PRIVATE LAW vs PUBLIC LAW: ISSUES IN GOVERNMENT LIABILITY

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Introduction

This paper relates to recent issues in the private law vs public law debate in Australia.

Private law, as you know, more often than not relates to harm or damage being caused by the negligent or tortious conduct of a person which causes loss or damage to a plaintiff. Causes of action in private law are generally not complete until loss or damage is sustained. Private law primarily focuses on the person or entity suffering the loss of damage and the provision of compensation for that loss.

Public law, on the other hand, which is also known as administrative law, had, traditionally, little to do with compensating individuals for loss and damage, although, as we have seen in the paper delivered earlier today on the High Court decision in *Mengel* (*Northern Territory of Australia v Mengel* (1995) 185 CLR 307), damage can often ensue from the same set of facts. Public law is concerned with governmental type decision making and available challenges to quash decisions which are made in excess of power, in bad faith, in breach of the rules of procedural fairness, or arguably, unreasonableness [See Sir Anthony Mason's address titled "*The Importance of Judicial Review of Administrative Action as a Safeguard of Individual Rights*" to the Australian Bar Association 5th Biennial Conference, Noosa, 4 July 1994, page 4]. Damages are not normally available in public law matters.

Historically another difference between private law and public law has been the way a Court's jurisdiction is invoked. Even under the *Administrative Decisions (Judicial Review) Act* 1977 (Cth) ("the ADJR Act"), to invoke the Federal Court's jurisdiction you need to commence proceedings utilising the form specified in order 54 of the Federal Court Rules, titled "An Application for an Order of Review". Other proceedings in the Federal Court are commenced by a different form of application. However, these formal distinctions do not appear to be any real impediment to litigants commencing proceedings which both allege public and private law matters.

Indeed, it is nowadays becoming much more common for matters against a government or a government decision-maker in respect of whose decisions have caused loss or damage, to find pleadings alleging both public and private law remedies.

We propose to examine some recent cases which touch on the public law and private law issues in government liability and which may be of some assistance in determining where the line is to be drawn between public law and private law. This is one of the most difficult (and, we think, interesting) questions in the area of government liability today.

In the second section of our paper, we offer a few comments drawn from the cases examined which might be of some assistance in ascertaining where the line can be drawn between public and private law.

In the third section of our paper we examine the content and nature of negligence law as it applies to the negligent exercise of government power.

A. CASES UNDER THE ADMINISTRATIVE DECISIONS (JUDICIAL REVIEW) ACTS

General Newspapers Pty Limited v Telstra Corporation (1993) 45 FCR 164

One of the most significant recent cases on the subject of the public law/private law divide is the General Newspapers Case. It arose in the context of government business enterprises, or, GBEs as they are commonly known. It is a decision of the Full Court of the Federal Court dated 22 September 1993 comprising Davies, Gummow and Einfeld JJ. The relevant judgment was jointly published by Davies and Einfeld JJ (with Gummow agreeing). The case concerned the question whether conduct on the part of Telecom not to put out to tender the production of the yearly telephone directories known as The White Pages and The Yellow Pages was justiciable under the Administrative Decisions (Judicial Review) Act 1977 (Cth) ("The ADJR Act"). The case also concerned whether the conduct on the part of Telecom was misleading or deceptive or likely to be so, in breach of s.52 of the Trade Practices Act 1974 (Cth) ("the TPA"), and whether a breach of s.46 of the TPA occurred with Telecom allegedly using substantial powers in a market with a view to excluding a hopeful tender bidder from entering the market.

The General Newspapers case is significant in that it effectively overrules a longstanding Full Federal Court decision on the justiciability of tender decisions under the ADJR Act, namely, Australian Capital Territory Health Authority v Berkeley Cleaning Group Pty Ltd (1985) 7 FCR 575.

For many years, Telecom published the White and Yellow Pages in Australia listing customers and their telephone numbers. In recent years, the printing of the directories was undertaken by two companies referred to as "McPhersons" and "News", which were both successful tenderers for the printing contracts which were due to expire at the end of 1992. The Applicant group of companies known as "Hannaprint" contacted Telecom in 1991 expressing an interest in tendering for the printing work. Hannaprint's name was placed on the list of potential tenderers after its business was examined by Telecom. However, Telecom entered into new contracts with McPhersons and News without calling for tenders and without informing Hannaprint that it would not be calling for tenders. The new contracts were for effectively a period of 10 years.

The Full Court held there was no misleading or deceptive conduct in breach of s.52 of the TPA, or misuse of market power in breach of s.46 of the TPA. On the issue of justiciability, the Court unanimously held the decisions were not reviewable under the ADJR Act.

The source of power for Telecom to enter into contracts was to be found in two Acts. Prior to 1 February 1992, the Australian Telecommunications Corporation Act 1989 (Cth) s.19(1), conferred upon Telecom "all the powers of a natural person", including the power "(a) to enter into contracts."

From 1 February, 1992, Telecom's power to contract became sourced in its new Memorandum of Association and s.161 of the Corporations Law (ACT) in terms of "the legal capacity of a natural person" which includes, of course, the capacity to enter into contracts, as a natural person. The Court stated at page 169:

> *"In our opinion there was no conduct or decision on the part of Telecom which was amenable to an order under the ADJR Act. The ADJR Act provides the structure for judicial review, which is review, not of acts taken under the general law applicable in the community, but of acts which have a statutory effect because of the provisions of a federal enactment. Thus, a "decision" taken under a federal enactment is an action or a refusal to act which, by*

> *virtue of the statute affects legal rights and/or obligations. A step which has no such effect is not a reviewable decision for the purposes of s.5 of the ADJR Act. And conduct is not reviewable under s.6 of the ADJR Act unless it is, "conduct for the purpose of making a decision to which this Act applies." The ambit of the jurisdiction is limited to decision as defined and to conduct leading up to the making of such decisions."*

The Court considered the new meaning of "decision" under the ADJR Act as stated by the High Court in Australian Broadcasting Corporation v Bond (1990) 170 CLR 321 at 336-338 and considered the line of cases commencing with Australian National University v Burns (1982) 43 ALR 25; 64 FLR 166, on the meaning of a decision "under an enactment" which related to the termination of a contract of employment between the Australian National University and an employed professor in circumstances of a grant of a general power to appoint professors and other university staff under the relevant legislation. In Telstra Corporation the Court held that ANU v Burns should be followed in preference to other Federal Court decisions that are contrary to ANU v Burns such as Australian Capital Health Authority v Berkeley Cleaning Group Pty Ltd (1985) 7 FCR 575.

In the Berkeley Group case, the Full Court of the Federal Court held that an unsuccessful tenderer could challenge the rejection of its tender bid, as "conduct for the purpose of making a decision" under s.6 of the ADJR Act, and the decision to award a contract and the making of the contract itself was a reviewable decision under s.5 of the ADJR Act. The decision depended in part on a finding that a decision to enter into a contract was an "act or thing" within the meaning of s.3(2)(g) of the ADJR Act. The Full Federal Court in Telstra Corporation held that as the Berkeley Cleaning Group case was decided before Australian Broadcasting Tribunal v Bond the former case should, "not be followed in preference to Australian National University v Burns." The Court said:

> *"A contract entered into by a corporation under a general power to enter into contracts is not given force and effect by the empowering statute. The empowering statute merely confers capacity to contract, whilst the validity and effect of the contract is determined by the ordinary laws of contract." (at page 173).*

The Court did leave some room for the operation of the Berkeley Cleaning Group case by impliedly suggesting that there may be jurisdiction under s.39B of the Judiciary Act 1903 (Cth), in observing that the Berkeley Cleaning Group case (and another case which had relied on it) concerned strike out applications in a context where, "it was arguable that the circumstances of the calling for tenders implied rights as between all the parties to the tender process that the tenders would be dealt with in accordance with the conditions of tender and fairly, at least in a procedural sense. Accordingly, the Court may well have had jurisdiction to deal with a dispute, though, in our opinion, not under the ADJR Act" (at page 173). There is a hint here, in our view that the common law door in judicial review was left open.

As for Telecom, the Court held that all that was conferred by the legislation was merely, "a capacity to act" and not a relevant power to make a reviewable decision in the post Bond sense. The Court said:

> *"The contracts were not relevantly authorised or required by and were not made under an enactment. The validity of the contracts and the acts done was governed entirely by the law of contract, not by the statutes. Thus, the ADJR*

> *Act had no application to the conduct or to the alleged decisions" (at page 173).*

The remedy, if one was available, was in private law, and not in public law. In contract, and not in judicial review (at least, not under the ADJR Act). The Court left open the door in "exceptional" cases where ADJR Act proceedings might be considered in cases where the letting of a contract may constitute "an act or thing" within the meaning of s.3(2)(g) of the ADJR Act. If the contract is entered into "for an ulterior purpose such as private gain, and the validity of the act is challenged by reference to the statute under the general aegis of which the act or thing is done. If the challenge to validity is made by reference to a federal enactment, then the challenge may be appropriate, even in relation to a contract, because the statute affects the force and effect of that which was done." (pp13-14). Therefore, judicial review proceedings might still be available for:

- improper purpose;
- bad faith; and
- simple ultra vires matters.

The General Newspapers decision follows closely the decision of Davies J in Federal Airports Corporation v Makucha Developments Pty Ltd (1993) 115 ALR 679 where it was held that a decision by the Federal Airports Corporation in its capacity as a landlord to issue a notice of termination to a lessee was not a decision under an enactment and was not reviewable under the ADJR Act. The validity of the termination of the contract was held to be determined by reference to private law alone. [NB, however, the decision in NSW, Nicholson v New South Wales Land & Housing Corporation, unreported, decided 24 December 1991, Badgery-Parker J; is to opposite effect.]

The implication of the Telstra Corporation decision is that it will now be much harder for decisions to enter into contract or decisions relating to government tenders to fall within the jurisdiction of the ADJR Act. The Court did not expressly consider common law judicial review under s.39B of the Judiciary Act 1903 (Cth). Justiciability of these kinds of decisions at the State level is far from settled and there are interesting developments in Victoria which we shall deal with later in this paper.

One of the most interesting questions raised by the decision is: In the context of the public law remedies being "tightened up" in the General Newspapers Case and the Bond Case, will private law remedies be expanded to "fill the void" as it were either generally or, in relation to government liability?

We agree with the conclusion of Margaret Allars ("Private Law But Public Power: Removing Administrative Law Review From Government Business Enterprises" (1995) 6 Public Law Review 44) at page 63 where she considered the decision in General Newspapers a "wholly incoherent approach to the justiciability of decisions of incorporated GBEs". Allars said, in a excellent summary of the case:

> *"To summarise the effect of General Newspapers, a distinction is drawn between a statute as the source of a GBE's capacity to contract and a statute as the source of the force and effect of a contract. All decisions of an incorporated GBE to enter into contracts are made under the common law capacity to contract, derived from the incorporated GBE's memorandum of association and the Corporations Law. The force and effect of the statutory provision conferring that capacity is immediately exhausted either upon its enactment or on the date of incorporation of the GBE. There is one exception to this. The statutory provision returns to centre stage where a decision to enter a contract is invalid because it is made for an improper purpose. Here*

> *the statute will provide a basis for holding that the decision is justiciable under the ADJR Act, and also that it is invalid because the decision is not made for the purposes of the statute. However, the statutory provision may not play any part in establishing justiciability or the ground of review when other grounds, in particular procedural fairness, are invoked."*

As to the Full Court's perception of the role of the ADJR Act generally in General Newspapers, the Court said (45 FCR page 169):

> *"The ADJR Act provides the structure for judicial review, which is review, not of acts taken under the general law applicable in the community, but of acts which have statutory effect because of the provisions of a Federal enactment. Thus, a "decision" taken under a Federal enactment is an action or a refusal to act which, by virtue of the statute, affects legal rights and/or obligations."*

In our view there are three bases of executive power and capacity deriving from constitutional power. They are:

- statutory power conferred by constitutionally valid legislation;
- prerogative power; and
- a capacity (rather than a power) to act in the execution of these powers that is neither statutory nor prerogative (such as, for example, capacity to act in the exercise of private rights as if the Crown were a natural person).

[These categories of powers or capacities are described by Brennan J in Davis v Commonwealth (1988) 166 CLR 79 at 108-110.]

There is no clear principle articulated in the majority judgment in General Newspapers that explains how a test for ascertaining the source of power becomes a matter of capacity, power having already been given. The judgment might have been influenced by the language of Brennan J in Davis v Commonwealth, which is helpful in some contexts, is not of assistance in a different context. The result is confusion of the concepts of source of power and capacity to act.

Bonlac Foods Limited v The Milk Authority of the Australian Capital Territory, unreported.

This is a decision of Ryan J dated 22 April 1994. It was probably the first case to apply the General Newspapers decision. An application for an Order of Judicial Review was made under the ADJR Act 1989 (ACT) for review of two alleged decisions of the Milk Authority.

The decisions challenged were:

1. a decision not to invite tenders for the supply of bulk raw milk to Canberra for the period from 1 July 1993 to 30 June 1996; and
2. a decision made in or about October 1992 to vary contracts for the supply of bulk raw milk to Canberra.

The Authority was established by ACT legislation as a body corporate with statutory functions to engage in, regulate and control the supply, sale and distribution of milk in the territory. The Authority could regulate the sale of milk by fixing the price at which milk may be sold or the charges that may be made in connection with the sale of milk.

The Authority's powers were conferred by s.17 of the Milk Authority Act (1971) in the following terms:

> *"17.1 The Authority has power to do all things necessary or convenient to be done for or in connection with the performance of its functions under this Act and, in particular, has power-*
>
> *(a) to acquire milk from inside or outside the Territory;*
>
> *(b) to enter into contracts to have milk processed, whether inside or outside the Territory;*
>
> *(c) to enter into contracts for the sale or distribution or sale and distribution, of milk; ....*
>
> *1A. In addition to the powers specified in sub-section (1) the Authority also has power -*
>
> *(a) to enter into a contract, arrangement or understanding with a person or corporation whereby the person or corporation agrees to do, in relation to the acquisition, processing, sale and distribution of milk, only the acts and things specified in the contract, arrangement or understanding and no other acts or things; and*
>
> *(b) to give effect to such a contract, arrangement or understanding."*

Since its establishment in 1971 the Authority entered into contracts with various companies for the supply to it of bulk milk which was then processed, packaged and distributed within Canberra. In 1976, the Minister for the ACT directed the Authority (as he was empowered to do under the Act) to call publicly for tenders to supply bulk milk to the Authority. There were, over the years, over five or six potential suppliers of milk to the Territory in this manner. Over the next thirteen or so years, the five or so contracts which were let from time to time were either subjected to public tender or known suppliers were invited to tender. From time to time, private negotiation resulted in contracts being extended. It was clear there was no established or long-standing fixed pattern of conduct in relation to the letting of the contracts.

In March 1991 public tenders were called for the supply of bulk milk for the two years commencing 1 July 1991. The applicant submitted a tender then but was unsuccessful. There were four successful tenderers, each of which entered into contracts called "Deeds of Supply". In October 1992 the Authority resolved to vary the Deeds of Supply by extending the period of their operation for two years to 30 June 1996.

In late 1991 the applicant became aware of rumours suggesting that the Authority might have extended the contracts of its existing milk suppliers. The general manager of the applicant telephoned the Secretary of the Authority asking whether a public tender will be called for the 1993 to 1996 period. In January 1993 the Authority wrote to Bonlac simply saying that

the matters raised in the conversation and the letter which Bonlac sent in December 1992 "received preliminary consideration by the Authority at its meeting held on 15 December 1992 and will be considered again in more detail at its meeting to be held on 27 January 1993" (bear in mind that the Authority had already extended the existing contracts at this point).

There were some further discussions at which the Secretary of the Authority was "non-committal about the subject matter and said he would convey the applicant's request to the Board". In February 1993 the Authority sent the applicant a letter stating that it would not be calling for tenders for the supply of bulk raw milk for the relevant period. Reasons were sought and a meeting was held. It was not until 14 April 1993 at a further meeting between the parties that it was unequivocally indicated on behalf of the Authority that it had already extended the contracts of its existing suppliers to mid-1996 and the Authority would not be calling for tenders.

The applicant then challenged the two decisions I referred to. There was a formal objection to the time as to when the application was commenced. It was held that the application was commenced within a reasonable time after the Authority's decision was conveyed to the applicant bearing in mind the applicant was seeking legal advice and exploring non-curial (self help) remedies seeking to redress its grievances against the Authority.

A notice of objection to competency was filed by the Authority alleging that their decision was not one made "under an enactment" as required by the ADJR Act (ACT). Justice Ryan analysed the landmark decision on the meaning of the expression decisions made "under an enactment" in Australian National University v Burns (1982) 64 FLR 166 where it was held that the immediate source of power for the making of the decision must have been contractual. Ryan J was first inclined to apply a modification of ANU v Burns by applying his own decision in Taylor v Ansett Transport Industries IES (1987) 18 FCR 342 (which Northrop and Fisher JJ agreed) where he observed that rather than ask whether the power was specifically derived under the enactment, the better question to ask is whether the "connection" between the decision and the enactment is "sufficiently close". He said that if he applied that test in this case he would not have found that there was a decision under an enactment because:

- the Milk Authority Act did not expressly or by necessary implication regulate the making of the decision as to how to enter into contracts;
- the Act did not repose the making of decisions of that kind in any identified person or group of persons; and
- the actual or potential effects of such decisions on persons other than parties to the supply contracts are no different from the effects of vast numbers of commercial arrangements to which statutory authorities are not parties.

Justice Ryan, however, considered himself bound by the Berkeley Cleaning Group. Ryan J noted that Davies J had attempted to distinguish the Berkeley Cleaning Group Case in a number of decisions but Ryan J did not believe the Berkeley Cleaning Group Case could be so appropriately distinguished. However, the General Newspapers Case which was handed down after the Bonlac Foods Case was argued it was taken into account. The court found the General Newspapers Case and the Berkeley Cleaning Group Case to be irreconcilable and gave effect to the inclination I expressed a few moments ago. Ryan J said (at page 20-21):

> *"In my view, neither the present case nor Berkeley Cleaning is distinguishable from General Newspapers on the ground that in the former cases the power to enter into contracts was expressly conferred by the statutes which brought the relevant statutory corporations into being, whereas in General Newspapers the power was left to be inferred from the grant of power extending to "the legal capacity of natural persons". It is true that the making by the Authority of contracts for the sale and distribution of milk was expressly contemplated by s.17 of the Milk Authority Act but nowhere else in that Act are there any requirements governing the making of those contracts. Thus, by contrast with the conclusion which I reached in Taylor v Ansett Transport Industries, the connection between the decision to award the contracts and the Milk Authority Act is of the remoter kind exemplified by Australian National University v Burns."*

The Court then went on to apply the test stated by Mason CJ in Australian Broadcasting Tribunal v Bond (1990) 170 CLR 321 at 336 and held that the decision to extend the contracts of the existing milk suppliers was "final or operative and determinative". Ryan J further stated at pages 22-24:

> *"It is clear from Australian National University v Burns and General Newspapers that not every decision, however final and operative, made in exercise of a statutory power is a decision under the enactment conferring that power. In the present case the alleged decision was not given "force and effect" by the Milk Authority Act or "by a principle of law applicable to it" cf General Newspapers at page 11. It is impossible to discern in the Milk Authority Act any prescription of relevant factors to be taken into account or irrelevant factors to be disregarded by the Authority in making a contract for the distribution of milk. Of course, it is to be implied from the statutory prescription of the functions and powers of the Authority that those powers will be exercised in furtherance of the performance of its functions. However, that implication does not entail that every final and operative decision taken by the Authority in purported exercise of its powers is a decision made under the Milk Authority Act, or is given force and effect by that Act. Many decisions will derive their force and effect from the fact that they are made presumptively within power by a statutory corporation.*
>
> *The implication to which I have just referred leaves a decision of the Authority open to attack if it is made for some ulterior purpose or otherwise not in good faith. Nevertheless it is true as counsel for Bonlac has suggested, that my conclusion that a decision of the Authority made within power is not, by that reason alone, made under an enactment invokes the consequence that many decisions of the Authority and bodies like it are not reviewable under the ADJR Act. It is a matter of policy for the legislature how far that consequence should be avoided by specifically bringing some decisions of the relevant authority under an enactment by, for example, specifying procedural requirements to be observed or criteria to be taken into account in making them or by reposing them in a specified officer. It is not, I consider, for the Courts to bring all final and operative decisions of statutory authorities within the purview of the ADJR Act by automatically classifying them as "made under an enactment".*

In summary, the case held that a decision not to enter into a milk tender for the supply of bulk milk to Canberra was not justiciable under the ADJR Act as:

- the connection between the decision and the source of power to award the contract was too remote; and

- decisions of the Authority for the distribution of milk contracts are not justiciable in judicial review proceedings except for ulterior purpose or bad faith.

We do no more than point out that one of the grounds of judicial review that one of the grounds of judicial review that was to be argued in this case by Bonlac was irrelevant considerations. Canberra Milk is the brand name of milk distributed in the Territory by the Authority. It was the major sponsor of the Canberra Raiders Rugby League football team. It was alleged that the Authority made the decision to extend the contracts of existing suppliers upon securing their respective commitment to sponsor the Canberra Raiders (see, Canberra Times, 23/4/94).

CEA Technologies Pty Limited v Civil Aviation Authority (1994) 51 FCR 329

This was a Federal Court decision by a single judge, Neaves J. It related to eight companies who were invited by the CAA to submit tenders for the supply of processing and display equipment and the installation of that equipment in the control tower of the Sydney Kingsford Smith Airport. An aggrieved tender sought review proceedings under the ADJR Act (Cth) seeking review of the following "decisions":

1. decision not to award the contract to the applicant tenderer; and

2. the failure of the CAA to decide that the successful bidder must use Australian goods and services in the performance of its contract.

It was held, applying the General Newspapers Case and Bond's Case, that if these are "decisions" within the meaning of Bond's Case, they are not justiciable as they are not decisions under an enactment.

The CAA is established as a body corporate under the Civil Aviation Act 1988 (Cth). The general functions of the Authority are well known and are set out in the Act. Relevantly, they were to develop, implement and ensure compliance with safety standards with respect to the movement of vehicles and aircraft on aerodromes under its control. Under s.13 of the CAA Act there was a general power to do all things necessary or convenient to be done for or in connection with the performance of the CAA's functions including a power to "enter into contracts". The relevant functions could be found in s.10(1)(d) which provided that the CAA had the functions of ensuring compliance with and implementing standards relating to the planning, construction, establishment, operation and use of aerodromes.

After considering, but not deciding, whether the challenged decisions were "reviewable decisions" within the meaning of the Bond Case, Neaves J considered in some detail the General Newspapers Case. The Court noted the distinction which once existed between the cases that were concerned with a decision to enter into a contract and the cases concerned with decisions made under existing contracts. The Court noted that this distinction was "not regarded as significant" by the Full Federal Court in General Newspapers. The Court held that it was clear from the reasoning in General Newspapers that a general capacity to enter into contracts stated in the empowering legislation of a statutory corporation was not sufficient to provide the source of power relevant to the entry into contracts so as to make such decisions justiciable under the ADJR Act. Although he did not so, it appears clear to us that Neaves J felt himself bound to apply General Newspapers in the following way:

> *"The argument advanced by counsel for the applicant in the present case, however, requires that an answer be given to the question whether the presence in the Civil Aviation Act of ss.9 and 10 (functions of the CAA) compels the conclusion that the decisions by the respondent to enter into the relevant contracts are properly to be characterised as decisions made under those provisions. In my opinion, that question must be answered adversely to the applicant. Sections 9 and 10 of the Act do no more than set out the functions of the respondent. It cannot, in my opinion, properly be said that they required or authorised, in any relevant sense, the making of the particular decisions in question and gave statutory effect to them or that they relevantly made provision for the making of the decisions. While the specifications forming part of the contracts may have reflected decisions taken by the respondent as to the standards to be observed in the operation and use of Sydney Kingsford Smith Airport (see s.10(1)(d)) and while it may be said that the respondent was seeking, by the installation of the equipment in question, to implement those standards, it is not those decisions, but the decisions to enter into the contracts for the supply and installation of that equipment that are the subject of challenge. The question whether such decisions, if made, are reviewable under the Judicial Review Act is not a question which now arises and I express no view upon it."*

The CEA decision makes it clear that the Full Federal Court decision in General Newspapers is more likely than not going to be followed in its wider interpretation by the Federal Court from now on, rather than an individual assessment of the proper scope and applicability of the decision in ANU v Burns. The Federal Court will not undertake a detailed and independent analysis such as that made by Ryan J in the Bonlac Foods Case.

Chapmans Limited v Australian Stock Exchange Limited (1994) 123 ALR 215

This is a decision of Beaumont J in the Federal Court where the issue was the justiciability of decisions of the Australian Stock Exchange ("ASX") Limited under the ADJR Act. The decision challenged was a decision of the ASX that the applicant's name be removed from the official list of the ASX. The source of power alleged was the listing rules provided for by virtue of the Corporations Law. An objection to competency was argued with the ASX asserting that the decision was not a decision under an enactment within the meaning of the ADJR Act. The ASX argued that the relationship between the parties at the Stock Exchange was governed exclusively by the contract between them and was not susceptible of judicial review. Accordingly, they said, the law of contract was applicable rather than the ADJR Act. It was said that the parties had agreed in 1950 that the applicant's name remained on the official list at the "pleasure" of the respondent and that, as a matter of the private law contract, the respondent was entitled to withdraw its "pleasure" without assigning a reason. The Court surveyed the alleged power upon which the listing rules were given force and effect and determined that mere references in the legislation to the listing rules did not give "force or effect" to those rules. Beaumont J said:

> *"Rather, as I would interpret the legislative scheme, the legislature has assumed that the listing rules and, for that matter, any listing agreement, derived their force and effect from the law of contract. In essence, in my view, the 1987 legislative scheme identified the listing rules but did not give them force and effect within the meaning of the authorities in the present area.*

> *It is also true that the legislative scheme establishes a regime which permits a degree of regulation by public authorities in the public interest. It may be possible to argue from this that, for instance, there are imposed upon the respondent duties of a public character which may be susceptible of judicial review under the Court's supervisory jurisdiction in the form of a prerogative writ issued under s.39B of the Judiciary Act."*

Ashley Black will speak further on this in his paper in Session Three to be delivered after lunch today.

Justice Beaumont decided in that case that the power exercised by the ASX was contractual/private power and not public or statutory power. In doing so, he specifically endorsed the expression of the Full Federal Court in the General Newspapers Case declaring that the authorities have established that the ADJR Act is:

> *".... concerned with decisions which being authorised or required by an enactment are given force or effect by the enactment or by a principle of law applicable to the enactment."*

Hutchins v Deputy Commissioner of Taxation (1994) 123 ALR 133

This is a decision of Jenkinson J, of the Federal Court in Melbourne dated 14 July 1994. It is a tax case concerning a challenge under the Commonwealth ADJR Act against a decision of the Deputy Commissioner to vote against a special resolution in the applicant's bankruptcy that the creditors of the bankrupt accept a composition of his debts. Had the Commonwealth voted in favour of the motion it would have carried under Pert X the Bankruptcy Act. An objection to competency was argued and the Deputy Commissioner alleged that there was no "decision" within the meaning of ABT v Bond and there was no decision made "under an enactment" within the meaning of Bond's Case and the General Newspapers Case. While the case is of more importance for its discussion of Mason C J's judgment in Bond's Case, it is significant to point out that Jenkinson J picked up on one sentence of the former Chief Justice in Bond (170 CLR at 737) where he said "a reviewable decision" is one for which provision is made by or under a statute. He then took that statement together with a line in the General Newspaper Case which was that "to be subject to review under the ADJR Act an action or refusal to act must amount to an ultimate or operative determination which an enactment authorises or requires and thereby gives it statutory effect".

In our view the last six words of the above quotation, in effect, add a new element to the equation. Further, in discussing the general effect of the General Newspapers decision, Jenkinson J stated that it may now be said that:

> *".... an enactment empowering a body corporate to make contacts does not make provision for decisions concerning the exercise of the capacity it confers." (at 137)*

Jenkinson J held that two cases which were relevant to the case before him might no longer be good law bearing in mind the narrowed interpretation of the meaning of "decision" in Bond's Case. However, Jenkinson J went further and stated that the two precedents may well not stand with the following statement by Davies and Einfeld JJ in the General Newspapers Case where they said (45 FCR page 169):

> *"The ADJR Act provides the structure for judicial review, which is review, not of acts taken under the general law applicable in the community, but of acts which have statutory effect because of the provisions of a Federal enactment. Thus, a "decision" taken under a Federal enactment is an action or a refusal to act which, by virtue of the statute, affects legal rights and/or obligations."*

The last six or seven words of the above quote are, in our view, in addition to the narrowed interpretation offered by the High Court in Bond. If the General Newspapers Case continues to be analysed by the Federal Court and applied in this manner, serious inroads will be made to the nature and scope of judicial review in Australia under the ADJR Act.

Concord Data Solutions Pty Limited v Director-General of Eduction (1994) 1 Qd R 343

This is a decision of Thomas J of the Supreme Court of Queensland which was delivered just five days after the Full Federal Court decision in General Newspapers. Accordingly, it did not take into account the General Newspapers decision. In this case, a challenge was mounted by an unsuccessful tenderer to a decision of the Director-General of Education to appoint the third respondent as the preferred supplier of certain computer software to Queensland government schools. The tenders related to the supply of automated software for libraries. The contract with the third respondent had not yet been entered into at the time of the hearing. The application was made under the new Judicial Review Act 1991 (Qld) which is largely based on the Commonwealth ADJR Act. The unsuccessful tenderer was advised in writing that it did not become the preferred tenderer and was invited to a "debriefing" meeting. At that meeting, some statements made by departmental officers formed the basis of the applicant's allegations that procedures which were required by law to be observed in the making of the decision were not observed and that an improper exercise of power was involved. The real basis of the applicant's concern was apparently that on the face of it the applicant's software system, while more expensive, would on a fair economic analysis be found to have been more beneficial and in the end collectively cheaper to the Department and the schools than the conversion to the successful tenderer's software. The judge made the comment that the Judicial Review Act did not make "the Supreme Court a merits review tribunal" and decided a threshold justiciability question which determined the case. The applicant attempted to establish that the very lengthy document titled "State Purchasing Policy" was a statutory instrument and therefore an "enactment" for the purposes of the Queensland Judicial Review Act. The policy was a loose-leaf book containing very detailed references to standards and guidelines and codes of practices in relation to the State purchase policy. As to the legislative status of the policy, Thomas J decided (at page 359):

> *"In short, the State Purchasing Policy seems to designed to create systems which will affect ultimate decision making, but it is not in its own right applied by statute or statutory instrument to the making of individual decisions. It may be noted in passing that even if I am wrong in thinking this to be so, its contribution to the statutory regime applicable to the making of particular decisions is so lacking in specific requirements that it may fairly be described as slight and remote."*

The Court referred to the "extensive matrix of financial regulation and policy material bearing upon the actions of a department that wishes to call for tenders and to let out a contract". He then outlined four or five major Acts upon which sources of power could be identified. He held that the State Purchasing Policy was not a statutory instrument in that it did not directly contribute to any relevant body of law that should be assessed for the purposes of deciding whether a particular decision was made under an enactment he held it was "a statement of policy arising through executive discretion". The Court applied the

reasoning of ANU v Burns and said that one should search for the "**operative or substantial source of the power** rather than incidental sources".

Importantly, Thomas J found that the decision to award the contract in the present case was non-statutory and was made within the exercise of the prerogative powers of the Crown. The Federal Court case of Hawker Pacific Pty Limited v Freeland (1983) 79 FLR 183 was applied as it arose in similar circumstances.

Thomas J ultimately held in the following terms (at 352-353):

> *"When one returns to the tests suggested in the decided cases, it is necessary to look for the operative source of the power rather than incidental requirements that are tacked onto it* [citations omitted]. *In the present matter although there is a veritable statutory smorgasbord of provisions applicable to the actions of the accountable officer, they are very general and have very little to say about what he is to do in making a decision of the present kind. In the end, I conclude that the essential power that was exercised in the present case remained the prerogative power and that the statutory overlay was incidental to the making of the decision. The statutory requirements do not intrude to a sufficient extent to make it a decision "under" an enactment. I therefore conclude that the decision is not reviewable under the Judicial Review Act."*

Common Law Trends (no ADJR Act)

Mercury Energy Limited v Electricity Corporation of New Zealand Limited (1994) 1 WLR 521

This decision was handed down on 28 February 1994 by the Privy Council on appeal from the Court of Appeal of New Zealand. There were two principal issues involved in the appeal:

1. whether proceedings for judicial review would lie against a New Zealand state enterprise; and, if so
2. whether the plaintiff should be allowed to proceed with such a claim.

Mercury Energy was a distributor of bulk electricity to greater Auckland in New Zealand. The Electricity Corporation of New Zealand was a state enterprise under the New Zealand State-Owned Enterprises Act 1986 and was responsible for generating and distributing electricity throughout New Zealand to local electrical supply authorities. There was a written agreement in 1987 whereby the Authority undertook to supply Mercury Energy (the distributor) with bulk electricity at an agreed price. The price was to be determined by the Authority. In March 1992, the Authority gave the distributor twelve months' notice of termination of the contractual arrangements, but nevertheless continued to supply the plaintiff with energy at fair and reasonable prices. The plaintiff distributor sued in:

1. contract;
2. breach of statutory duty;
3. abuse of monopoly power; and

4. judicial review of the decision (under the relevant New Zealand procedural legislation).

The Authority, although designated as a state-owned enterprise, was registered under the New Zealand Companies Act 1955 and its shares were held by the Minister for Finance and the Minister Responsible for the House of Representatives. Section 4 of the relevant Act provided:

> *"The principal objective of every state enterprise shall be to operate as a successful business and, to this end, to be - (a) As profitable and efficient as comparable business' that are not owned by the Crown; and (b) A good employer; and (c) An organisation that exhibits a sense of social responsibility by having regard to the interests of the community in which it operates and by endeavouring to accommodate or encourage these when able to do so."*

On a preliminary point on the justiciability of the judicial review aspect of the claim, the case was argued in the Privy Council. The judicial review grounds alleged were unreasonableness, breach of good faith, improper motives and ulterior objects.

The first question the Privy Council asked itself was: Is the Authority a body against which relief can be obtained by judicial review? The Privy Council said (at page 526):

> *"Judicial review was a judicial invention to secure that decisions are made by the executive or by a public body according to law even if the decision does not otherwise involve an actionable wrong. ....*
>
> *A state enterprise is a public body; its shares are held by ministers who are responsible to the House of Representatives and accountable to the electorate. The defendant carries on its business in the interests of the public. Decisions made in the public interest by the defendant, a body established by statute, may adversely affect the rights and liabilities of private individuals without affording them any redress. Their Lordships take the view that in these circumstances the decisions of the defendant are amenable in principle to judicial review both under the Act of 1972 as amended and under the common law."*

Their Lordships said it did not follow that the plaintiff was entitled to proceed with its claim for judicial review. Judicial review, they said, "involves interference by the Court with a decision made by a person or body empowered by Parliament or by the governing law to reach that decision in the public interest".

Their Lordships said that in a proper case where the principles of judicial review or the established grounds of judicial review are properly pleaded or plausibly pleaded and, substantiated at the trial, the courts will interfere. The Privy Council cited with approval the classic formulation of the major grounds of judicial review as listed by the "definitive judgment" of Lord Greene M.R. in Associated Provincial Picture Houses Limited v Wednesbury Corporation (1948) 1 KB 223. The Privy Council said that "the principles apply equally to the defendant exercising a discretion to terminate a contract" (at page 526-527).

The crux of the Privy Council's decision in striking out the pleadings based on judicial review was that the source of power to make the decision was contract and not statute. The Court held that the pleadings which alleged irregularity or illegality in the making of the decision did not in fact plead any discernible facts to support in any way their claim to judicial review. Although not expressly stated, it seems to us implicit in Their Honours' decision that the case was unsuccessful for the applicants because of defective pleadings alone. However, the Privy Council stated that "the exploitation and extension of remedies such as judicial review beyond their proper sphere should not be encouraged" (at page 529) and said further:

> *"It does not seem likely that a decision by a state enterprise to enter into or determine a commercial contract to supply goods or services will ever be the subject of judicial review in the absence of fraud, corruption or bad faith."*

The stated rationale for the above assertion was that:

> *"Increases in prices whether by state-owned or private monopolies or by powerful traders may be subjected to voluntary or common law or legislative control or may be uncontrolled. Where a state enterprise is concerned, the shareholding ministers may exercise powers to ensure directly or indirectly, that there are no price increases which the ministers regard as excessive. Retribution for excessive prices is likely to be exacted on the directors of the state enterprises at the hands of the ministers. Retribution is liable to exacted on the ministers at the hands of the House of Representatives and on the elected members of the House of Representatives at the hand of the electorate. Industrial disputes over prices and other related matters can only be solved by industry or by government interference and not by judicial interference in the absence of a breach of the law."*

Mercury Communications Limited v Director General of Telecommunications, unreported 9 February 1995, House of Lords

This is a case reported in The Times of 10 February 1995 at page 34. It is a decision of five judges of the House of Lords dealing with an unusual and significant question of the dividing line between public law and private law remedies in the context of litigation over the question of the correct and appropriate manner of commencing legal proceedings. This was a claim by Mercury Communications, a licensed operator of a telecommunications system, against British Telecommunications plc ("British Telecom") which had entered into a contract with Mercury Communications which allowed that company to connect into the British Telecom telephone system. In this way, the monopoly previously held by British Telecom was being broken down. Mercury Communications held a telecommunications licence granted to it in 1982 under the relevant legislation by the Secretary of State for Trade and Industry.

Under the scheme as was set up in 1984, British Telecom was granted a licence by the Secretary of State which by condition 13 required British Telecom to enter into an agreement with, in effect, Mercury Communications and provided that British Telecom could only require that the agreement be subject to specified terms and conditions. A few months later, the Secretary of State granted a licence to Mercury Communications under s.7 of the new Telecommunications Act 1984. The two companies then entered into an agreement varying their original agreement. The parties provided that after five years the agreements could be renegotiated if a fundamental change in the circumstances had occurred. In mid-1992,

British Telecom told the Director General of Telecommunications that the parties were discussing a new negotiated agreement and referred to the Director under a clause of the agreement a question as to the amounts to be charged for connection and the conveyance of calls. The Director made a determination. Mercury Communications contended that the Director had misinterpreted certain phrases in condition 13 relating to "fully allocated costs" and "relevant overheads". Mercury Communications argued that a different accounting principle ought to be invoked and issued an originating summons in the Supreme Court seeking a declaration on the true construction of the British Telecom licence and, in particular, a construction as to the relevant costs and overheads for which it contended.

The Director General and British Telecom commenced a strike-out application on the following grounds:

- the application was frivolous or vexatious;
- or otherwise an abuse of the process of the Court; and
- if the question could be raised at all, it had to be raised in judicial review proceedings (which was specifically provided for in Order 53 of the Supreme Court Rules).

The defendants contended that the relationship between the Director and Mercury Communications and British Telecom in connection with the determination and any challenge to that determination was governed solely by public law and should be determined exclusively in public law. The defendants relied on a decision of Lord Diplock in O'Reilly v Mackman (1983) 2 AC 237.

The House of Lords said it was of particular importance, as Lord Diplock saw it in the O'Reilly Case to retain "some flexibility" as:

> *".... the precise limits of what was called "public law" and what was called "private law" were by no means worked out. It had to be borne in mind that the overriding question was whether the proceedings constituted an abuse of the process of the Court.*
>
> *The Director's office was created by statute and he had statutory functions, some of which he shared with the Secretary of State. They were performing public duties when they sought to secure the provision of such telecommunications as satisfied all reasonable demands.*
>
> *The granting of a licence containing condition 13 was an act performed under s.7 of the 1984 Act. That did not mean that what the Director did could not lead to disputes that fell outside the realms of administrative law any more than a government department could not enter into a commercial contract or commit a tort actionable before the Court under its ordinary procedures.*
>
> *Even though condition 13 was in the licence, the interpretation of its terms arose no less in a dispute between two telecommunications companies. What the Director decided became a part of their contract; the dispute in substance and form was as to the effect of the terms of the contract even if it could also be expressed as a dispute as to the terms of the licence.*
>
> *The procedure by way of originating summons in the Commercial Court was at least as well suited as, and might be better than the determination of the issues than the procedure by way of judicial review."*

This case demonstrates that the House of Lords is prepared to maintain some flexibility in considering where the dividing line exists between public law and administrative law and private law. It is clear from this case, to our mind, that in the context of corporatisation and privatisation that distinction can easily be blurred, can be seen as unimportant, and can in fact detract from the main dispute at issue between the parties.

Victoria v The Master Builders' Association of Victoria, unreported, Appeal Division of the Supreme Court of Victoria, 30 September 1994

This is a landmark decision of the Appeal Division of the Supreme Court of Victoria holding that an administrative decision made by a representative of the Crown in the right of the State of Victoria exercising the prerogative powers of the Crown was justiciable in judicial review.

The decision is that of Tadgell, Ormiston and Eames JJ. The two main judgments of Tadgell and Eames JJ are both agreed with by Ormiston and the main judgments largely come to the same conclusions.

The case concerned the entity set up in Victoria by the Kennett government known as the Building Industry Task Force. The task force was, in essence, created to "clean up" as it were, the building industry in Victoria as it related to the letting of public construction contracts. It was modelled on a Commonwealth initiative which, in turn, was modelled on the work of the Gyles Royal Commission into Productivity in the NSW Building Industry, and the New South Wales Building Industry Task Force. In August 1993 a letter was sent out to over 700 building and construction contractors who had previously tendered for Victorian government contracts (there were 300 additional letters to go out at the time of the appeal hearing). The letter was under the hand of a solicitor who described himself as "Solicitor-in-Charge, Building Industry Task Force". The solicitor was described by Tadgell J as "the only human manifestation of the Building Industry Task Force revealed by the evidence" (at page 3). Accompanying each letter was a pro forma statutory declaration and the letter invited each contractor to whom it was sent ton execute the declaration in the form attached. In essence, the letter required compliance by contractors with the scheme or procedure with which is proposed as a condition of the government's further dealing with them.

The letter is analysed and dissected in the most minute detail by the Victorian judges. Essentially the letter related to the existence of a practice in the Victorian building industry of collusive agreements between tenderers on projects and undisclosed tenderers' fees which would be paid to unsuccessful tenderers by the successful tenderer and that those fees would be undisclosed to the party letting the tender. It was alleged that the tender prices for projects were inflated as a result of those agreements. The Commonwealth had sent letters to all of its contractors and tenderers where, within a certain period, there was evidence implicating them in these possibly unlawful arrangements. By contrast, the Victorian Building Industry Task Force simply sent letters uniformly to all contractors who had tendered within the relevant period, whether or not there was supposed to be evidence implicating them in something evil. The letter asserted that Victoria will not award a contract to a contractor in respect of whom there is evidence relating to, inter alia, unsuccessful tenderers' fees and the like, until matters relating to these projects have been resolved to the State's satisfaction. The Chief Executive Officer of the construction company was, essentially, required to complete the attached pro forma statutory declaration. The pro forma statutory declaration was described by Tadgell J as a "blunt instrument". He said it was "so extravagant that I should not be surprised by a reluctance on the part of anyone to make it. I should certainly not be surprised if any prudent legal adviser were to counsel against making it".

He said the letter was clearly designed as a threat to contractors. Those who did not respond satisfactorily to the threat contained in the letter were or were to be put on a "blacklist" of contractors who were not to be allowed to tender and to whom contracts were not to be

awarded by the State of Victoria. There was evidence that a blacklist had in fact been prepared. A second letter was sent out in September 1993 which enclosed a "tender status report listing those contractors who are not permitted to tender or be awarded State government contracts at this stage". Enclosed with the letter was "a list of tenderers not clear to tender, nor to be awarded contracts" said to number 240.

The Master Builders' Association of Victoria took exception to the letter and sued the State of Victoria seeking injunctive and declaratory relief in respect of the scheme or the procedure that the letter described. The remedy ultimately sought was a declaration that the actions of the Building Industry Task Force in sending the letter and in preventing or seeking to prevent building contractors from tendering or being awarded contracts by the State of Victoria were unlawful.

In one of the most significant Australian common law decisions of recent times, the Court held that the sending of the letter and the practice of the Building Industry Task Force was not pursuant to any statutory power and was undertaken in the exercise of the State's prerogative power. The Court applied the judgement of the House of Lords in Council of Civil Service Unions v Minister for the Civil Service (1985) AC 374 ("the GCHQ Case") and the Full Court of the Federal Court in Minister for the Arts, Heritage and Environment v Peko-Wallsend Limited (1987) 15 FCR 274. The Court so held after examining five lever arch files of authorities submitted by the parties representatives.

All three judges separately quoted with approval a comment of Lord Scarman in the GCHQ Case (which had also been adopted extra judicially by Sir Anthony Mason in an article published in the Federal Law Review in 1989 ("Administrative Review: The Experience of the First Twelve Years" 18 Federal Law Review 122)) where he said at page 407:

> *".... I believe that the law relating to judicial review has now reached the stage where it can be said with confidence that, if the subject matter in respect of which prerogative power is exercised is justiciable, that is to say if it is a matter upon which a Court can adjudicate, the exercise of the power is subject to review in accordance with the principles developed in respect of the review of the exercise of statutory power .... the controlling factor in determining whether the exercise of prerogative power is subject to judicial review is not its source but its subject matter."*

The State argued that it was only exercising private power and was not exercising prerogative power. The State has the capacity as has any juristic person to determine with whom and on what conditions it will enter into contracts. It was argued that conduct not pursued in the exercise of any power in the fulfilment of a public duty and has no public law consequences is not amenable to judicial review. Tadgell J stated (at page 30) that:

> *"The dichotomy which has developed in England, notably since O'Reilly v Mackman .... between public law and private law in the context of judicial review seems not so far to have been the subject of much comment in this country: See, however, Kioa v West, ... at 621, per Brennan J. The development of the dichotomy in England owes itself largely to the procedural reforms embodied in Rules of Court in 1977 and the considerations of public policy which they carried with them. The matter is traced in O'Reilly v Mackman and is interestingly and critically discussed by Sir William Wade in an article "Procedure and Prerogative in Public Law" (1985) 101 LQR 180. A nice classification of the conduct of the Building Industry Task Force as a matter of public law, as opposed to a matter of private law, might matter if the conduct were (as with the Take-over Panel under consideration in R v Panel*

> *on Take-overs and Mergers ex p Datafin plc [1987] 1 QB 815) not under direct government aegis. Here, however, the Building Industry Task Force directly represents the State of Victoria being, as it were, its alter ego. The Task Force is by no means, as Sir John Donaldson, MR described the Take-over Panel in the Datafin Case, "without visible means of legal support". Its source of power is patent*."

The Court held applied the judgment of the High Court in Ainsworth v Criminal Justice Commission (1992) 175 CLR 564 which held that reputations were a sufficient interest or right adversely affected so as to warrant the intervention of the Courts by judicial review. The Victorian Appeal Division of the Supreme Court held that the placing of the two hundred-odd names on the blacklist in circumstances where the contractors on that list had not had an opportunity to defend or adequately defend themselves was something that adversely affected their reputations and constituted a denial of natural justice. A declaration to that effect was made by the Court.

Justice Eames provided an interesting discussion of the public law/private law divide (at page 22 et seq). He analysed the English cases on the question and said that essentially the question was twofold, whether:

- the body was exercising public law functions or had a public law element; or
- the body had functions which have a public law consequence.

Eames J analysed the public law element/consequence aspect by invoking a 4-step analysis (at p 26).

Eames J's comments are worth quoting in full:

> *"Insofar as it is necessary to identify a public element in the decision of the Task Force, as contrasted with a decision relating to merely private affairs as between contractors, then the task involves, in my opinion, a comprehensive analysis of the nature of the power being exercised, the characteristics of the body making the decision, and the effect of determining that a review of the exercise of the power is not amenable to the review. The source of power would also remain a relevant, but not determinative factor to be considered. Such an analysis was conducted by the Court of Appeal in Datafin, and led to the conclusion that whilst the Panel on Take-overs was ostensibly a merely private self-regulating body it operated in the public domain, was performing functions which might as easily, and as appropriately, have been the subject of legislation, and concerned institutions and activities which affected the public. Power exercised behind the scenes, by government, as Lloyd LJ observed at 847, which would undoubtedly be the exercise of power under a public duty, is no less the exercise of power with a public law basis merely because an apparently independent, self-regulating, body is at the forefront in making the decisions. In the view of the Court of Appeal, as best expressed by Sir John Donaldson MR at 839, it was unthinkable in that case, that a body which had such power to regulate the financial markets and to determine the manner and entitlement of persons to participate in the market (those persons being, in reality, compelled to submit to its authority), should go on its way cocooned from the attention of the Courts in defence of the citizenry ...."(at p 26)*

The Judge held (at page 28) that the Building Industry Task force had a clear public law basis and that:

> *"It would be unrealistic to pretend that the actions of the executive in this case, through administrative agencies of the State, concerned merely private functions akin to those which might be exercised by any citizen. The integrity, and efficiency, of the building industry is plainly a matter of immense public importance. We were told that some fifty percent of contracts in the industry are awarded by the State or public instrumentalities of the State, or else by local government bodies. The elimination of corrupt practices is therefore a matter of public importance ...." (at page 28).*

B. WHERE IS THE LINE BETWEEN PUBLIC LAW AND PRIVATE LAW?

The judicial review concept of justiciability will often be the best indicator of what is private law and what is public law. A matter is considered not justiciable in judicial review because it either involves the exercise by the Crown of private power with the Crown acting as a normal juristic person or entity or involves the exercise of special prerogative powers of the Crown such as:

- undertakings between government in the exercise of political power;
- power to ratify treaties, defend the realm and dissolve parliament; and
- power to commence (by ex officio information) or withdraw (nolle prosequi/no-bill) a prosecution.

[For an extended discussion of justiciability and the prerogative see Mark Robinson's paper titled "*The Source of Government Power*" delivered at a BLEC conference "Government Liability in Contract, Tort and Administrative Law" in February 1993. See also Sampford "*Law, Institutions and the Public/Private Divide*" (1991) 20 Federal Law Review 185; and Fiona Wheeler in "*Judicial Review of Prerogative Power in Australia: Issues and Prospects*" (1992) 14 Sydney Law Review 432; and Margaret Allars "*Private Law But Public Power: Removing Administrative Law Review From Government Business Enterprises*" (1995) 6 Public Law Review 44; and Mark Aronson "*Ministerial Directions: The Battle of the Prerogatives*" (1995) 6 Public Law Review 77; and Roger Wettenhall "*Corporations and Corporatisation: An Administrative Perspective*" (1995) 6 Public Law Review 7; and John Farrar and Bernard McCabe "*Corporatisation, Corporate Governance and the Deregulation of the Public Sector Economy*" (1995) 6 Public Law Review 24.]

Perhaps the best way of approaching the question of identifying the dividing line between public and private law is to look to the concept of "public duty". The principal question could be asked in a number of ways: Is there a public duty? What is the public law factor or element? The four tests set out by Eames J in Victoria v The Master Builders' Association of Victoria are, in our view, quite helpful. In any given situation, these questions should be asked;

- What is the nature of the power being exercised;
- What are the characteristics of the body making the decision;
- What is the effect of determining that judicial review is not available; and
- What is the source of the power (which would remain a relevant, but not determinative factor to be considered).

In our view, the answers to these questions would almost certainly correctly determine where the dividing line falls.

The most serious matter raised by the consideration of public law and private law issues today is that a **fundamental and unworkable tension** has been created between the judicial review remedies available under the various ADJR Acts (which render only decisions under an enactment judicially reviewable) and the development of the common law concept of justiciability (which allows for wholesale judicial review of exercise of prerogative power). As we have seen, it can now safely be said that the common law of judicial review in Australia is more concerned with examining the subject matter of the decision in the context of whether or not there is a public duty or power in the nature of public power being exercised. In what is now stark contrast to that position, the ADJR Acts provide judicial review in the limited case of enactments and decisions made under an enactment. The focus of the threshold enquiry is the **source** of the decision-maker's power and not until that question is answered is the **subject** of the decision of any relevance.

In our view, legislative reform is urgently called for at both State and Federal levels to rectify this situation. Of course, in New South Wales, a good start would be the enactment of an ADJR-equivalent Act in the first instance! We understand that administrative law reform in New South Wales is very much on the high priority list of the present Carr government.

We agree with the proposed reform of the Commonwealth ADJR Act recommended by the Administrative Review Council ("ARC") in its report titled "Government Business Enterprises and Commonwealth Administrative Law", report no. 38, 1995 which was made publicly available in mid-April this year. The ARC (at paras.4.51 and 4.52.) called for the ambit of the ADJR Act to be, as far as possible, parallel to the ambit of the High Court's judicial review jurisdiction (which is the same as the Federal Court's jurisdiction under s 39B of the *Judiciary Act* 1903 (Cth)). The proposals include:

> *".... amending the ADJR Act jurisdiction to include jurisdiction to review decisions of an administrative character made or proposed to be made by an officer of the Commonwealth under a non-statutory scheme or program, the funds of which are authorised by an appropriation made by the Parliament for the purpose of that scheme or program.*
>
> *The effect of this recommendation is that decisions made*
>
> - *by an officer of the Commonwealth; and*
> - *under a non-statutory scheme that is funded out of monies appropriated by Parliament specifically for the purpose of that scheme*
>
> *would be subject to judicial review under the ADJR Act."*

John Atwood, Deputy Director or Research of the ARC, and an author of the report, will speak about that report in session 4 this afternoon.

Other avenues for future reform of the laws concerning the dividing line between public law and private law arise out of the corporatisation and privatisation of government business or trading enterprises in Australia at present. As corporatisation and privatisation very often necessarily involves a diminution in or removal of the public law rights and remedies available to members of the public, detailed calls have been made for legislative provisions to provide for either some new form of accountability or some new mechanism to deal with public law entities which are now or which now look like private law entities. Margaret Allars (supra, at page 69 et seq) calls for the inclusion in statutes which corporatise government business enterprises provisions imposing "community service obligations" on

those GBE's. These provisions express duties in a broad nature for the GBE to exhibit a sense of social responsibility by having regard to the interests of the relevant community and to provide that community with accessible services whilst, at the same time, operating efficiently. If the public law nature of these proposed community service obligations is to be preserved, the obligations must be enforceable or justiciable through judicial review proceedings.

Mark Aronson (supra, at page 94) has called for an approach by governments in the context of corporatisation and privatisation to either:

1 Completely sever the government business or trading enterprise and withdraw from involvement in it altogether (except perhaps as a minority shareholder);

2 Provide for some public interest or consumer group representation on the boards of government business enterprises;

3 Increase use of industry ombudsmen;

4 Enforce statutory performance standards; or,

5 Provide some public involvement in the determination of major decisions by the entity.

C. NEGLIGENT EXERCISE OF GOVERNMENT POWER

> *"...the law of negligence should be capable of application in solicitors' offices. It should not have to await definition in litigation".*
>
> per Brennan, J.

> *"...the problem remains of arriving at a legal formulation which will allow recovery of economic loss in appropriate cases, while rejecting it in the case of loss which is too distant".*
>
> per Toohey, J.

The above two extracts from the reasons for judgment given by two of the justices of the High Court in Bryan v. Maloney, unreported (delivered 23 March 1995) highlight the ongoing difficulty facing all legal advisers in advising their clients as to the liability in negligence of a public authority. Maloney was not a case dealing with the negligence of a government official. However, as we have seen in this morning's paper, the High Court in Mengel has now placed the liability of governments and public officers for their negligent acts on the same footing as the liability of private individuals. This must include the question of liability for economic loss just as much as for ordinary physical injury to the person or property of a plaintiff.

Negligence -- Application to Government Authorities

It is apparent from the High Court's approach in Mengel, that in determining the liability of a government body or officer the applicability of the ordinary principles of negligence will be of utmost importance. In a number of recent cases, concerned with the question whether, and in what circumstances, a duty of care is to be imposed upon public officials or government instrumentalities in the exercise of their powers or the performance of their functions, attention has been directed to resolving what, if anything, must be shown over and above the forseeability of the harm resulting to the plaintiff from an act or omission of the official. In

formulating an approach to be adopted in dealing with these questions, courts have drawn on Lord Wilberforce's dictum in Anns v. Merton London Borough Council (1978) AC 728 where his Lordship (at 751-752) articulated a two-stage test; first, whether a sufficient relationship of proximity or neighbourhood existed between the alleged wrongdoer and the persons who had suffered damage, such that in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter - in which case a prima facie duty of care arises. Secondly, if that question is answered affirmatively, whether there are any considerations (of a policy nature) which ought to negative, or reduce or limit the scope of, the duty or class of person to whom it is owed or the damages to which a breach of it may give rise.

In Sutherland Shire Council v. Heyman (1985) 157 CLR 424 the High Court rejected the Anns approach, with Brennan J. in particular expressing his preference for developing "novel categories of negligence incrementally and by analogy with established categories" (at 481). Three of the other justices in Heyman wrote fully considered opinions each reviewing the basis of the common law duty of care, the part played in deciding whether a duty of care existed in a particular case by reference to the concepts of reasonable foreseeability and proximity and the particular position of public authorities in regard to these matters. Each of the justices rejected the view of Lord Wilberforce in Anns that reasonable foreseeability coupled with carelessness on the part of the defendant causing damage to the plaintiff, prima facie raises a duty of care owed by the defendant to the plaintiff which might however be negatived, in particular cases, on policy grounds. Gibbs C.J. thought that the first question in deciding whether a duty of care existed was whether there was a relationship of neighbourhood or proximity between the parties and seems to have considered that a duty will arise in circumstances where damage was a foreseeable consequence of a governmental authority's failure to exercise a power conferred upon it "with the intention that it should be exercised if and when the public interest requires it" (at 441). Mason J. did not consider proximity in the same way as Gibbs CJ. and examined the possibility that reliance was the major determinant of the existence of a duty of care. His Honour thought that no common law duty of care to exercise a power would be imposed upon a public authority unless it was under a statutory obligation to exercise that power, or unless by its conduct it placed itself in such a position that it attracted a duty of care calling for the exercise of that power. Deane J. held that a duty of care would only arise if there was the "requisite element of proximity in the relationship between the parties with reference to the relevant act or omission" (at 507-508). His Honour saw "proximity" as a control over the circumstances in which a duty of care to avoid reasonably foreseeable harm should be found to exist, despite some ambiguities and difficulties which the general notion involved (at 496-497).

In the circumstances of the case, all of the justices in Heyman referred to the characterisation of the damages claim in terms of economic loss or physical damage. In Heyman Council officers had inspected a house when under construction. The house was built with inadequate footings. The inadequate footings were not detected and after the plaintiff had bought the house (some seven years after its construction) damage, due to subsidence caused by the inadequate footings, became apparent. Whilst Gibbs CJ. would not have characterised the damages claim as being of pure economic loss, Mason and Brennan JJ. did not appear to have thought it necessary to categorise the nature of the damage as economic loss or physical damage. Deane J. thought the damages claim was for economic loss (at 504). For him, it followed from this that there would need to be special circumstances or a special relationship before a duty to take care to avoid such pure economic loss could arise (at 502-503).

It is difficult to extract from the discussion in Heyman a single clear principle of the law applicable to a case of pure economic loss. In particular, to establish the relationship of proximity necessary to identify a relevant duty of care, is it essential for the plaintiff to prove reliance where the claim is one purely for economic loss?

In a very well reasoned decision of the Northern Territory Court of Appeal (Northern Territory of Australia v. Deutscher Klub (Darwin) Inc. (1994) 84 LGERA 87) it was held that the requisite proximity could be established by means other than by showing reliance by the plaintiff on the acts or omissions of the government authority in question. The decision in Deutscher Klub involved a claim in respect of ordinary physical injury to a person following a negligent safety inspection by officers of the Northern Territory Fire Service. Priestley J. considered that the reliance criterion falls into place as a species of proximity, that is, if reliance can be shown then it must follow that the relevant requirement of proximity is likewise established. Proof of reliance is only one way in which a plaintiff claiming damages for negligence from a public authority may succeed but it is not the only way. Proximity may be established by reference to factors other than reliance; in particular, in the context of physical injury, physical proximity as to time and space (in Deutscher all of the relevant events occurred on the one day, within hours of each other and at the one venue) and causal proximity in the sense of closeness or directness of the causal connection between the act or omission of the government authority and the injury. These factors, coupled with more general considerations, such as fairness, reasonableness and public policy (including "general community expectation" as to what is done by such officials) were sufficient to establish the relationship of proximity without resort to the need for the plaintiff to show reliance. However, the question is raised, whether in circumstances of mere economic loss, reliance is a necessary element to be shown at least where the claim is against a public authority for negligent use, or failure to use, statutory powers. In this regard, although not dealing with the position of a government authority, some light may be thrown on the principle of law applicable to a case of pure economic loss by the decision of the High Court in Bryan v. Maloney. Accordingly, Maloney, as the latest authoritative expression of the principles which are to govern in determining whether a relevant duty of care under the law of negligence exists, is of significance in the context of both public and private law issues.

General Principles of Negligence

Maloney concerned the liability of a professional builder to a subsequent purchaser of a house who, upon becoming aware of a latent defect in the walls of the house, brought an action for damages to recover the expenditure needed to remedy defective footings and consequential damage to the fabric of the house.

The house had been built in 1979 for the original owner, a Mrs. Manion (the builder's sister-in-law) and was sold by her to Mrs. Maloney some seven years later.

Both in the High Court and in the appeal court below, the case was argued on the basis of a number of mutually accepted facts between the parties, in particular, that the builder was negligent in building the house with inadequate footings; that these inadequacies became manifest when Mrs. Maloney first became aware of cracks in the walls of the house which began to appear some six months after she had purchased it; that the damage was a foreseeable consequence of the builder's negligence; and that the economic loss involved was the amount which would necessarily be expended in remedying the inadequate footings and the consequential damage to the house. Accordingly, the sole issue was whether the builder owed the subsequent purchaser, Mrs. Maloney, a relevant duty of care under the law of negligence.

In a joint judgment Mason C.J., Deane, and Gaudron J.J. commenced their analysis of this issue by re-affirming the principle (expressed in Sutherland Shire Council v. Heyman (1985) 157 CLR 424 and Burnie Port Authority v. General Jones Pty. Ltd (1994) 179 CLR 520) that a duty of care arises under the common law of negligence in Australia only where there exists a relationship of proximity between the parties with respect to both the relevant class of act or omission and the relevant kind of damage. Their Honours drew a distinction between categories of negligence involving "ordinary physical injury to the person or property of a

plaintiff" (described as "more settled areas of the law of negligence") and the field of liability for "mere economic loss". In the former area, their Honours observed that "reasonable foreseeability" of the injury will, generally be sufficient, of itself, to ensure that a relevant relationship of proximity exists between the parties based on categories of negligence, the scope of which is "reasonably settled". In the latter area, the question whether the requisite relationship of proximity exists in a particular category of case is more likely to be unresolved by precedent. The task for the Court is to "articulate" the circumstances which denote sufficient proximity in "the different categories of case". Those "circumstances" inevitably must include "policy considerations... influenced by the court's assessment of community standards and demands". With the categories of cases involving mere economic loss, "commonly, but not necessarily, they will involve an identified element of known reliance (or dependence) or the assumption of responsibility or a combination of the two".

In determining the existence of a sufficient relationship of proximity between a professional builder and a subsequent purchaser of a residential property, the Court took into account some related situations including the liabilities of an architect to a third party as discussed by the Court in Voli v. Inglewood Shire Council (1963) 110 CLR 74 at 84.

The Court then determined whether a relationship of proximity would exist between the builder and the first purchaser, Mrs. Manion, with respect to mere economic loss (in the form of the diminished value of the house caused by the inadequacy of the footings) had Mrs. Manion been the one to sustain that loss. After noting that the contract between them contained no exclusion or limitation of liability or other "special feature", the Court considered that the ordinary relationship between a builder and the first owner with respect to the kind of economic loss suffered by Mrs. Maloney is characterised by "the kind of assumption of responsibility on the one part (i.e., the builder) and known reliance on the other (i.e., the building owner) which commonly exists in the special categories of case in which a relationship of proximity and a consequent duty of care exists in respect of pure economic loss".

It was not suggested that the establishment of a relationship of proximity between the first contracting parties (i.e., the builder and first purchaser) was a sine qua non to the establishment of a relationship of proximity between the builder and the subsequent purchaser. Rather, it appears the identification of a duty of care between the first contracting parties was a relevant factor to be taken into account in determining the existence of a duty of care in the category of case under consideration. Another factor denoting a relationship of proximity was "the connecting link of the house itself". Moreover, subsequent purchasers of the house could not be viewed as belonging to an "indeterminate class" nor could the particular kind of economic loss suffered be considered to be an "indeterminate amount".

The majority of justices concluded that "no distinction can be drawn between the two relationships insofar as the foreseeability of the particular kind of economic loss is concerned... In the absence of competing or intervening negligence or other causative event, the causal proximity between negligence on the part of the builder in constructing the footings and consequent economic loss on the part of the owner when the inadequacy of the footings becomes manifest is the same regardless of whether the owner in question is the first owner or a subsequent owner". Their Honours considered that "both relationships are characterised, to a comparable extent, by assumption of responsibility on the part of the builder and likely reliance on the part of the owner" (emphasis added). All of the relevant policy considerations, said their Honours, point toward the extension of liability for economic loss suffered by a subsequent purchaser of a residential dwelling in circumstances where the diminution of the value of the house in question has been caused by latent defects in the footings of the building which the consequent damage to the fabric of the building first reveals.

In a separate judgment, largely supportive of the joint judgment, Toohey J. also reaffirmed the importance of establishing that a relationship of proximity exists between a plaintiff and a defendant for an action to lie in negligence (also repeating passages from various judgments in Burnie Port Authority and Sutherland Shire). His Honour also noted the recognition (albeit in a different context) given in Caltex Oil (Australia) Pty. Ltd. v. The Dredge "Willemstad" (1976) 136 CLR 529 that it may be possible to recover economic loss when no physical damage is involved even though there has been no reliance on the part of the plaintiff. His Honour referred to a number of policy considerations drawn from the judgment of Thayer J. of the Supreme Court of New Hampshire in Lempke v. Dagenais (1988) 547 A 2d 290. That case concerned an action by subsequent purchasers of property against the builder of a garage. Although the court rejected the claim in negligence as involving economic loss, it awarded damages for breach of an implied warranty of workmanlike quality. In doing so Thayer J. identified as relevant a number of policy considerations, including the fact that latent defects will not manifest themselves for a considerable time, often after the property has been sold to an unsuspecting purchaser; that in a mobile society a builder must expect that the house will be sold within a relatively short time; that a subsequent purchaser has little opportunity to inspect and little experience and knowledge about construction; and that confining recovery to the first purchaser might encourage sham first sales as a means of insulating builders from liability. Toohey J. thought that these considerations were "equally applicable in the present case even though the action is one in negligence, not for breach of warranty".

All of the majority justices, stressed that their judgments were not to be taken as implying necessarily any extension of liability of manufacturers for latent defects in products sold to consumers.

The only Justice in the minority was Brennan J. His Honour maintained his narrower view of the scope of the modern law of negligence, adopting the more rigid compartmentalisation of contract and tort applicable under the law of England. His Honour opined that where the existence of a duty of care related solely to the quality of the building (or chattel) bought by a purchaser, the interests to be protected are "appropriately to be governed by the law of contract". His Honour held that "the absence of a builder's duty of care to a remote purchaser in respect of defects in the quality of the building is attributable not so much to the rejection of the classification of such defects as physical damage but to the exclusion of those defects from any category of damage for which damages in negligence might be awarded".

For Brennan J. the utility of the notion of proximity as a means of identifying the categories of case into which a duty of care arises, is limited by the inherent uncertainty of its scope: "unless proximity has an ascertainable meaning, it cannot provide a working criterion of liability". Accordingly, for Brennan J. the court's task is to develop the content of rules which reflect the requirement of proximity rather than to use the notion of proximity as a general concept for determining the existence of liability. As a criterion of liability, the notion of proximity without a priori definition of its content in any category of case will be "a juristic black hole into which particular criteria and rules would collapse and from which no illumination of principle would emerge".

Negligence of Public Officials -- Duty of Care to Whom?

Whilst the implication of Mengel is that the High Court will not entertain development of any sui generis cause of action to impose liability, if the requisite relationship of proximity is satisfied, a duty to take care to avoid a reasonably foreseeable risk of injury or economic loss may be recognised. What factors and policy considerations will be taken into account in determining the existence of a duty of care in relation to the exercise of any particular governmental or regulatory power will depend upon both the factual components of the kind

of relationship in question and the identification of any applicable policy considerations. Obviously no definitive legal formula directed to enabling recovery of particular types of economic loss in particular categories of cases involving government authorities can yet be devised. However, it is submitted that the view expressed by Gibbs CJ. in Heyman (at 442-443) that the circumstances in which a public authority would be under a duty of care could be more limited than in the case of private persons must now be reviewed in the light of Mengel. Logically, the notion that liability could only arise where the public authority was otherwise under a legal duty to act (see Gibbs CJ. at 443-445) should be rejected, at least as an a priori qualification to the existence of a duty of care arising by reason of the requisite relationship of proximity. Thus discretionary decisions of public authorities should not be excepted from the common law principles of negligence unless relevant "policy considerations" suggest a reduction or limitation of the scope of the duty or even a negation of the existence of a duty in relation to the class or person to whom it might otherwise be owed.

This raises the question whether the duty of care of a public official should be expressed in terms of a duty to fulfil the officer's public function, a breach of which causing particular damage to an individual, would be actionable upon the relationship of proximity between the parties being established. This issue is merely touched upon en passant in Mengel in the passage referred to this morning by Mark Robinson in his analysis of the case. The suggestion from the majority of justices is that there may be very many circumstances where there is a duty of care on governments to avoid foreseeable harm by taking steps to ensure that their officers and employees know and observe the limits of their power. If that is the case, it will be a short step for the court to take to hold that a duty of care exists on the part of public officers to ascertain the limits of his or her power and to observe those limits in administrative decision making. It may therefore be too soon to say with certainty, as was submitted by the Solicitor General for New South Wales in the recent interlocutory decision of the New South Wales Supreme Court in Abigroup Limited v. State of New South Wales (unreported 18 August 1994) that damages cannot be claimed for "mere breaches of administrative law obligations". In other words, if the "limits" of power are eventually held to encompass the kind of public law obligations referred to earlier in this paper (e.g., good faith, observance of the rules of natural justice and procedural fairness, reasonableness, etc.) and the requirements as to proximity are satisfied, breaches of legal obligations of that kind which cause damage to private individuals may give rise to common law negligence actions [cf San Sebastian Pty Ltd v Minister for Environmental Planning Act (1986) 162 CLR 340 at 374-375 per Brennan J].

It has been suggested that in this field the existence or scope of such a duty may be negated or cut down by reason of the existence of public law remedies. The decision of the English Court of Appeal in Jones v. Department of Employment (1989) 1 QB 1 lends some support to this proposition. In that case, the plaintiff brought an action in negligence in respect of the failure of a departmental officer to properly assess and determine his claim for unemployment benefit and for the department's negligent failure to review that decision once further evidence had been put before it by the plaintiff. The plaintiff appealed, pursuant to a statutory right of appeal, to the Social Security Appeal Tribunal which allowed his appeal and paid him unemployment benefits retrospectively. The damage alleged to have been caused by the negligent decision-making process constituted essentially the plaintiff's legal fees in conducting his appeal to the tribunal together with unquantified "aggravated damages" for worry, distress, and inconvenience caused to the plaintiff. The Court of Appeal held that the decision of the adjudication officer was not susceptible to challenge at common law unless it could be shown that the officer was guilty of misfeasance. Both the non-judicial nature of the officer's responsibilities and the very specific rights of review provided under the statutory scheme for social security payments, were relied upon by the court in formulating its view that the officer was not under any common law duty of care. Glidewell LJ. took the opportunity to suggest a general principle to be applied where a government decision-making process carries with it a statutory framework providing a right of appeal to

an aggrieved claimant which, upon a point of law arising, may result in a matter being brought before a court. His Lordship said:

> "Indeed, in my view, it is a general principle that, if a government department or officer, charged with the making of decisions whether certain payments should be made, is subject to a statutory right of appeal against his decisions, he owes no duty of care in private law. Misfeasance apart, he is only susceptible in public law to judicial review or to the right of appeal provided by the statute under which he makes his decision" (at 22).

Slade LJ. adopted a similar view to that of Glidewell LJ. finding that it would be contrary to the wording and intention of the Social Security Act to hold that an adjudication officer owed any duty of care in common law to a claimant for unemployment benefit and rejected "that it is open to a claimant to challenge the correctness of his decision by bringing an action in negligence". His Lordship was influenced by what he saw as a "logically inevitable consequence" of holding that a common law duty of care existed in that "immediately following an arguably negligent and erroneous decision of an adjudication officer, a claimant would have the right to pursue an action in negligence against the adjudication officer and/or department without even pursuing his statutory rights of appeal (albeit at the risk of having any award of damages reduced, though not necessarily eliminated, on the grounds that he had not mitigated his damage by appealing)".

In our view, the reasoning in Jones is somewhat unsatisfactory in that the plaintiff was not by his action seeking to challenge the "correctness" of the adjudication officer's decision as such but rather seeking to challenge the process by which that decision was made and the breaches of administrative law obligations which that process may have entailed. That is not to say that the result which the Court of Appeal came to may not be supportable on the basis that a relationship of proximity could not be established between the parties with respect to the particular class of act or omission involved. Moreover, the existence of a statutory review mechanism by which a person who is entitled to a benefit may be able to seek judicial or administrative review of erroneous decisions made in respect of that benefit may be amongst the relevant "policy considerations" referred to by the High Court in Maloney. In such circumstances, whilst foreseeability of loss (in the sense of expenditure in engaging the statutory review procedures and in the stress and anxiety that may be caused in having to pursue such procedures) may be established, the requisite circumstantial proximity may be absent.

In some situations, the absence of a duty may be clear as a matter of interpretation of the legislation under which the public official has acted or purported to act. This was the approach taken by Wood J. in Coshott v. Woollahara Municipal Council (1988) 14 NSWLR 675. In that case the plaintiff alleged failures on the part of the Chief Town Planner and his planning officer to process a development application "promptly and diligently". The plaintiff's claim for damages was confined to additional costs and charges said to be attributable to the delays of the defendants in processing the application. His Honour applied the approach taken in Jones and held that as a matter of interpretation of the relevant Act (Environmental Planning and Assessment Act 1979) there was no duty imposed on the Council to process and determine the development application within any particular time.

There may be some force in the view that specific statutes which set out special regimes of regulation (e.g., building control and town planning) or which provide specific procedures for the administration of public funds (e.g., social security) and which prescribe their own statutory review procedures for administrative decisions taken upon application by a person seeking some form of benefit, dispensation or approval, may impliedly exclude a common law duty of care by the public officials required to make public law decisions under the statutes. However, in accordance with the general presumption against excluding a common law right and having regard to the difference in the nature of the remedy sought under a

common law action based on negligence, it is submitted that no automatic rule along these lines could be definitively asserted. Whether Parliament, as a matter of legislative intention, envisages under any particular statutory regime that the existence of statutory review procedures should result in the expungement of common law duties of care in relation to decision-making processes and procedures under the statute, is a matter to be determined on a case-by-case basis.

In any event, whether decisions made in good faith but beyond or outside the limits of the power conferred on the decision-maker or tainted by breach of an administrative law obligation, should or should not give rise to a duty of care, the position may be contrasted with other activities of government officials which may give rise to sufficient proximity and reasonable reliance to found a duty of care. In particular, the giving of advice which may induce a person to change his or her position to their detriment or not to pursue a particular right (e.g., a statutory right of review) could very readily give rise to the existence of a duty of care (see for example Shaddock & Associates Pty. Ltd v. Parramatta City Council (No. 1) (1981) 150 CLR 225; cf Green v Daniels (1977) 51 ALJR 463 at 470). However, in our view, the mere existence of a right of review under an act such as the Administrative Decisions (Judicial Review) Act would not automatically exclude a right to a remedy at common law in negligence. For example, in the situation which the stock owners in Mengel found themselves in, it would be a harsh result if the existence of a right of judicial review, of itself, precluded a properly based claim in negligence for damages. As far as we are aware it has never been suggested by the Courts that rights of judicial review under the general law have impliedly excluded the existence of a common law duty and a right to otherwise pursue a claim for damages at common law.

In Conclusion

The recent decision in Mengel may not foreshadow any significant new governmental tort or category of duty of care in relation to government liability. When read in the context of the decision of the High Court in Maloney it is clear that any development in this area will probably be cautious and emphasise the special nature of the relationship of proximity and the consequent duty of care which must be found to exist before actions for recovery of damages in respect of pure economic loss occasioned by incompetent government decision-making will find favour with the court. Nonetheless, it would be unwise for government officials and authorities to be reckless or indifferent in understanding and observing the limits of their powers. Unfortunately, the extent of liability of those officers who transgress may need to await definition through litigation. Legal practitioners may find, for the present, that the law of negligence, in its application to government authorities, is not "readily capable of application" in their offices.

4 May 1995