. 1.

authors.[12] They can, however, take comfort in the knowledge that the High Court of Australia has recently treated fairness and natural justice as synonymous.[13]

The discussion, in chapter 5, of the content of the rules of natural justice is extremely comprehensive, although some minor points may be mentioned. At page 120, the authors conclude that natural justice does not impose a *general* obligation on administrators and tribunals to give reasoned decisions, citing in support the judgments of Lord Denning, M.R. in the *Gaming Board Case*[14] and Samuels, J.A. in *Taylor* v. *Public Service Board*.[15] Since the authors clearly deplore this conclusion, one would have expected them to argue against it rather than merely to accept it. In fact, the *Gaming Board Case* is not authority for such a general proposition. Lord Denning, M.R. there held that the giving of reasons was not required by the *minimum standards* of natural justice that applied in that case. In a later case, *Breen* v. *Amalgamated Engineering Union*,[16] his Lordship emphatically stated that reasons should be given where *higher standards* of natural justice apply. There is thus no inconsistency between the two judgments, as suggested by the authors in footnote 180. In *Taylor's Case*, Samuels, J.A. also simply assumed that the *Gaming Board Case* is authority for the general proposition that natural justice does not require the giving of reasoned decisions. In addition, reference may be made to the *dicta* of Lord Pearce and Lord Upjohn in *Padfield* v. *Minister of Agriculture*,[17] and of Lord Denning, M.R. in *Congreve* v. *Home Office*,[18] albeit in the context of *ultra vires*, in support of a general obligation on Ministers (and, *a fortiori*, lesser public authorities) to give reasoned decisions.

In the discussion of the rule against bias, the non-application of the rule in cases of *necessity* might also have been considered.

The void/voidable debate is thoroughly canvassed at pp. 133-142, in the context of the effect of breach of the rules of natural justice — the area of administrative law most afflicted by this controversy. If forced to take up a position in the conventional debate, the authors feel (as does this reviewer) that the view of Lord Morris of Borth-y-Gest in *Ridge* v. *Baldwin*[19] "accords much more with legal consequences, ordinary use of language, and with the objective of producing sensible results" (at p. 140). The authors, however, deplore the ways in which courts have manipulated the labels "void" and "voidable" in order to accom-

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[12] See, however, G. D. S. Taylor, "Fairness and Natural Justice — Distinct Concepts or Mere Semantics?" (1977) 3 *Monash L.R.* 191; D. Bernie, R. Dalgleish and P. Punch, "Natural Justice and the Duty to Act Fairly" (1977) 2 *U.N.S.W.L.J.* 27 — the latter article being written by three of the authors' students.

[13] In *Heatley*, n. 8 above.

[14] See n. 5.

[15] [1975] 2 N.S.W.L.R. 278.

[16] [1971] 2 Q.B. 175.

[17] [1968] A.C. 997.

[18] [1976] Q.B. 629.

[19] [1964] A.C. at 125.

modate policy decisions.[20] In chapter 1 (p. 14), they advocate the complete abandonment of this language and the substitution of the words "valid" and "invalid":

> A decision that is valid would be one that has not been challenged and will be honoured; or one that on challenge has been found to be impeccable; or one that has been found to be defective on challenge but has been validated by the refusal of a court to intervene because of delay, consent, waiver, or other reason. An invalid decision would be one where a defect has been found, of whatever nature, and the court is prepared to intervene in order to invalidate it.

This is a most valuable suggestion whose adoption would contribute significantly to a rationalisation of the principles of judicial review. It is to be hoped that it is followed up by the courts.

Of the remaining grounds of judicial review, Jurisdictional Error and *Ultra Vires* are covered in chapter 6, while Error of Law is discussed in chapter 7. This reviewer would suggest some structural alterations which, it should be added, are purely a matter of personal preference. First, since non-jurisdictional error of law itself is not a ground of judicial review at common law — the error of law must also be apparent on the face of the record — it would have been better had chapter 7 contained a discussion of both elements, *viz.* "error of law" *and* "apparent on the face of the record", instead of merely the former. The latter element is dealt with in chapter 12 at pp. 414-419, in the course of the discussion of the grounds for issuing *certiorari*.

Secondly, this reviewer is of the opinion that the impact of *Anisminic Ltd.* v. *Foreign Compensation Commission*[21] is best appreciated if it is dealt with immediately after the "narrow, original" doctrine of jurisdictional error. In chapter 6, however, the large topic of *Ultra Vires* is "sandwiched" between them. While the order of topics followed in chapter 6 is chronologically correct, it is suggested that changing the order by covering *Ultra Vires* first, then "narrow" Jurisdictional Error, and finally "extended" Jurisdictional Error (*Anisminic*) facilitates understanding. The resulting juxtaposition of Jurisdictional Error and Error of Law on the Face of the Record would also facilitate understanding of the traditional relationship between these two grounds of review, and the impact of *Anisminic* on this relationship. These suggestions are, however, based on this reviewer's experience in teaching these principles to students — for whom, after all, the book is not primarily intended.

It was said above that Part 3 on Remedies could well have been substantially briefer so as to make room for chapters on the Crown and the civil liability of public authorities. In view of the authors' belief that the remedial law has become much less important than the substantive

[20] See, for example, *Durayappah* v. *Fernando* [1967] 2 A.C. 337; *R.* v. *Secretary of State for the Environment; Ex parte Ostler* [1977] Q.B. 122.

[21] [1969] 2 A.C. 147.

principles governing the grounds of review (p. 39), it is rather surprising that they devote almost as much space to the former (237 pp.) as to the latter (244 pp.). Specifically, *habeas corpus,* although of fundamental importance as a means of securing personal freedom, plays a relatively minor role in administrative law and might well have been omitted — especially in view of the availability of R. J. Sharpe's recent monograph, *The Law of Habeas Corpus* (1976). So, too, a separate chapter on *locus standi* seems an unnecessary luxury. In relation to prohibition, *certiorari* and *mandamus, locus standi* seems nowadays to be more a matter for the discretion of the court than of substantive law, in view of such cases as *R.* v. *Metropolitan Police Commissioner; Ex parte Blackburn* (*No. 1*),[22] (*No. 3*),[23] and *R.* v. *Greater London Council; Ex parte Blackburn*[24]— although it may be expected that Australian courts will continue to follow a more orthodox course. *Locus standi* has always played a more substantive role in relation to injunctions and declarations, but even here it seems to be becoming increasingly discretionary. How else can the inconsistencies in the interpretation of "special damage" be explained?[25] In these circumstances, the *locus standi* question is best dealt with in the chapter on the relevant remedy (as is done in chapter 10 on injunctions), rather than in a separate chapter. Furthermore, the technicalities of the remedial law have become less important as a result of statutory reforms, e.g., section 65 of the Supreme Court Act, 1970 (N.S.W.), Part 40, rule 1 of the Supreme Court Rules, section 16 of the Administrative Decisions (Judicial Review) Act, 1977 (Cth.).

Part 3, commencing with chapter 8 entitled "Evidence and Procedure" (note that the cover page is misplaced at the *end* of this chapter), contains a very thorough examination of the remedial law. Some minor points may, however, be made. In discussing the wide scope of the declaration, perhaps greater emphasis could have been given to the opinion of the majority of the Court of Appeal in the recent case of *Johnco Nominees Pty. Ltd.* v. *Albury-Wodonga (N.S.W.) Corporation*[26] — the leading case to date on section 75 of the Supreme Court Act, 1970 (N.S.W.). Emphasis is, instead, given to the minority views of Hutley, J.A. in *Mutton* v. *Ku-ring-gai Municipal Council,*[27] *Parramatta City Council* v. *Sandell*[28] (p. 296), and in *Johnco Nominees* (p. 297). It is most unlikely that these views will gain further support. Indeed, Hutley, J.A. himself seems to have abandoned the restrictive view he expressed in *Mutton* and *Sandell* — see his judgment in *Johnco Nominees.* And in the last-mentioned case, the view he expressed, *viz.* that the

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[22] [1968] 2 Q.B. 118.
[23] [1973] Q.B. 241.
[24] [1976] 1 W.L.R. 550.
[25] Compare, for example, *Helicopter Utilities Pty. Ltd.* v. *Australian National Airlines Commission* (1961) 80 W.N. (N.S.W.) 48 and *Phillips* v. *New South Wales Fish Authority* (1969) 72 S.R. (N.S.W.) 297.
[26] [1977] 1 N.S.W.L.R. 43.
[27] [1973] 1 N.S.W.L.R. 233.
[28] [1973] 1 N.S.W.L.R. 151.

Supreme Court has no *jurisdiction* to determine an *abstract* question, was completely out of line with that of the majority (Street, C.J. and Moffit, P.) who held that there is no jurisdictional bar to the granting of a declaration under section 75. It might also have been pointed out that the principle in *Punton* v. *Ministry of Pensions (No. 2)*[29]—discussed at pp. 300-302—seems not to apply under section 75, in view of the opinion of the majority in *Johnco Nominees*. It was, however, pleasing to note the comprehensive demolition of the "principle" in *Toowoomba Foundry Pty. Ltd.* v. *Commonwealth*[30] (at pp. 290-291).

In their discussion of *R.* v. *Paddington Valuation Officer; Ex parte Peachey Property Corporation Ltd.*[31] (at pp. 380-381), the authors seem to misunderstand the views of Lord Denning, M.R. His Lordship was there saying that the term "invalid" can embrace two kinds of decision: first, where the decision is a nullity (as in the case of a jurisdictional error); and second, where the decision is voidable (as in the case of a non-jurisdictional error of law on the face of the record). These were the "two kinds of invalidity" to which his Lordship was referring. He was not saying, as the authors suggest, that there are degrees of *nullity*. It would have been better had the authors criticised Lord Denning, M.R. for the inconsistency between his statement in *Peachey Property* that *mandamus* will lie in advance of *certiorari* where the decision in question is merely voidable,[32] and his earlier statement in *Baldwin & Francis Ltd.* v. *Patents Appeal Tribunal*[33] (quoted in footnote 197, p. 380).

Finally, at pp. 494-496, the authors distinguish between ouster clauses which provide that decisions shall not be "challenged" or "called in question" in any court, and those which prohibit such challenges or questioning "on any ground". They cite *Anisminic Ltd.* v. *Foreign Compensation Commission*[34] as the leading authority for the proposition that the former type of clause effectively ousts only non-jurisdictional review. As to the latter type of clause, they express the view that the positions in Australia and in England are different. They cite *Clancy* v. *Butchers' Shop Employees' Union*[35] as authority for the proposition that, in Australia, the additional words "on any ground" make no difference. In England, however, the authors conclude, after a consideration of *Smith* v. *East Elloe Rural District Council*,[36] that the "position must at present be taken as accepting at face value a statute which forbids the questioning at common law of any order on any grounds" (at p. 496). This reviewer does not share the authors' view that the English courts would distinguish between these two types of ouster clause in a normal case. The approach taken in *Anisminic* is, it is submitted, applicable to both types of clause.

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[29] [1964] 1 W.L.R. 226.
[30] (1945) 71 C.L.R. 545.
[31] [1966] 1 Q.B. 380.
[32] *Id.* at 402.
[33] [1959] A.C. 663 at 693-694.
[34] See n. 21.
[35] (1904) 1 C.L.R. 181.
[36] [1956] A.C. 736.

In short, there is no difference between the Australian and English positions here. Can it really be doubted that the House of Lords in *Anisminic* would have taken the same view towards section 4(4) of the Foreign Compensation Act, 1950 had the words "on any ground" also appeared in it? As the authors themselves point out (p. 157), that was a case where "the intention of parliament could not have been clearer", and yet the House of Lords held that the clause did not preclude jurisdictional review. The *East Elloe Case* should be regarded as an authority only on time-limit ouster clauses, where different policy considerations apply: see, for example, *R.* v. *Secretary of State for the Environment; Ex parte Ostler*.[37]

Finally, a few points about the presentation of the book may be made. The authors have, unfortunately, been let down by their proofreaders, for there are numerous typographical errors and omissions. Mention may be made of some of the more substantial instances:

p. 87: the full name of the Bland Committee is incorrectly stated in footnote 342;

p. 203: in the quotation from Kitto, J.'s judgment in the *Television Corporation Case*, the following words should be inserted between the words "authority" and "on" in line 5: ". . . to substitute its opinion or decision for his. But the courts have authority . . ."

p. 228: the reference to Menzies, J. in line 10 should, in fact, be to Gibbs, J.;

p. 341: the reference to Holland, J. in footnote 143 should, in fact, be to Rath, J.;

p. 487: the Administrative Decisions (Judicial Review) Act is misnamed in footnote 7;

p. 496: lines 24 and 25 should be in reverse order.

It should be stated, in conclusion, that none of the above criticisms — which are relatively few in number given the size of the book, and most of which, in any event, merely involve differences of opinion — should be taken as detracting from the great worth of the authors' achievement. They have produced a volume whose scholarly quality is, by any standards, of the highest order and which will readily find a place in the vanguard of Australian legal publications. The dynamic area with which the book deals will ensure that the authors are kept busy preparing future editions, and these will be awaited with interest. The authors have made an immense contribution to Australian legal scholarship in an area of the law which is rapidly growing in both size and importance. For this, they are to be heartily congratulated.

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[37] [1977] Q.B. 122.

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