Comment

JUDICIAL REVIEW OF ENVIRONMENTAL AND PLANNING LAWS

The Land and Environment Court has the same civil jurisdiction as the Supreme Court would have had, had not its jurisdiction to hear and determine proceedings to enforce rights, obligations and duties and to review functions conferred or imposed by planning and environmental laws been removed by the *Land and Environment Court Act* 1979 (NSW). Planning and environmental laws are defined by reference to seventeen nominated Acts of Parliament including the *Environmental Planning and Assessment Act* 1979 (NSW), the *Clean Air Act* 1961 (NSW), the *Clean Waters Act* 1970 (NSW), the *Noise Control Act* 1975 (NSW), together with the *State Pollution Control Commission Act* 1970 (NSW) which established a Commission to administer and enforce pollution control legislation.

Section 123 of the *Environmental Planning and Assessment Act* 1979 (NSW) provides that any person may bring proceedings in the Court for an order to remedy or restrain a breach of the Act whether or not any right of that person has been infringed by or as a consequence of the breach. There are similar provisions in the *Environmentally Hazardous Chemicals Act* 1985 (NSW) and the *Heritage Act* 1977 (NSW). There are no analogous provisions in the *Clean Air Act* 1961 (NSW), the *Clean Waters Act* 1970 (NSW), the *Waste Disposal Act* 1970 or the *State Pollution Control Commission Act* 1970 (NSW).

Judicial review suits are determined in the Class 4 jurisdiction of the Court. Judicial review is concerned with government and local government action alleged to be beyond legislative power. The jurisdiction of the Court is concerned with the decision making process and not the decision itself. Unless specifically authorised by law (as, for example, in the Class 1 jurisdiction of the Court which provides for administrative merit appeals with respect to applications for development consent under the *Environmental Planning and Assessment Act* 1979 (NSW) and applications for licences under pollution control legislation), the merit correctness of an administrative decision, as opposed to its legal correctness, is beyond the jurisdiction of the Court.

In *Attorney General (NSW) v Quin* (1990) 64 ALJR 327 at 341, Brennan J defined the scope of judicial review "not in terms of the protection of individual interests but in terms of the extent of power and the legality of its exercise". Nonetheless, it is individual interests or the claimed right of individuals to speak on behalf of the public interest that initiates the judicial review process and those interests are relevant to the question of remedy. The discretionary width of the remedy, at least with respect to challenges brought pursuant to s 123 of the *Environmental Planning and Assessment Act* 1979 (NSW), was discussed by the Court of Appeal in *F Hannan Pty Limited v Electricity Commission of New South Wales (No 3)* (1985) 66 LGRA 306.

Section 23 of the *Land and Environment Court Act* 1979 (NSW) provides that the Court has the power, in relation to matters in which it has jurisdiction, to make orders of such kinds, including interlocutory orders, as it thinks appropriate.

Except with respect to planning and pollution control legislation, New South Wales does not have a system of administrative appeals such as the Federal Government has established under the *Administrative Appeals Tribunal Act* 1977 (Cth). The courts, we are reminded, should not make good any perceived unfairness by the absence of such a system by expanding its judicial review function. However, it cannot be gainsaid that the absence of an adequate system of administrative appeals has affected judicial attitudes with respect to judicial review generally.

During the last three decades, superior courts have been encouraged by the highest courts in Australia and the United Kingdom to exercise closer supervision of administrative action than had previously been thought legitimate or appropriate. Increasing judicial supervision has not always been applauded and it is clear, I think, that it has exacerbated the hostility of the Executive to the judiciary. There is less hostility from local government due largely to the fact that local councils are accustomed to having their decisions reversed or confirmed by the courts in administrative appeals.

Notwithstanding that much of the criticism by the Executive is the result of a lamentable misconception of the Westminster system and from a belief that the Parliament should be subservient to the Executive, some of it is understandable. Not all judges heed the spirit of Mason J's warning in *Minister for Aboriginal Affairs v Peko Wallsend* (1986) 162 CLR 54 that a court should proceed with caution when reviewing an administrative decision lest it exceed its supervisory role by reviewing the decision on the merits. Furthermore, I think not all judges have appreciated the risk to the judiciary as an institution when it exceeds its judicial review jurisdiction. Brennan J referred to this matter in *Quin* and to the observations of Frankfurter J in *Trop v Dulles* (1958) 356 US 86 at 199 where he said:

> All power is, in Madison's phrase, 'of an encroaching nature' . . . . Judicial power is not immune against this human weakness. It also must be on guard against encroaching beyond its proper bounds, and not the less so since the only restraint upon it is self restraint.

Although courts have repeatedly disclaimed any right of intervention in the merits of a decision subject to judicial review, their forays into the area of "*Wednesbury* unreasonableness" (*Associated Provincial Picture Houses Limited v Wednesbury Corporation* [1948] 1 KB 223) have led many to believe that under the guise of legal investigation the courts are, in truth, becoming involved in the actual merits of decisions notwithstanding the stated acknowledgment that a successful challenge on this ground only results in a decision being set aside.

With respect to major environmental decisions reviewed in the Land and Environment Court, it appears to be assumed that a practical result of a successful challenge on any of the "*Wednesbury*" grounds is that not only will the decision be set aside, but that it may never be lawfully remade. The litigants tend to use the decisions of the Court for their own political ends. If

the Court sets aside a decision because, for example, a decision maker has failed to have regard to some matter to which it is bound to have regard, the decision is apt to be used by interest groups as being a decision of the Court opposing the project the subject of the decision. The manner of presentation of many cases makes it fairly clear that, although the lawyers give lip service to the proposition that the decision maker is entitled to remake the impugned decision so long as it acts according to law, they in fact share their clients' view that it is not. The problem is exacerbated where the decision is impugned on the ground of "*Wednesbury* unreasonableness" because the Court in such a challenge is bound to have regard to merit matters. An unfortunate consequence is that the Court's decision becomes part of a political process over which it has no control. The standing and legitimacy of the judicial system is put at risk because public confidence in its capacity to administer impartial justice is eroded if it is seen as part of the political process.

An illustration of the problem I have referred to arose with respect to the application of the doctrine of "legitimate expectation". An expectation of a right to be heard in accordance with the rules of procedural fairness was extended to the protection or enforcement of that to which the expectation was directed, ie the merit decision. That, at least, was the perception of the effect of the judicial decisions. In *Quin* the High Court rejected any extension of the jurisdiction of the courts in this regard. A number of writers have claimed that the judiciary has not, in fact, extended its hegemony but simply realigned judicial authority to where it would have been much earlier but for World War II which permitted the Executive, under the banner of national security, to break free from judicial control. Other writers have frankly acknowledged the extension of jurisdiction and have justified judicial intervention by reference to the complexity of modern legislation and the inability or unwillingness of the legislature properly to supervise the Executive. The process of increased intervention was accelerated by the *Administrative Decisions (Judicial Review) Act* 1977 (Cth) and the decisions of the High Court with respect thereto as, for example, *Peko Wallsend* in which the relevant grounds of judicial review established by statute were regarded as a codificat- ion of the common law.

The "*Wednesbury* principles" are familiar to lawyers. A decision will not be set aside unless it is shown that the decision maker has failed to take into account a relevant circumstance, has taken into account an irrelevant circumstance or that the decision is relevantly unreasonable. The application of the principles is, however, not always easy particularly where the decision under challenge is made in the context of broad policy considerations, is made by a decision maker which has no express statutory criteria it is bound to apply (or where the criteria are so broadly stated with reference to concepts such as the "public interest" or the "circumstances of the case" as to amount to the same thing), and who is not required to give reasons. The problem is made no easier by the circumstance that the resolution of the challenge takes place within an adversarial system, the efficiency of which is inversely proportional to the breadth of the issue for determination.

The High Court would seem to have endorsed the English view that where a decision maker is an elected body its decisions will not be set aside on the ground of "unreasonableness" unless it amounts to perversity or absurdity (see *R v Hillingdon London Borough Council; ex parte Phulhofer* [1986] AC

484 and *Australian Broadcasting Tribunal v Bond* (1990) 64 ALJR 462). It is also interesting to note that in *Bond* the Court appeared to accept that a decision would be reviewable upon the ground that there was no probative evidence to support it and an inference would be reviewable upon the ground that it was not reasonably open to the decision maker. However, there seems to be some difference of opinion as to whether natural justice requires that the decision must be based upon "*some* material that tends logically to show the existence of facts consistent with the finding and the reason supportive of the finding, if it be disclosed is not logically selfcontradictory" (*Mahon v Air New Zealand* [1984] AC 808 at 821). Mason CJ with whom Brennan J agreed said (at 478):

> These statements may be traced back to the observations of Diplock LJ in *R v Deputy Industrial Injuries Commissioners; ex parte Moore* [1965] 1 KB 456 at 448. See also *Minister for Immigration and Ethnic Affairs v Pochi* 1984 FLR 541 per Deane J at 6768 (an appeal of a decision of the Administrative Appeals Tribunal under the *AAT Act*). The approach adopted in these cases has not so far been accepted by the Court.

Deane J in *Bond* referred to the "compelling force of the approach adopted in the English cases such as *R v Deputy Industrial Injuries Commissioner; ex parte Moore* . . .". In *Bond* and *Pochi* it was not difficult to determine what material was before the Tribunal and the reasons for the decisions. Generally speaking, in New South Wales, decision makers exercising functions under environmental or planning laws are not obliged to give reasons. A decision maker making a decision pursuant to Part V of the *Environmental Planning and Assessment Act* 1979 (NSW) is obliged to furnish a report of its consideration of environmental impacts and the council is obliged by s92 to indicate reasons for the imposition of conditions for the refusal of consent but not to give reasons why it grants consent. But neither obligation affords members of the public great insight into the decision making process. Even if the view of Deane J in both *Bond* and *Pochi* be accepted, a challenger must establish that although there was evidence entitling a decision maker to reach a conclusion, in fact that conclusion was reached by ignoring that evidence and was based on nonprobative material. It is not surprising that only a few challenges based on *Wednesbury* grounds have been successful.

There may be good reasons for resisting the establishment of a system of administrative appeals with respect to policy decisions likely to significantly affect the environment. There is much to be said for the view that such decisions are more appropriately left to politicians or those for whose acts politicians are responsible. But many important decisions with respect to the environment are made by semi-autonomous bodies created and structured to minimise political accountability. There is force in the suggestion that decisions of those bodies should be subject to closer judicial scrutiny than that appropriate to decision makers responsible to an electorate provided that the extended scrutiny does not jeopardise the legitimacy of the judicial system.

J S CRIPPS
Chief Justice of the Land and Environment Court